2005-2007

HOUSE SELECT COMMITTEE ON CAPITAL PUNISHMENT

MINUTES

House Select Study Committee on Capital Punishment

2005-2006

Membership

Representative Joe Hackney, Co-Chair
Post Office Box 1329
Chapel Hill, North Carolina 27514
919-929-0323 Fax: 919-929-3960

Representative Jeff Barnhart
Post Office Box 246
Concord, North Carolina 28026
704-788-4801 Fax: 704-784-2276

Representative Nelson Cole
2012 Carpenter Drive
Reidsville, North Carolina 27320
336-349-6734 Fax: 336-349-6734

Representative W. Pete Cunningham
3121 Valleywood Place
Charlotte, North Carolina 28216
704-394-0919 Fax: 704-394-0919

Representative Richard B. Glazier
2642 Old Colony Place
Fayetteville, North Carolina 28303
910-484-4168

Representative L. Hugh Holliman
103 Sapona Road
Lexington, North Carolina 27295
336-956-1385 Fax: 336-248-6275

Representative Paul Luebke
1507 Oakland Avenue
Durham, North Carolina 27705
919-286-0269

Representative Henry M. Michaux, Jr.
Post Office Box 2152
Durham, North Carolina 27702
919-596-8181 Fax: 919-596-8183

Representative Earline W. Parmon
3873 Barkwood Drive
Winston-Salem, North Carolina 27105
336-767-7395 Fax: 336-703-1701

Representative Bonner L. Stiller
4908 E. Yacht Drive
Oak Island, North Carolina 28465
910-278-5379 Fax: 910-457-4980

Representative Beverly Earle
312 S. Clarkson Street
Charlotte, North Carolina 28202
704-333-7180

Representative Walter Church
Post Office Box 760
Valdese, North Carolina 28690
828-874-2141 Fax: 828-874-2831

Representative Arlie Culp
8521 U. S. Highway 64 East
Ramseur, North Carolina 27316
336-824-2218

Representative Rick L. Eddins
1504 Stratlen Court
Raleigh, North Carolina 27615
919-847-1372 Fax: 919-847-8122

Representative Pricey Harrison
Post Office Box 9339
Greensboro, North Carolina 27429
336-292-1953 Fax: 919-856-0417

Representative Marvin W. Lucas
3318 Hedgemoor Circle
Spring Lake, North Carolina 28390
910-497-2733

Representative Daniel McComas
Post Office Box 2274
Wilmington, North Carolina 28402
910-343-8372 Fax: 910-343-8003

Representative Bill Owens
113 Hunters Trail East
Elizabeth City, North Carolina 27909
252-335-0167

Representative Wilma M. Sherrill
Post Office Box 18561
Asheville, North Carolina 28814
828-254-0991 Fax: 828-254-0991

Representative Ronnie N. Sutton
2940 Philadelphus Road
Pembroke, North Carolina 28372
910-843-2353

Representative Joe Tolson
Post Office Box 1038
Pinetops, North Carolina 27864
252-827-2749

Representative William L. Wainwright
Post Office Box 33
Havelock, North Carolina 28532
252-447-7379 Fax: 252-672-4075

Representative Roger West
Post Office Box 160
Marble, North Carolina 28905
828-837-5246 Fax: 828-837-3776

Representative Douglas S. Vinson
14313 Lissadell Circle
Charlotte, North Carolina 28277
704-541-7957

Representative Jennifer Weiss
303 Tibbetts Rock Drive
Cary, North Carolina 27513
919-678-1367 Fax: 919-677-1254

Representative W. A. Wilkins
210 Fair Oaks Drive
Roxboro, North Carolina 27574
336-599-7336

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Representative W. A. Wilkins
210 Fair Oaks Drive
Roxboro, North Carolina 27574
336-599-7336

House Select Study Committee
on
Capital Punishment
2005-2006

Staff

Ms. Susan Sitze
Bill Drafting Division
545 Legislative Office Building
919-733-2578 FAX 919-715-5460
susans@ncleg.net

Mr. Hal Pell
General Research Division
545 Legislative Office Building
919-733-2578 FAX 919-715-5460
halp@ncleg.net

Emily Reynolds Freeman
Committee Assistant
2207 Legislative Building
919-733-5752 FAX: 919-828-6257
hackneyla@ncleg.net

James B. Black
Speaker



Office of the Speaker
North Carolina House of Representatives
Raleigh, North Carolina 27601-1096

House Select Study Committee on Capital Punishment

Revised January 3, 2006

TO THE HONORABLE MEMBERS OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES

Creation of the House Select Study Committee on Capital Punishment

Section 1. Pursuant to the authority vested in me by North Carolina General Statute (G.S.) 120-19.6, I hereby establish the: **House Select Study Committee on Capital Punishment**, hereafter referred to as "Select Committee."

Section 2. The Select Committee shall be composed of the twenty-six members listed below.

Rep. Joe Hackney, Co-Chair	Rep. Beverly Earle, Co-Chair
Rep. Jeffrey L. Barnhart	Rep. Daniel McComas
Rep. Walter G. Church, Sr.	Rep. Henry M. Michaux, Jr.
Rep. Nelson Cole	Rep. Bill Owens
Rep. Arlie F. Culp	Rep. Earline W. Parmon
Rep. W. Pete Cunningham	Rep. Wilma M. Sherrill
Rep. Rick L. Eddins	Rep. Bonner L. Stiller
Rep. Richard B. Glazier	Rep. Ronnie N. Sutton
Rep. Pricey Harrison	Rep. Joe P. Tolson
Rep. L. Hugh Holliman	Rep. Douglas S. Vinson
Rep. Marvin W. Lucas	Rep. William L. Wainwright
Rep. Paul Luebke	Rep. Jennifer Weiss
	Rep. Roger West
	Rep. W. A. Wilkins

Section 3. The Select Committee may study all aspects of capital punishment. The study shall include an examination and report on:

(1) The adequacy of counsel in all stages of capital cases and the sufficiency of guidelines for the appointment and performance of such counsel appointed prior to the enactment of current guidelines and qualifications.

(2) The process for judicial review of the merits of constitutional claims in State post-conviction and federal habeas corpus proceedings.
(3) Any disproportionate racial impact from any aspect of capital case processing.
(4) Whether there is discrimination in capital sentencing on the basis of the victim or defendant's race.
(5) Prosecutorial misconduct as a factor in the imposition of the death penalty.
(6) The presence of innocent persons on death row.
(7) Whether the felony murder rule should be applied in capital cases.
(8) Any other appropriate or relevant subject.

Section 4. The Select Committee shall meet upon the call of its Chairs. A quorum of the Select Committee shall be eleven members.

Section 5. The expenses of the Select Committee including per diem, subsistence, travel allowances, and contracts for professional or consultant services shall be paid upon the written approval of the Speaker pursuant to G.S. 120-32.02(c) and G.S. 120-35 from funds available to the House of Representatives for its operations.

Section 6. The members of the Select Committee serve at the pleasure of the Speaker of the House. The Speaker of the House may dissolve the Select Committee at any time.

Section 7. The Legislative Services Office shall assign professional and clerical staff to the assist the Select Committee in its work. The House of Representatives' Supervisor of Clerks shall assign clerical support staff to the Select Committee.

Section 8. The Select Committee, while in the discharge of its official duties, may exercise all powers provided for under G.S. 120-19 and G.S. 120-19.1 through G.S. 120-19.4. The Select Committee may contract for professional, clerical, or consultant services as provided by G.S. 120-32.02.

Section 9. The Select Committee may meet at various locations around the State in order to promote greater public participation in its deliberations. The Legislative Services Commission shall grant adequate meeting space to the Select Committee in the State Legislative Building or the Legislative Office Building.

Section 10. The Select Committee shall submit a final written report of its findings and recommendations on or before December 31, 2006. All reports shall be filed with the Speaker of the House of Representatives and the Legislative Librarian. Upon the earlier of the filing its final report or December 31, 2006, the Select Committee shall terminate.

Effective this 9th day of November, 2005.

James B. Black
Speaker, North Carolina House of Representatives

1/3/2006 9:45 AM

James B. Black
Speaker



Office of the Speaker
North Carolina House of Representatives
Raleigh, North Carolina 27601-1096

Revised November 29, 2005

**TO THE HONORABLE MEMBERS OF THE
NORTH CAROLINA
HOUSE OF REPRESENTATIVES**

**Creation of the
House Select Study Committee on Capital Punishment**

Section 1. Pursuant to the authority vested in me by North Carolina General Statute (G.S.) 120-19.6, I hereby establish the: **House Select Study Committee on Capital Punishment**, hereafter referred to as "Select Committee."

Section 2. The Select Committee shall be composed of the twenty-two members listed below.

Rep. Joe Hackney, Co-Chair
Rep. Arlie F. Culp
Rep. Rick L. Eddins
Rep. L. Hugh Holliman
Rep. Paul Luebke
Rep. Henry M. Michaux, Jr.
Rep. Wilma M. Sherrill
Rep. Ronnie N. Sutton
Rep. William L. Wainwright
Rep. Roger West
Rep. Jeffrey L. Barnhart

Rep. Beverly Earle, Co-Chair
Rep. W. Pete Cunningham
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(4) Whether there is discrimination in capital sentencing on the basis of the victim or defendant's race.
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Effective this 9th day of November, 2005.

James B. Black
Speaker North Carolina House of Representatives

Emily Reynolds (Rep. Hackney)

From: Hal Pell (Research)
Sent: Thursday, December 21, 2006 2:35 PM
To: Rep. Arlie Culp; Rep. Beverly Earle; Rep. Bill Owens; Rep. Bonner Stiller; Rep. Danny McComas; Rep. Doug Vinson; Rep. Earline W. Parmon; Rep. Hugh Holliman; Rep. Jeff Barnhart; Rep. Jennifer Weiss; Rep. Joe Hackney; Rep. Joe Tolson; Rep. Marvin Lucas; Rep. Mickey Michaux, Jr.; Rep. Nelson Cole; Rep. Paul Luebke; Rep. Pete Cunningham; Rep. Pricey Harrison; Rep. Rick Eddins; Rep. Rick Glazier; Rep. Roger West; Rep. Ron Sutton; Rep. Walter Church; Rep. William Wainwright; Rep. Wilma Sherrill; Rep. Winkie Wilkins
Cc: Susan L. Sitze (Research)
Subject: FW: For the Committee

Attachments: talk.txt; katz.htm

talk.txt (17 KB) katz.htm (138 KB)

To the House Select Committee on Capital Punishment:

I have received the attached e-mail from one of the speakers at our last meeting, Prof. Cramer, with the request that it be forwarded to the committee. Prof. Cramer has attached an article that discusses the McClesky v. Kemp case, in which the US Supreme Court considered whether Georgia's capital sentencing system was racially biased.

I would note that, at the end of the following, Prof. Cramer has suggested that any study that may be authorized by the committee include certain data, including the race of the offender and victim, and the presence or absence of aggravating factors in all homicides.

H. Alan Pell, Staff Attorney
North Carolina General Assembly
545 Legislative Office Building
Raleigh, N.C. 27603
Telephone (919) 733-2578 Fax (919) 715-8365
Internet: halp@ncleg.net <mailto:halp@ncleg.net>

-----Original Message-----
From: Elliot M. Cramer [mailto:Cramer@email.unc.edu]
Sent: Thursday, December 14, 2006 5:05 PM
To: Hal Pell (Research)
Subject: For the Committee

To: The House Select Committee on Capitol Punishment
From: Elliot M. Cramer

I appreciated the opportunity to speak before the House Select Committee on death penalty issues. I can understand Ben David's indignation at being called a racist after Reverend Barber's accusation that I was a racist, giving me no opportunity to respond.

Yesterday I noted the observation in Dean Boger's study that murderers of non-whites were less likely to receive the death penalty than murderers of whites. I stated my belief that the cause of this discrepancy is that non-white homicides tend to be less aggravated than white homicides. This discrepancy does not represent discrimination. I pointed out that the discrepancy would be remedied by sentencing more murderers of non-whites to death. Since 94% of the murderers of non-whites were themselves non-white, this would mean sentencing more non-whites to death and I stated that THIS IS NOT WHAT ANY OF US WANT.

I did attempt to explain this to Reverend Barber after the meeting, but he seemed not to

be interested. Reverend Barber either failed to understand what I was saying or made his comments for purely political reasons.

I am attaching the text of my comments and a critical analysis of the Baldus study which first raised this issue. The Boger study was designed with Baldus's advice.

Let me try to clarify a few issues. The Boger study is seriously flawed and I do not believe that ANY valid conclusions can be drawn from it. Yesterday Dean Boger gave you a copy of his April
2001 "preliminary report" which, over five years later, STILL has not been accepted for publication by any journal. Dean Boger says that it is now under consideration and that he expects it to be accepted. This is what I was told four years ago. I believe that it has not been accepted for publication because it is so seriously flawed. At the very least, Dean Boger should make the data available to your Committee so that it may be examined by outside critics as was promised at the April 16, 2001 news conference.

It is true as Dean Boger says that statistics has been valuable in medical research and in investigating the effects of smoking.
The difference is that randomized controlled trials are the preferred methodology in medical research while prospective studies were important in smoking investigations. It is well know in statistics that retrospective studies, where one collects data from the past, are subject to many biases. This is illustrated in the paper which I enclose on the Baldus study.

I believe that reproducing the Boger study would be a waste of time and resources. If the Committee wants to do further research, I suggest that the Committee direct the Attorney-General's office to begin collecting data on all new first and second degree homicides including race of defendant, race of victim, aggravating and mitigating conditions, and a detailed description of the crime. This would provide an unbiased source of data for future research. I would be happy to advise the Committee on such a proposal.

[redacted]liot M. Cramer
[redacted] 428
Chapel Hill, NC 27514

919-942-2503

Cramer@unc.edu

Websites
www.unc.edu/~cramer
www.friendsofocas.org

WARREN McCLESKEY V. RALPH KEMP: IS THE DEATH PENALTY IN GEORGIA RACIALLY BIASED?

by
JOSEPH L. KATZ, Ph.D.
DEPARTMENT OF DECISION SCIENCES
GEORGIA STATE UNIVERSITY
ATLANTA, GEORGIA, 30303
JUNE 1991

ABSTRACT

In April 1987, the United States Supreme Court dismissed statistical arguments in McCleskey v. Kemp that the Georgia capital sentencing system was racially biased, and generally rejected the use of any complex statistical model as evidence of discrimination in capital sentencing decisions. Several members of Congress have attempted to override the Supreme Court decision in McCleskey by proposing legislation, titled the Racial Justice Act, to prohibit the statewide application of the death penalty, if the penalty is imposed in a racially disproportionate pattern. This article discusses the general limitations of statistics to infer racial bias in capital cases by considering the statistical evidence presented in McCleskey and examines the impact that the Racial Justice Act would have on fairness in the application of the death penalty.

* I am grateful to Mary Beth Westmoreland (Georgia Attorney General's Office), George M. Palmer (Appellate Division for Los Angeles County), and William Miller (Past President of the Southeastern Legal Foundation) for their advice and suggestions on earlier versions of this paper. I would also like to thank the four anonymous reviewers for their recommendations for improving this article.

1. INTRODUCTION

On Saturday May 13, 1978, about 2:15 in the afternoon, Warren McCleskey, Ben Wright, David Burney, and Bernard Dupree, four black men, robbed the Dixie Furniture Store on Marietta Street in Atlanta, Georgia. All four men were armed with either a gun or a shotgun. McCleskey entered through the front of the store, while the other three came in through the loading dock in the back of the store. The robbers tied up the employees and customers with hospital tape, forced them to lie on the floor, and threatened to kill anyone who moved.

Answering a silent alarm, triggered by one of the furniture store employees that signaled a robbery in progress, Frank Schlatt, a white police officer, drove his patrol car to the front of the furniture store. McCleskey saw the patrol car arrive and hid behind a couch. Officer Schlatt entered the furniture store and proceeded down the center aisle to the middle of the store. McCleskey jumped up from behind the couch and fired two shots at the police officer. One bullet hit Officer Schlatt in the eye; the fatal shot. The second bullet ricocheted off a cigarette lighter that was in Officer Schlatt's left shirt pocket. Officer Schlatt fell backward to the floor. McCleskey escaped through the front of the store. Officer Schlatt was found in a pool of blood and died several hours later. In October, 1978, Warren McCleskey was tried, convicted, and sentenced to death for the murder of Officer Schlatt.

One of the issues raised by McCleskey's lawyers on appeal in Federal Court was that McCleskey's death sentence was unfair because the Georgia capital sentencing system is racially biased against black murderers and killers of white victims. This claim was based on a statistical study of Georgia defendants conducted by Professors David C. Baldus, George Woodworth, and Charles Pulaski.

An evidentiary hearing on McCleskey's claim of racial discrimination in death sentencing in Georgia was held in August 1983. Federal District Court Judge J. Owen Forrester ruled that the conclusion of the study, of racial bias in the Georgia system, was without merit. In 1985, the full 11th Circuit Court of Appeals, by a 9 to 3 vote, agreed with the District Court on this issue concluding (753 F.2d at 899) "Viewed broadly, it would seem that the statistical evidence presented here, assuming its validity, confirms rather than condemns the system." Finally, in April 1987, the United States Supreme Court, by a 5 to 4 count affirmed the decision of the 11th Circuit Court of Appeals. The court ruled that the statistical study, conducted by Professors Baldus, Woodworth and Pulaski, did not establish that the Georgia capital sentencing system discriminates against black defendants or killers of white victims. Furthermore, the Supreme Court flatly rejected the use of any complex statistical model as evidence to infer discrimination in capital sentencing decisions. The controversy did not end with the United States Supreme Court decision.

In 1988, Michigan Representative John Conyers sponsored Bill H.R. 4442, titled the "Racial Justice Act of 1988," which sought to prohibit the application of the death penalty if the penalty is imposed in a racially disproportionate pattern. The Racial Justice Act of 1988 provided that a prima facie case of racial bias would be established when ordinary methods of statistical proof show that "death sentences are being imposed or executed-

(1) upon persons of one race with a frequency that is disproportionate to their representation among the total numbers of persons arrested for, charged with, or convicted of, death eligible crimes; or

(2) as punishment for crimes against persons of one race with a frequency that is disproportionate to their representation among the number of persons against whom death eligible crimes have been the subject of arrests, charges, or convictions.

To rebut a prima facie case, the Racial Justice Act of 1988 required that "a government must establish by clear and convincing evidence that identifiable and pertinent nondiscriminatory factors persuasively explain the observable racial disparities comprising the disproportion." Senator Kennedy offered the Racial Justice Act to the Senate as an Amendment to the Omnibus Drug Bill. The Amendment was soundly defeated. In 1990, a modified version of the Racial Justice Act was offered as an Amendment to the Crime Bill, and again defeated in the Senate. However, the House of Representatives narrowly approved an Amendment to the Racial Justice Act offered by Representative Hughes, which strengthened the defendant's evidentiary requirements for establishing a prima facie case, and lowered the standard of proof required from the prosecution to rebut a prima facie case. According to the Hughes Amendment, an inference that race was the basis of the death sentence is established if, at the time the death sentence was imposed, that death sentences were "imposed significantly more frequently in the jurisdiction in question--

(1) upon persons of one race than upon persons of another race; or

(2) as punishment for capital offenses against persons of one race than as punishment for capital offenses against persons of another race.

If a significant racial disparity in the imposition of the death sentence is found, the Hughes Amendment required the court to determine the validity of the inference that race was the basis of the death sentence by considering evidence of the statutory aggravating factors of the crimes involved and by comparing similar cases involving persons of different races. The Hughes Amendment lowered the standard of proof needed to rebut the inference that race was the basis of the death sentence, to a preponderance of the evidence. The Hughes Amendment did not survive the final compromise Crime

bill passed by Congress in 1990. In 1991, the Hughes Amendment was again offered as part of the Crime bill, with a new name "Fairness in Death Sentencing Act." This time, the bill was defeated by both the Senate and the House of Representatives.

Each version of the Racial Justice Act begins with the premise that a fair capital sentencing system should produce equal death sentencing rates by race, and racially disproportionate death sentencing rates are probably due to racial bias. This underlying premise is flawed because it ignores fundamental differences in racial homicide patterns.

I was hired by the Georgia Attorney General to analyze the Baldus et al. databases, and testified as to my findings at McCleskey's evidentiary hearing. In my opinion, the Supreme Court ruled properly that statistical models are inappropriate and ineffective to measure the extent (if any) of discrimination in capital sentencing decisions. This article discusses the general limitations of statistics to infer racial bias in capital cases by considering the statistical evidence presented in McCleskey and examines the effect that the Racial Justice Act, if enacted, would have on the equitable application of the death penalty.

2. THE GEORGIA CAPITAL SENTENCING PROCESS

In 1972, the United States Supreme Court, in Furman v. Georgia, voided all death penalty statutes nationwide, because they permitted the imposition of death sentences on defendants, who kill under extremely mitigated circumstances. The court concluded that the lack of safeguards against freakish and capricious death sentences violates the Eighth Amendment prohibition against "cruel and unusual punishment." In 1973, the Georgia Legislature enacted revised death penalty statutes to conform with the guidelines demanded by Furman, which the Supreme Court approved in 1976 in Gregg v. Georgia.

The revised Georgia statutes divide murder trials into two parts. First, the jury hears evidence concerning the guilt or innocence of the defendant and renders a decision. If the defendant is found guilty of murder, then a second trial, or penalty trial, is held to determine the sentence, either life imprisonment or death. As a matter of practice, a defendant convicted of murder is automatically given a life sentence unless the prosecutor asks for the death penalty.

During the penalty trial, the prosecution and defense are permitted to offer the jury additional aggravating and mitigating evidence unrelated to the murder. A death sentence may be imposed on the defendant only if the jury finds, beyond a reasonable doubt, that the murder was accompanied by one or more of the following 10 statutory aggravating circumstances:

(1) The offense of murder was committed by a person with a prior record of convictions for murder, armed robbery, kidnaping or rape, or the offense of murder was committed by a person with a substantial history of serious assaultive criminal convictions.

(2) The offense of murder was committed while the offender was engaged in the commission of rape, armed robbery, or kidnaping, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

If the jury does not find one or more of these 10 statutory aggravating factors present, beyond a reasonable doubt, a life sentence is automatically imposed. Furthermore, the jury has full discretion to decline to sentence a convicted killer to death, even if the defendant has violated one or more of the 10 statutory aggravating factors.

The revised Georgia statutes also mandate that a death-sentenced defendant be granted an automatic appeal of his sentence to the Georgia Supreme Court. Among other issues to consider, the Georgia Supreme Court must conduct a proportionality review to determine whether the defendant's "sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Thus, the Georgia Supreme Court is given the authority to vacate a death sentence if one is wantonly or freakishly imposed.

3. THE BALDUS, WOODWORTH, AND PULASKI STUDIES

David C. Baldus was interested in studying whether Georgia's revised death sentencing statutes truly changed the way in which death sentences were imposed. With the help of George Woodworth, a statistician, and another legal colleague, Charles Pulaski, data was collected on Georgia murder cases to compare the sentencing pattern of defendants convicted of murder before the Furman ruling with defendants convicted of murder under the revised Georgia death penalty statutes. This effort was called the Procedural Reform Study (PRS) (see Baldus et al. (1984), (1985) and (1986) for the findings from this study). The NAACP Legal Defense Fund commissioned the Baldus team to conduct a second more detailed statistical study, called the Georgia Charging and Sentencing Study (GCSS), to focus on sentencing practices in Georgia after Furman (see Baldus et al. 1990). The purpose of the second study was to empirically test whether or not the revised Georgia death sentencing system is operating fairly, and formed the basis for the statistical analyses presented to the District Court.

The second study attempted to collect information on over 500 crime related factors for a sample of 1,082 defendants convicted of voluntary manslaughter or murder in Georgia between 1973 and 1978. Drawing on information from data files at the Georgia Department of Pardons and Paroles, five 2nd year law students were paid $5 an hour to fill out a 42 page questionnaire for each defendant sampled. The bulk of the data on the circumstances of the offense was taken from a one or two page police or criminal investigation report. Most of the questionnaire items are categorical, indicating whether or not the coder

believed a particular aggravating, mitigating or evidentiary factor occurred in the case.

4. LIMITATIONS OF THE GEORGIA CHARGING AND SENTENCING STUDY DATABASE

Despite the persistent data-gathering effort, the final database has serious problems. Over 100 questionnaire items associated with the crime were unknown for a significant percentage of the 1,082 cases (see 580 F.Supp 358). For instance, in 41% of the cases, it was unknown if the homicide was motivated by racial hatred. In 46% of the cases, it was unknown if the homicide had been planned for more than five minutes. In 74% of the cases, it was unknown whether the victim pleaded for his life. In 82% of the cases it was unknown if the defendant expressed pleasure with the homicide. Even the race of the victim was unknown for 62 cases. The consistency and accuracy of the data was a further problem. When identical aggravating or mitigating factors were compared in the same case between the earlier Procedural Reform Study and the later Georgia Charging and Sentencing Study, differences were often found (see 580 F.Supp at 357-358).

There are further structural problem with the questionnaire and the coding of items. Most crime related factors are collected as categorical items, which ignores qualitative differences in the factors between cases (for example torture, mental torture, victim beaten before killing, defendant bragged about killing, or victim had a criminal record).

Other conventions confound the aggravation or mitigation effect of certain circumstances of the homicide. For example, one question lists 19 offenses, ranging from misdemeanors to felonies such as armed robbery, rape, and kidnaping, and asks the coder to indicate whether the homicide occurred while the defendant was engaged in the commission of each offense whether or not the defendant was charged and convicted of the offense.

In the case of homicides with multiple offenders, the study adopted the protocol of attributing the aggravating circumstances of the crime to each offender without adjustment for his/her particular level of involvement. This muddling of the aggravating variables makes it more difficult for statistical models to predict or explain the sentencing outcomes for each offender. Multiple offenders are involved in 40.3% of the life sentence cases and 61.6% of death penalty cases (see Table I).

To assess the reliability and face validity of the data from the two studies, I presented the coded data on the death penalty cases to the State attorneys, who litigate all death penalty appeals for Georgia. After examining the data, the consensus agreed that the two studies missed important aggravating and evidentiary facts in the death penalty cases. In fact, important aggravating factors were missing from McCleskey's own case. Consider the following comparison of several items from Warren McCleskey's questionnaire to the record from his trial transcript.

(1) In 1970, Warren McCleskey was charged with 25 to 30 counts of armed robbery. A jury convicted him on 3 counts of armed robbery and imposed 3 life sentences. McCleskey also pled guilty to 5 other counts of armed robbery. In 1971, McCleskey was resentenced to 18 years for 3 counts of armed robbery. The questionnaire records that McCleskey was sentenced to 18 years for 3 counts of armed robbery.

(2) McCleskey spent 7 years and 4 months in prison from 1970 through 1977. McCleskey was released into a work release program in September 1977 and paroled several months later. The questionnaire did not record any of these facts and the foil designed to record the amount of time McCleskey spent in prison was left blank, inferring that McCleskey spent no time in prison.

(3) McCleskey was implicated in the armed robberies of the Red Dot Fruit Stand in Powder Springs in March 1978, and the Red Dot Grocery Store on Edgewood Ave. in April 1978. The manager of the Red Dot Fruit Stand became hysterical during his testimony. He recalled being tied up with tape, a gun pointed at his head, thinking that he was about to die. A victim of the Red Dot Grocery Store robbery testified that she was held at gunpoint while the robbers stole her purse. The questionnaire did not ask for, nor does it record the brutal psychological abuse McCleskey and his coperpetrators inflicted upon their robbery victims.

(4) McCleskey visited the Dixie Furniture Store on the morning before the robbery and talked with a saleslady about buying a bed. Before returning in the afternoon to rob the store, McCleskey changed shirts, shaved his moustache, and used makeup to make his face appear bumpy with a scar. The questionnaire indicates that the contemporaneous offense was planned for more than 5 minutes.

(5) As to the actual sequence of events leading to the murder of Officer Schlatt, as described in the introduction section of this article, the questionnaire records simply that between 6 and 10 people were exposed to a risk of death during the course of an armed robbery by McCleskey and 3 coperpetrators.

(6) Concerning Officer Schlatt's murder, the questionnaire records that the homicide was bloody, the defendant intended to use deadly force, one of the two shots hit the victim in the head, and the defendant left the scene of the crime.

(7) After his arrest, McCleskey gave a written statement to the police in which he admitted that he had robbed the Dixie Furniture Store on May 13, 1978, but denied that he was responsible for killing Officer Schlatt. The questionnaire records that McCleskey gave an oral statement rather than a written statement.

(8) McCleskey testified at his trial that he was not at the Dixie Furniture Store on May 13th. Instead, he was at his sister's house, his mother's house and he played cards with his friends. No one testified at McCleskey`s trial to corroborate his story. The questionnaire records that McCleskey's defense at trial was "mistaken identity."

(9) McCleskey concluded his testimony with "I am not a killer. I am not a murderer. I am not a violent person at all. I never assaulted anyone or cut anyone or shot anyone in my life." The questionnaire records that it was unknown to the coder whether McCleskey was remorseful for the killing.

(10) McCleskey confessed to the murder of Officer Schlatt to Offie Evans, his cellmate in the Fulton County Jail. McCleskey bragged to Evans that he would "shoot his way out if it had been a dozen of them." The questionnaire records that it was unknown to the coder whether or not McCleskey expressed pleasure with the killing.

Murder cases are stories, not a collection of categorical aggravating, mitigating, and evidentiary factors. Even if the foils available in McCleskey's questionnaire were completely and accurately filled out, there would still be insufficient detail to enable anyone, unfamiliar with his case, to recreate the crime story.

The District Court ruled on the sufficiency of the database and found (580 F.Supp at 360) "the data base has substantial flaws and that petitioner has failed to establish by a preponderance of the evidence that it is essentially trustworthy," and "there are errors in coding the questionnaire for the case sub judice. This fact alone will invalidate several important premises of petitioner's experts."

5. ANALYSIS OF THE GEORGIA CHARGING AND SENTENCING STUDY IS THE GEORGIA SENTENCING SYSTEM ARBITRARY?

If a defendant is convicted of murder and the prosecution asks for the death penalty, then the trial moves to the penalty phase. The jury is obligated to consider the combination of all relevant aggravating, mitigating and evidentiary facts of the case before imposing a sentence. Thus, it is impossible to judge the appropriateness of a defendant's sentence based upon the knowledge of whether or not one or several particular factors occurred. However, if the revised statutes are working as designed, then death-sentenced defendants should have a relatively high frequency of incidents that tend to exacerbate homicides such as the mutilation or rape of the victim. Furthermore, death-sentenced defendants should also have a relatively low frequency of incidents that tend to excuse homicides such as the killing resulting from a family quarrel or other dispute. This is precisely the pattern that is depicted by the Georgia Charging and Sentencing Study database. Table I below compares the incidence of important aggravating and mitigating factors of the crimes according to the offender's conviction and sentence.

TABLE 1

COMPARISON OF AGGRAVATING AND MITIGATING CRIME FACTORS BY CONVICTION AND SENTENCE

	VOLUNTARY MANSLAUGHTER CONVICTION: 1 - 20 YEARS		MURDER CONVICTION: LIFE SENTENCE		MURDER CONVICTION: DEATH SENTENCE	
AGGRAVATING FACTORS	**COUNT****	**PERCENT**	**COUNT****	**PERCENT**	**COUNT****	**PERC**
VICTIM KILLED DURING ARMED ROBBERY	14/504	2.8%	118/422	28.0%	77/138	
VICTIM KIDNAPED	2/504	0.4%	27/422	6.4%	51/138	
VICTIM RAPED	1/504	0.2%	15/422	3.6%	28/138	
VICTIM BEATEN	21/502	4.2%	50/420	11.9%	28/140	
VICTIM WITNESS TO CRIME	3/501	0.6%	51/390	13.1%	56/117	
EXECUTION STYLE MURDER	24/468	5.1%	65/380	17.1%	67/125	
VICTIM MUTILATED	7/502	1.4%	43/420	10.2%	43/140	
KILLING UNNECESSARY TO FINISH CRIME	7/499	1.4%	45/395	11.4%	50/119	
VICTIM PLED FOR LIFE	11/118	9.3%	32/98	32.7%	44/67	
VICTIM TORTURED	2/502	0.4%	5/420	1.2%	17/140	
VICTIM FORCED TO DISROBE	2/502	0.4%	20/420	4.8%	44/140	
DEFENDANT RESISTED ARREST	31/474	6.5%	75/403	18.6%	53/138	
MITIGATING FACTORS						
JEALOUSY MOTIVATED THE KILLING	67/421	15.9%	43/392	11.0%	1/139	
DEFENDANT ENRAGED	389/444	87.6%	166/348	47.7%	23/109	
FAMILY, LOVER, LIQUOR,	321/443	72.5%	150/390	38.5%	12/129	

BARROOM FIGHT						
KILLING RESULTED FROM DISPUTE	373/458	81.4%	178/380	46.8%	18/128	
DEFENDANT REMORSEFUL	32/56	57.1%	20/74	27.0%	2/39	
VICTIM PROVOKED PASSION IN DEFENDANT	92/397	23.2%	23/391	5.9%	0/131	
DEFENDANT/VICTIM STATUS						
DEFENDANT POOR	389/503	77.3%	327/417	78.4%	38/100	
DEFENDANT HIGH STATUS	12/504	2.4%	12/416	2.9%	4/127	
VICTIM A STRANGER TO DEFENDANT	38/495	7.7%	122/413	29.5%	82/140	
VICTIM FAMILY, FRIEND, OR INTIMATE	272/495	54.9%	149/419	35.6%	20/140	
VICTIM A POLICE OFFICER	0/507	0.0%	13/421	3.1%	9/140	
MULTIPLE OFFENDERS	45/500	9.2%	170/422	40.3%	85/138	
NUMBER OF CASES IN DATABASE	516		426		140	

* Cases in which the occurrence of a factor is unknown are excluded from the percentage calculation for that factor.

** Under the column "COUNT," the denominator indicates the number of defendants for which the factor was known and the numerator indicates the number of defendants for which the factor was indicated present in the case.

The 1,082 defendants were divided into three distinct groups by crime of conviction (voluntary manslaughter or murder) and sentence: (1) defendants convicted of voluntary manslaughter and sentenced to prison for 1 to 20 years, (2) defendants convicted of murder and sentenced to life imprisonment and (3) defendants convicted of murder and sentenced to death. For several important aggravating and mitigating features of homicides, Table I displays the percentage of cases for which each of these factors occurred, broken down by crime of conviction and sentence. Table I is an abbreviated version of a more detailed exhibit with over 100 aggravating and mitigating factors that I presented to the court.

According to Table I, the victim was killed during an armed robbery in 55.8% of the death sentence cases, 28.0% of the life sentence cases, and 2.8% of the voluntary manslaughter cases. On the other hand, the homicide arose as the result of a dispute in 81.4% percent of the voluntary manslaughter cases, 46.8% of the life sentence cases and only 14.1% of the death sentence cases.

Cases in which the occurrence of a factor is unknown are excluded from the percentage calculation for that factor. Admittedly, the vast number of unknown and incorrect data in the Georgia Charging and Sentencing Study database limit the accuracy and reliability of any analysis of the data. Nevertheless, Table I shows a consistent pattern of higher percentages for aggravating factors and lower percentages for mitigating factors as the sentence increases in severity. Death sentence cases tend to exhibit the highest percentage of each aggravating factor and the lowest percentage of each mitigating factor. Unless the coders consistently misrepresented the general facts of most cases, it is unlikely that complete correct data would substantially change or reverse the general pattern of higher percentages for aggravating factors and lower percentages for mitigating factors as the sentence increases in severity.

On viewing the more extensive exhibit I prepared for the court, the District Court was moved to find

(580 F.Supp at 365) "These observations, other testimony by all of the experts and the court's own analysis of the data put to rest in the court's mind any notion that the imposition of the death penalty in Georgia is a random event unguided by rational thought."

Of particular interest is the third section of Table I, where 77.3% of the defendants convicted of voluntary manslaughter and 78.4% of defendants convicted of murder and sentenced to life are classified as poor as compared to only 38.0% of the defendants sentenced to death. This is inconsistent with the theory that only the poor and the powerless are sentenced to death. Furthermore, high status defendants are not prone to commit homicides which explains the extremely low percentages within each sentence category. Yet, further analysis reveals that 14.3% (4/28) of high status defendants are sentenced to death to only 5.0% (38/754) of poor defendants.

RACE OF VICTIM ANALYSIS

The Georgia Charging and Sentencing Study estimated that 7% of white defendants were sentenced to death as compared to only 4% of black defendants. Therefore, death sentences were imposed on a higher percentage of whites than blacks. However, when the cases were divided up by the race of the victim, 11% of the white victim killers were sentenced to death as compared to only 1% of the black victim killers. There are two plausible explanations for this 10 percent disparity.

Baldus testified that racial factors play a role in determining who receives the death penalty in Georgia. He contends that at least part of the difference in death sentencing rates is due to institutionalized racism in the Georgia sentencing system, in that a black life is not held to be as valuable as a white life. An alternative explanation for the 10 percent disparity in death sentencing rates is that white victim homicides generally occur in more aggravated circumstances than black victim homicides. The Georgia Charging and Sentencing Study database supports this position. Table II displays the percentage of cases in which several of the more important aggravating and mitigating features are broken down by the victim's race.

TABLE II

COMPARISON OF AGGRAVATING AND MITIGATING CRIME FACTORS BY THE RACE OF THE VICTIM

	WHITE VICTIM CASES		BLACK VICTIM CASES			
AGGRAVATING FACTORS	COUNT	PERCENT	COUNT	PERCENT	PER CENT DIFFERENCE	Z SCORI
VICTIM KILLED DURING ARMED ROBBERY	170/510	33.3%	37/498	7.4%	25.9%	10.
VICTIM KIDNAPED	68/510	13.3%	11/498	2.2%	11.1%	6.
VICTIM RAPED	29/510	5.7%	15/498	3.0%	2.7%	2.
VICTIM BEATEN	63/512	12.6%	31/493	6.3%	6.3%	3.
VICTIM WITNESS TO CRIME	92/471	19.5%	17/481	3.5%	16.0%	7.
EXECUTION STYLE MURDER	118/465	25.4%	34/456	7.5%	17.9%	7.
VICTIM MUTILATED	76/512	14.8%	14/493	2.8%	12.0%	6.
KILLING UNNECESSARY TO FINISH CRIME	81/474	17.1%	21/484	4.3%	12.8%	6.
VICTIM PLED FOR LIFE	60/156	38.5%	26/117	22.2%	16.3%	2.

VICTIM TORTURED	18/512	3.5%	6/493	3.0%	6.8%	4.
VICTIM FORCED TO DISROBE	50/512	9.8%	15/493	3.0%	6.8%	4.
DEFENDANT RESISTED ARREST	112/493	22.7%	42/469	9.0%	13.7%	5.
MITIGATING FACTORS						
JEALOUSY MOTIVATED THE KILLING	29/477	6.1%	70/427	16.4%	-10.3%	-5.
DEFENDANT ENRAGED	200/423	47.3%	334/428	78.0%	-30.7%	-9.
FAMILY, LOVER, LIQUOR, BARROOM FIGHT	165/468	35.3%	284/444	64.0%	-28.7%	-8.
KILLING RESULTED FROM DISPUTE	205/464	44.2%	327/450	72.7%	-28.5%	-8.
DEFENDANT REMORSEFUL	21/91	23.1%	29/71	40.8%	-17.7%	-2.
VICTIM PROVOKED PASSION IN DEFENDANT	34/451	7.5%	73/417	17.5%	-10.0%	-4.
DEFENDANT/VICTIM STATUS						
DEFENDANT POOR	302/469	64.4%	407/488	83.4%	-19.0%	-6.
DEFENDANT HIGH STATUS	20/493	4.1%	8/494	1.6%	2.5%	2.
VICTIM A STRANGER TO DEFENDANT	184/509	35.8%	55/483	18.8%	17.0%	9.
VICTIM FAMILY, FRIEND, OR INTIMATE	167/509	34.6%	242/483	39.6%	-5.0%	-5.
VICTIM A POLICE OFFICER	18/512	3.5%	3/498	0.6%	2.9%	3.
MULTIPLE OFFENDERS	227/507	44.8%	65/495	13.3%	31.5%	10.
NUMBER OF CASES IN DATABASE**	516		504			
DEATH SENTENCE PERCENTAGE		11%		1%		

* Cases in which the occurrence of a factor is unknown are excluded from the percentage calculation for that factor.

** The percentage calculations omit the 62 cases in which the race of the victim was unknown.

*** The Z-value indicates the number of standard deviations the calculated percent difference is from 0.

White victim homicides have a much higher incidence of armed robberies, kidnapings, and rapes. For example, in 33.3% of the white victim cases, the victim was killed during the course of an armed robbery as compared to only 7.4% of the black victim cases. The 25.9% difference in armed robbery rates between white victim and black victim cases is approximately 10.2 standard deviations above 0%. Furthermore, white victim homicides show a greater percentage of mutilations, execution style murders, tortures, and beaten victims, features which generally aggravate homicides and increase the likelihood of a death sentence if one or more statutory aggravating factors is also present.

On the other hand, cases involving black victims are more likely to involve an enraged and remorseful defendant, who kills as the result of a fight or dispute. For instance, in 44.2% of the white victim cases, the homicide was precipitated by a dispute or fight as compared to 72.7% of the black victim homicides.

DEFENDANT-VICTIM RACIAL COMBINATION ANALYSIS

The Georgia Charging and Sentencing Study projected that 22% of black killers of white victims, 8% of white killers of white victims, 1% of black killers of black victims, and 3% of white killers of black victims are sentenced to death. Table III shows the incidence of important aggravating and mitigating factors broken down by the four defendant-victim racial combinations.

TABLE III

COMPARISON OF AGGRAVATING AND MITIGATING CRIME FACTORS BY THE DEFENDANT VICTIM RACIAL COMBINATION

	BLACK KILLS WHITE		WHITE KILLS WHITE		BLACK KILLS BLACK		WHITE KILLS BLACK	
AGGRAVATING FACTORS	**COUNT**	**PERCENT**	**COUNT**	**PERCENT**	**COUNT**	**PERCENT**	**COUNT**	**PERCENT**
VICTIM KILLED DURING ARMED ROBBERY	96/143	67.1%	74/367	20.2%	31/471	6.6%	6/27	22.2%
VICTIM KIDNAPED	26/143	18.2%	74/367	20.2%	10/471	6.6%	6/27	22.2%
VICTIM RAPED	14/143	9.8%	42/367	11.4%	15/471	3.2%	0/27	0.0%
VICTIM BEATEN	16/143	11.2%	15/367	4.1%	30/467	6.4%	1/26	3.8%
VICTIM WITNESS TO CRIME	47/129	36.4%	47/369	12.7%	14/457	3.1%	3/24	12.5%
EXECUTION STYLE MURDER	42/127	33.1%	76/338	22.5%	131/432	7.2%	3/24	12.5%
VICTIM MUTILATED	25/143	17.5%	51/369	13.8%	13/467	2.8%	1/26	3.8%
KILLING UNNECESSARY TO FINISH CRIME	47/124	37.9%	34/350	9.7%	21/461	4.6%	0/23	0.0%
VICTIM PLED FOR LIFE	25/43	58.1%	35/113	31.0%	23/108	21.3%	3/9	33.3%
VICTIM TORTURED	3/143	2.1%	15/369	4.1%	6/467	1.3%	0/26	0.0%
VICTIM FORCED TO DISROBE	18/143	12.6%	32/369	8.7%	15/467	3.2%	0/26	0.0%
DEFENDANT RESISTED ARREST	37/141	26.2%	75/352	21.3%	37/444	8.3%	5/25	20.0%
MITIGATING FACTORS								
JEALOUSY MOTIVATED THE KILLING	0/140	0.0%	29/337	8.6%	70/403	17.4%	0/24	0.0%
DEFENDANT ENRAGED	22/121	18.2%	178/302	58.9%	321/409	78.5%	13/19	68.4%
FAMILY, LOVER, LIQUOR, BARROOM FIGHT	10/133	7.5%	155/335	46.3%	273/420	65.0%	11/24	45.8%
KILLING RESULTED FROM DISPUTE	24/132	18.2%	181/332	54.5%	311/426	73.0%	16/24	66.7%
DEFENDANT REMORSEFUL	3/22	13.6%	18/69	26.1%	26/67	38.8%	3/4	75.0%
VICTIM PROVOKED PASSION IN DEFENDANT	4/132	3.0%	30/319	9.4%	67/394	17.0%	6/23	26.1%
DEFENDANT/VICTIM STATUS								

DEFENDANT POOR	93/125	74.4%	209/344	60.8%	386/460	83.9%	21/28	75.0%
DEFENDANT HIGH STATUS	0/133	0.0%	20/360	5.6%	7/466	1.5%	1/28	3.6%
VICTIM A STRANGER TO DEFENDANT	101/143	70.6%	83/366	22.7%	44/457	9.6%	11/26	42.3%
VICTIM FAMILY, FRIEND, OR INTIMATE	7/143	4.9%	160/366	43.7%	235/457	51.4%	7/26	26.9%
VICTIM A POLICE OFFICER	15/142	10.6%	3/370	0.8%	3/472	0.5%	0/26	0.0%
MULTIPLE OFFENDERS	82/140	58.6%	145/367	39.5%	58/468	12.4%	8/27	29.6%
NUMBER OF CASES IN DATABASE**	145		371		477		28	
DEATH SENTENCE PERCENTAGE		22%		8%		1%		3%

* Cases in which the occurrence of a factor is unknown are excluded from the percentage calculation for that factor.

** The percentage calculations omit the 62 cases in which the race of the victim was unknown.

The four defendant-victim racial combinations provide the key that unlocks the race-of-victim sentencing puzzle. Each defendant-victim racial combination portrays a fundamentally different homicide pattern. The black defendant white victim cases are the most aggravated of all four defendant-victim racial combinations. In 67.1% of the cases, the homicide results from an armed robbery whereas only 18.2% of the time is the homicide precipitated by a dispute. The interracial nature of this kind of homicide minimizes the possibility that the killing arose due to a family dispute, a quarrel between lovers, or arguments between friends and relatives. The victim was a stranger 70.6% of the time, and a family member or friend in only 4.9% of the cases. Multiple offenders were involved in 58.6% of the cases. Black defendant white victim killings are invariably linked to felony circumstances which legally qualifies the defendant for a death sentence.

Of all four defendant-victim racial combinations, the black defendant black victim homicides occur most frequently with 477 cases. Only 6.6% of the time did the homicide result from an armed robbery, whereas 73.0% of the time the killing was precipitated by a dispute. In this category of homicide, the victim is a stranger only 9.6% of the time as compared to a family member or friend 51.4% of the time. Multiple offenders are involved in only 12.4% of the cases. This kind of homicide is characterized by poor defendants (83.9%), acting alone, who kill family members, friends, or other acquaintances during a fight or argument. This type of killing tends to have mitigating circumstances which explains why few of these defendants are ever sentenced to death.

The white defendant white victim cases reflect a mixture of two basic types of killings. Although the majority of these homicides are precipitated by disputes and fights, a significant percentage occur during the course of a felony or involve horrible brutal killings.

Only 28 cases are categorized as white defendant black victim homicides. Four of these cases are misclassified as interracial killings due to the convention adopted by the study of classifying Hispanic defendants as white but Hispanic victims as black. The relatively few incidents of white defendant black victim homicides and the uncertain data make it difficult to ascertain any distinctive pattern. Yet, one important fact is clear. This type of homicide rarely occurs in Georgia. In fact, over 95% of the black victim cases have black defendants.

The black victim homicide patterns revealed by the Georgia Charging and Sentencing Study are

generally consistent with earlier studies of homicides in Atlanta, Georgia. For the 383 murder and nonnegligent homicides in Atlanta between 1958 and 1962, James Imes (1972) found 83.3% were black victim homicides. Over 99% of the black victim homicides had black offenders. Robbery precipitated 3.2% of the black victim homicides, as compared to 18.2% of the white victim homicides. A dispute, domestic quarrel, jealousy, or revenge caused 90.1% of the black victim homicides, compared to 77.3% of the white victim homicides. Rivers (1975) investigated socioeconomic factors related to 237 Atlanta homicides in 1972 of which 75.5% of them were black offender-black victim. Rivers concluded that "It can be said most emphatically that systemic socioeconomic factors are significant in explaining the large number of black on black homicides."

The F.B.I. Uniform Crime Reports for murder and nonnegligent manslaughter, document the consistent intra-racial nature of homicides nationwide, and the disproportionate higher number of black offender black victim homicides. The Georgia Department of Human Resources reports that between 1976 and 1985, homicide was the leading cause of death for black males between 20 and 44. Many researchers, for example Pettigrew and Speir (1962), Wolfgang and Ferracuti (1967), Harvey (1986), Staples (1986), and Hawkins (1986), in attempting to explain the differential racial homicide rates, point generally to cultural differences in the black community and the greater frustration experienced by blacks in trying to escape from their low social and economic standing.

6. MULTIVARIATE ANALYSES OF THE GEORGIA CHARGING AND SENTENCING STUDY

Although black victims homicides are more mitigated and less aggravated than white victims homicides, this fact, by itself, might not account for the complete 10% disparity in death sentencing rates between killers of whites and killers of blacks. Baldus contended that some slight, systemic bias, still existed against defendants who kill white victims after controlling for all possible factors that could conceivably affect the sentencing outcome. The District Court was presented with the results of numerous multivariate statistical analyses, which Baldus relied on to support his theory.

Multivariate analyses require that the variable values be known for each case. Thus, Baldus was forced to either recode all the unknown values for the variables in his database or abandon the use of multivariate analysis. Baldus chose to recode the tens of thousands of unknown values for all variables to "0" (i.e. to indicate that the factor did not occur). For example, if it was unknown to the coder whether or not the defendant expressed pleasure with the killing, then that foil was treated as if the defendant did not express pleasure with the killing. Baldus reasoned that if his data collector was unable to determine the status of these factors, given the summary reports that were examined, then the occurrence of the factor must also be unknown to the prosecutors and juries. This assumption is not even true for McCleskey's own questionnaire, and serves to understate the number and degree of aggravating factors that are present in his case. Furthermore, cases in which the race of the victim was unknown were recoded so that the race of the victim matched the race of the defendant.

CROSSTABULATION ANALYSIS

Initially, to control for the effect of nonracial variables, Baldus used crosstabulation tables to subdivide the cases into distinct groups based upon selected aggravating, mitigating and evidentiary variables. This method allows a comparison of death sentencing rates, by race, for cases whose joint occurrence of the selected aggravating, mitigating, and evidentiary factors are identical. But Baldus limited his crosstabulation analyses to at most three variables at a time.

Controlling for n variables simultaneously produces 2^n subgroups (assuming each control variable has

two values). Thus, controlling for 10 variables results in 1,024 subgroups and controlling for 230 variables produces approximately 1.7×10^{69} subgroups. Obviously, controlling for only 25 to 30 relevant factors could cause each of the 1,082 cases to be uniquely classified, which completely eliminates racial disparities in death sentencing rates and explains (although not necessarily correctly) death sentencing results through nonracial factors. There are numerous factors that can influence whether or not the defendant is sentenced to death and each case is a unique combination of these factors. Thus, numerous nonracial explanations of sentencing outcomes exist, even if the capital sentencing system is racially biased.

MULTIPLE REGRESSION AND LOGISTIC REGRESSION

The bulk of the evidence purporting to show the existence of racial bias in the Georgia capital sentencing system was based upon weighted multiple regression and logistic regression equations. The dependent variable was defined to indicate decisions at various stages of the capital sentencing process, such as whether or not the prosecutor sought a penalty trial or whether or not the defendant was sentenced to death at the penalty trial.

If the dependent and predictor variables are categorical, multiple regression, like the crosstabulation method, can control for background variables, if all interaction variables are specified in the equation. Controlling for n variables using the crosstabulation method produces 2^n subgroups but the equivalent regression equation, that controls for the same n background variables, requires a total of $2^n - 1$ regular and interaction variables.

The interaction variables are important because in many instances, the aggravating or mitigating effect of a factor can be deduced only within the context of the facts of the case (see also Barnett (1985)). For instance, the fact that the victim used alcohol before the homicide would mitigate the homicide if the intoxicated victim provoked a fight with the defendant, but would aggravate the homicide if the defendant robbed and killed a drowsy victim. Also, the fact that a victim is beaten before the homicide would aggravate the homicide if 4 men rob, attack, rape, and kill a woman abducted from a nearby parking lot, but is almost inconsequential if the victim started a fight with the defendant. As a rule, interaction variables were omitted from the regression models presented to the court.

The court was given numerous examples of regression and logistic regression equations, which attempted to show the average amount of racial bias present at several stages of the capital sentencing process (see Baldus et al. (1990)). One model contains 236 factors. Invariably, the coefficients for the racial variables were statistically significant at the .05 level.

Professor Baldus testified that if important background variables are not controlled for, then the coefficients of the racial variables would not necessarily provide the whole picture. For this reason, the legal opinions focus on the interpretation of the regression equation with the largest number of variables, the 230+ variable model (Baldus et al. (1990), Appendix L, pp. 620 - 629). The categorical dependent variable (DPMURIDT) assigns a 1 to cases in which the death penalty was imposed, and a 0 to cases in which the defendant was indicted for murder but the death penalty was not imposed. The 230+ variable model produced a coefficient of +.066 ($p = .0145$) for the defendant is black (BLACKD) variable and a coefficient of +.065 ($p = .0153$) for the recoded victim is white (WHVICRC) variable. But the 230+ variable model also has other coefficients that make no sense. Aggravating variables have negative or mitigated weights, such as the victim was a hostage (-.11, $p = .2876$), the victim was a witness to the crime (-.15, $p = .0692$), and the victim offered no provocation (-.13 $p = .0095$). Mitigating variables have positive or aggravated weights, such as defendant had no significant criminal history (+.06, $p = .0981$), coercion was used on the defendant (+.28, $p = .0032$), and family dispute other than spouse, or

ex-spouse (+.06 p = .0984). Furthermore, the importance and effect of the aggravating, mitigating, and evidentiary factors change dramatically from model to model depending upon the specific combination of factors that are present in the regression or logistic regression equation. The District Court observed (580 F.Supp at 363) "In the Charging and Sentencing Study a very substantial proportion of the variables are correlated to the race of the victim and to the death sentencing result. All or a big proportion of the major nonstatutory aggravating factors show positive correlation with both the death sentencing result and the race of the victim. More than 100 variables show statistically significant relationships with both death sentencing results and the race of the victim." Obviously, the existence of multicollinearity makes the coefficients unreliable as the marginal impact of that variable to the probability of the imposition of a death sentence.

To impose a death sentence, the prosecution must prove, beyond a reasonable doubt, that the defendant is also guilty of one or more of ten statutory aggravating circumstances. Accordingly, models of capital sentencing decisions must be limited to those offenders who were eligible for a death sentence. The 230+ variable regression model includes irrelevant defendants who were indicted for murder but had no statutory aggravating factors. These defendants had the same probability of being sentenced to death as parking violators. Furthermore, it is noteworthy that Baldus et al. report several multiple regression and logistic regression models for actual jury decisions at penalty trial with nonsignificant racial coefficients. (for example, see Baldus et al. (1990), pp. 644-645).

The Georgia Charging and Sentencing Study is missing important aggravating and evidentiary factors in the death penalty cases. These omissions serve to make death penalty and life sentence cases appear more factually similar, which impedes the ability of any multivariate methodology to differentiate the effect of the aggravating, mitigating, and evidentiary variables on the likelihood of being sentenced to death. This data collection problem could explain the fact that a large number of models have statistically significant race of victim coefficients, but with absurd coefficients for the nonracial variables (signs in the wrong direction, and magnitudes out of proportion to their expected effect).

Furthermore, using the same weighted multiple regression methodology but with different combinations of predictor variables, I have produced thousands of regression equations, of different sizes, in which the racial variables are not statistically significant at the .05 significance levels. Some of these models exceed 250 variables. One example, an equation with 34 predictor variables, is displayed in Table IV. Several others can be found in Katz (1989). These models with nonsignificant racial coefficients do not prove that the Georgia capital sentencing system is free from racial bias. The models with statistically significant racial coefficients do not prove that the Georgia capital sentencing system is racially biased. This exercise merely confirms the fact that different combinations of legitimate variables in the regression or logistic regression models produce different estimates of the racial and nonracial coefficients.

TABLE IV

THE COEFFICIENTS AND P-VALUES FOR THE VARIABLES FOR AN EXAMPLE OF A REGRESSION MODEL WITH RACIAL VARIABLES THAT ARE NOT STATISTICALLY SIGNIFICANT

DEPENDENT VARIABLE = DEATH SENTENCE GIVEN INDICTMENT FOR MURDER.
NUMBER OF PREDICTOR VARIABLES: 34
R-SQUARE: .3337
ADJUSTED R-SQUARE: .3106
F VALUE: 14.435 (DF. 34, 980)
INTERCEPT: -.049

LIST OF VARIABLES	PARTIAL REGRESSION	2 TAIL P-VALUE

	COEFFICIENT	
RACIAL VARIABLES		
1) DEFENDANT WAS BLACK	-.007	.7551
2) ONE OR MORE WHITE VICTIMS (RECODE)	-.003	.9012
AGGRAVATING VARIABLES		
3) COUNT OF STAT. AGG. FACTORS, B7 EXPANDED	.051	.0001
4) MALICE OR VIOLENCE	-.009	.6480
5) NUMBER OF MINOR AGGRAVATING FACTORS	.024	.0102
6) VICTIM SHOWED MONEY	-.063	.2566
7) NO VICTIM PROVOCATION	.032	.1553
8) MALICE OR DELIBERATION	-.006	.6974
9) DEFENDANT EXPRESSED PLEASURE WITH KILLING	.323	.0001
10) GREAT RISK OF DEATH TO OTHERS IN PUBLIC	-.047	.0172
11) MURDER WAS OUTRAGEOUS, WANTON, HORRIBLE	-.064	.0052
12) VICTIM WAS ON DUTY POLICE OFFICER	.041	.4798
13) MULTIPLE SHOTS	.022	.2632
14) NO VICTIM MITIGATING CIRCUMSTANCE	.010	.5823
15) NON-PROPERTY RELATED CRIME	.119	.0001
16) NUMBER OF OTHER VIOLENT PERSONAL CRIME CONVICTIONS, SIMPLE ROBBERY/AGGRAVATED ASSAULT OR BATTERY/ PERSONAL VIOLENT MISD	-.048	.1758
17) NUMBER OF VIOLENT PERSONAL CRIME CONVICTIONS BESIDE HOMICIDE/ARMED ROBBERY/RAPE/KIDNAP	.052	.1320
18) DEFENDANT LAY IN WAIT TO AMBUSH VICTIM	-.011	.6640
19) NUMBER OF CONVICTIONS FOR VIOLENT PERSONAL CRIMES, BURGLARY OR 1ST DEGREE ARSON	.007	.6640
20) DEFENDANT NOT KILLER BUT DID VIOLENCE	-.063	.1791
21) DEFENDANT FIRED 5 OR MORE SHOTS	.031	.2347
22) VICTIM WEAK	.018	.6740
23) NUMBER OF PRIOR ARRESTS	-.001	.4592
MITIGATING VARIABLES		
24) NUMBER OF MITIGATING FACTORS	.005	.4225
25) DEFENDANT PANIC DURING CRIME	.041	.2566
26) DEFENDANT SURRENDERED WITHIN 24 HOURS	.003	.8796
27) DEFENDANT ACCOMPLICE IN KILLING	-.052	.1329
28) HISTORY OF DRUG OR ALCOHOL ABUSE	-.025	.1014
29) REVENGE MOTIVE	-.005	.7687
30) HATE MOTIVE	-.019	.3428
31) DEFENDANT HAD NO SIGNIFICANT CRIMINAL REC.	.021	.2758
32) DEFENDANT HURT BY POLICE	.249	.0958
EVIDENTIARY VARIABLES		
33) SCIENTIFIC EVIDENCE OTHER THAN MED./WEAPON	.055	.0007
34) EYE WITNESS ID OF DEFENDANT	-.010	.4630

The thousands of regression models with statistically nonsignificant racial coefficients provide thousands of nonracial explanations for the death sentencing outcomes. None of these models truly reflect the operation of the Georgia charging and sentencing system. The regression models generated by Baldus et al. with statistically significant racial coefficients explains death sentencing outcomes, in part, through racial factors. None of these models truly reflect the operation of the Georgia charging and sentencing system.

In fact, it is possible to specify numerous multiple regression models based upon legitimate aggravating, mitigating, and evidentiary factors, that perfectly explain the death sentencing outcomes (R-square = 1) and assign the racial variables coefficient values of 0. For each death penalty case, identify legitimate aggravating, mitigating, and evidentiary factors that, in combination, uniquely distinguish that death penalty case from all other cases (both death penalty and non-death penalty) in the database. Define the interaction variable for each death penalty case to be the joint occurrence of those factors that uniquely identify it. Consider the multiple regression model with dependent variable indicating the sentencing outcome (death penalty or non-death penalty) and with the previously defined interaction variables and two racial variables as predictor variables. Each interaction variable will receive a coefficient value of 1. The coefficients of the racial variables will be 0. The constant term will be 0. The R-square value will be 1. Effectively, this model shows that the interaction variables, which were defined as a unique combination of legitimate factors, perfectly explain the death sentencing outcomes without any racial effects. As innumerable interaction variables can be defined for the death penalty cases, there exist innumerable multiple regression models of this type.

Several researchers (for example Gross (1985), Kaye (1986), and Kennedy (1988)) fault the courts for not accepting the multiple regression and logistic regression evidence offered by Professor Baldus as sufficient proof of racial discrimination in death sentencing. Others (for example Barnett (1985), Wilbanks (1987), and Edmunson (1990), have recognized limitations to the interpretation of the racial coefficients in regression models for capital sentencing decisions.

The District Court rejected these models as relevant to the measurement of racial effects in the context of capital sentencing, noting that it (580 F.Supp at 370, 372) "can produce endless series of self-fulfilling prophecies because it always attempts to explain actual outcomes based on whatever variables it is given," and "the presence of multi-colinearity substantially diminishes the weight to be accorded to the circumstantial statistical evidence of racial disparity."

The 11th Circuit Court of Appeals found that the general approach of attempting to control for all possible legitimate aggravating and mitigating factors to see if some racial bias was left over inappropriate for the capital sentencing decision (753 F.2d at 899), "From a legal perspective, petitioner would argue that since the difference is not explained by facts which the social scientist thinks satisfactory to explain the differences, there is a prima facie case that the difference was based on unconstitutional factors, and the burden would shift to the state to prove the difference in results from constitutional considerations. This approach ignores the realities. It not only ignores quantitative differences in cases: looks, age, personality, education, profession, job, clothes, demeanor, and remorse, just to name a few, but it is incapable of measuring qualitative differences of such things as aggravating and mitigating factors. There are, in fact, no exact duplicates in capital crimes and capital defendants."

THE AGGRAVATION AND MITIGATION INDEX

The aggravation and mitigation index approach develops a formula based on aggravating, mitigating, and evidentiary factors to classify each case according to its severity. Baldus selected the 500 defendants which he believed were at the greatest risk of a death sentence because they scored the highest on his aggravation and mitigation index. The 500 defendants were then categorized into 8 distinct groups.

Baldus assumed that cases within each group were comparable in level of aggravation and mitigation and that higher numbered groups represented more aggravated cases. Baldus provided the court with a breakdown of the death sentencing rates, by defendant victim racial combination, for these cases within each of the 8 levels. This data appears in Table V.

TABLE V
DEATH SENTENCING RATES BY DEFENDANT VICTIM RACIAL COMBINATION FOR CASES CATEGORIZED BY BALDUS INDEX*

CASE SEVERITY LEVEL	OVERALL	BLACK KILLS WHITE	BLACK KILLS BLACK	WHITE KILLS WHITE	WHITE KILLS BLACK
1	0/33	0/9	0/19	0/5	0/0
	0%	0%	0%	0%	---
2	0/55	0/8	0/27	0/19	0/1
	0%	0%	0%	0%	0%
3	6/76	3/10	2/18	1/39	0/9
	8%	30%	11%	3%	0%
4	4/57	3/13	0/15	1/29	0/0
	7%	23%	0%	4%	---
5	15/58	9/26	2/12	4/20	0/0
	27%	35%	17%	20%	---
6	11/64	3/8	1/20	5/32	2/4
	17%	38%	5%	16%	50%
7	29/71	9/14	5/13	15/39	0/5
	41%	64%	39%	39%	0%
8	51/58	20/22	6/8	25/28	0/0
	88%	91%	75%	89%	---

* The denominator indicates the number of cases that were classified in the case severity level and the numerator counts the number of cases in which the defendant was sentenced to death.

Based on this index, Baldus observed that the overall death sentencing rates tend to increase as one moves from level 1 to level 8. Furthermore, according to the index, the death sentencing rates for white victim cases are generally higher than the death sentencing rates for black victim cases in levels 3 through 7. Baldus testified that racial bias in sentencing is concentrated in cases at the midrange level of aggravation and mitigation (levels 3 through 7).

Baldus did not explain to the court exactly which variables were utilized in this index or how the formula worked. The list of factors comprising this index can be found in Baldus et al. (1990), although the point values for the factors are omitted. Analysis of the Georgia Charging and Sentencing Study database has enabled me to identify the particular index (called DPMRIDX3) that reproduces the summary statistical results in Table V. Table VI lists the factors used to produce this index and their associated point values.

TABLE VI
THE AGGRAVATION AND MITIGATION INDEX

AGGRAVATING FACTORS	POINTS

A1) MOTIVE TO AVENGE ROLE OF JUDICIAL OFFICER, DISTRICT ATTORNEY, OR POLICE OFFICER	48
A2) VICTIM PHYSICALLY TORTURED	27
A3) DEFENDANT EXPRESSED PLEASURE WITH KILLING	26
A4) KIDNAPPING INVOLVED	16
A5) VICTIM KILLED SO DEFENDANT COULD COLLECT INSURANCE MONEY	14
A6) DEFENDANT'S DEFENSE WAS INSANITY OR DELUSIONAL COMPULSION	12
A7) KILLING MOTIVATED BY RACE HATRED	8
A8) MENTAL TORTURE	3
A9) BRUTAL CLUBBING OR OTHER UNNECESSARILY PAINFUL METHOD OF ATTACK	3
A10) MUTILATION OF BODY DURING HOMICIDE	3
A11) MUTILATION OF BODY AFTER DEATH	3
A12) SLASHED THROAT	3
A13) EXECUTION STYLE HOMICIDE	3
A14) VICTIM PLEADED FOR LIFE	3
A15) SEXUAL PERVERSION OR ABUSE OTHER THAN RAPE	3
A16) DEFENDANT ON ESCAPE FROM LAWFUL CUSTODY OF POLICE OFFICER OR LAWFUL CONFINEMENT	3
A17) BRUTAL STOMPING OR BEATING WITH HANDS OR FEET	1
A18) MULTIPLE GUNSHOTS TO HEAD OF VICTIM	1
A19) MULTIPLE STABBING	1
A20) BLOODY	1
A21) VICTIM FORCED TO DISROBE	1
A22) HOMICIDE PLANNED FOR MORE THAN 5 MINUTES	1
A23) CONTEMPORANEOUS OFFENSE PLANNED FOR MORE THAN 5 MINUTES	1
A24) HOMICIDE WAS UNNECESSARY TO COMPLETE CRIME	1
A25) DEFENDANT COMMITTED ADDITIONAL CRIMES AFTER HOMICIDE	1
GEORGIA STATUTORY AGGRAVATING FACTORS	
B1) PRIOR CONVICTION OF MURDER, ARMED ROBBERY, RAPE, OR KIDNAPING 3	3
B2) KILLING OCCURRED WHILE DEFENDANT ENGAGED IN ARMED ROBBERY, RAPE KIDNAPING, BURGLARY, ARSON IN 1ST DEGREE, OR AGGRAVATED BATTERY	3
B3) GREAT RISK OF DEATH TO OTHERS IN PUBLIC PLACE	3
B4) DEFENDANT MURDERED TO OBTAIN MONEY	3
B5) DEFENDANT KILLED JUDICIAL OFFICER OR DISTRICT ATTORNEY FOR PERFORMING HIS OFFICIAL DUTIES	3
B6) DEFENDANT INVOLVED IN MURDER FOR HIRE	3
B7) THE MURDER WAS OUTRAGEOUSLY OR WANTONLY VILE, HORRIBLE OR INHUMAN:	
a) THE VICTIM WAS MUTILATED BEFORE OR AFTER DEATH	3
b) BRUTAL STOMPING OR BEATING WITH HANDS OR FEET, OR MULTIPLE GUNSHOT WOUNDS, OR MULTIPLE STABS, OR OTHER MODE OF MULTIPLE LETHAL OR PAINFUL ATTACK	3
c) RAPE OR KIDNAPING OF WEAK OR DEFENSELESS VICTIM	3
d) DURING THE COURSE OF AN ARMED ROBBERY, RAPE, OR KIDNAPING, THE VICTIM IS KILLED TO OBTAIN MONEY OR TO PREVENT THE VICTIM FROM TESTIFYING AS A WITNESS TO THE CRIME. IN ADDITION THE VICTIM IS EITHER WEAK, DEFENSELESS, KILLED EXECUTION STYLE OR PLED FOR HIS LIFE	3

e) VICTIM BRUTALLY CLUBBED, STOMPED ON, BEATEN WITH HANDS OR FEET STRANGLED, DROWNED, POISONED, OR SHOT AND SLASHED TO DEATH	3
f) SEXUAL ABUSE, SEXUAL PERVERSION, OR VICTIM PLED FOR LIFE	3
B8) VICTIM WAS ON DUTY POLICE OFFICER	3
B9) DEFENDANT ON ESCAPE FROM LAWFUL CUSTODY OR LAWFUL CONFINEMENT	3
B10) DEFENDANT MURDERED TO AVOID ARREST OR SILENCE WITNESS TO CRIME	3
MITIGATING FACTORS	
M1) DEFENDANT HAD IMPAIRED MENTAL CAPACITY	-46
M2) COPERPETRATOR RECEIVED A LESSER SENTENCE	-8
M3) DEFENDANT NOT TRIGGERMAN	-7
M4) DEFENDANT ADMITTED GUILT ASSERTING NO DEFENSE	-7
EVIDENTIARY FACTORS	
E1) WITNESS IDENTIFIED DEFENDANT NEAR SCENE OF CRIME	1
E2) PRETRIAL IDENTIFICATION OF DEFENDANT	1
E3) DEFENDANT ADMITTED HOMICIDE WITH NO DEFENSE	1
E4) COPERPETRATOR IMPLICATED DEFENDANT IN HOMICIDE	1
E5) WITNESS HEARD INCRIMINATING REMARK BY DEFENDANT OR COPERPETRATOR	1
E6) SCIENTIFIC EVIDENCE OTHER THAN WEAPON OR MEDICAL	1
E7) MURDER WEAPON FOUND, LINKED DEFENDANT TO HOMICIDE	1
E8) MEDICAL REPORT LINKED DEFENDANT TO HOMICIDE	1
E9) WITNESS WITH INFORMATION ON PREPARATION OR PRECIPITATING EVENTS	1

To calculate the aggravation and mitigation index score for a defendant convicted of murder or voluntary manslaughter, identify the factors listed in Table VI which apply to the particular defendant and the circumstances surrounding his crime. Then, add up the points associated with each of these factors. The total number of points is the index score for that defendant.

The higher the index score, the more aggravated the homicide, and factors that are not included in Table VI are assigned no points by default. Baldus used the index score to classify all cases into three levels of aggravation and mitigation, low (less than 17 points, levels 1 and 2 in Table V), midrange (17 points to under 44 points, levels 3 through 7 in Table V), and high (44 points or more, level 8 in Table V). Baldus observed that death sentences are rarely imposed on defendants with low index scores but quite often on defendants with high index scores, and concluded that race has little effect on sentencing at these levels. However, Baldus argued that race of victim discrimination was most pronounced against black defendants in the midrange of cases where he believes that the room for prosecutor and jury discretion is the greatest.

To be considered for a death sentence, the prosecution must prove, beyond a reasonable doubt, that the defendant is also guilty of one or more of ten statutory aggravating circumstances. If the prosecution cannot prove the existence of one or more statutory aggravating factors, then the defendant is not eligible for a death sentence, and there is no capital decision for the prosecutor or jury to make. Furthermore, homicides with statutory aggravating factors should be excluded if there are other legal reasons which bar the imposition of the death sentence. Accordingly, tests for racial bias in capital sentencing decisions, must compare only those offenders who were eligible for a death sentence. The inclusion of non-death eligible offenders improperly bloats the denominators in death sentencing rate comparisons. Baldus did not establish that each of the 500 cases contained one or more statutory aggravating factors. Therefore, it is possible that a significant percentage of the cases in the midrange

might not even be eligible for a death sentence under Georgia Law.

There are many unusual features of the aggravation and mitigation index, itself. A defendant who merely expresses pleasure with the homicide is assessed 26 points, which is 26 times worse than beating or stomping the victim to death. A defendant who claims insanity or delusional compulsion as his defense immediately aggravates his crime by 12 points. The aggravating factors with the highest point values (revenge killing of a judicial officer, district attorney, or police officer (48 points), physically torturing a victim (27 points), expressing pleasure with the murder (26 points), kidnaping (16 points), killing to collect insurance (14 points, have the strongest influence on which defendants will fall in the high aggravation range. Other aggravating factors such as armed robbery, rape, burglary, arson, aggravated battery, multiple killings, serial murders, etc. are assigned little importance by the index.

Even accepting the index at face value for the sake of argument, it is still impossible to classify each case properly because of the vast number of items that are unknown or incorrectly coded. For instance, it was unknown in 82% of the cases whether the defendant expressed pleasure with the homicide and it was unknown in 41% of the cases whether the homicide was motivated by race hatred. Baldus assumed for the purpose of the midrange analysis (and all multivariate analyses) that items whose occurrence was unknown to the coder, did not happen. McCleskey is a case which exemplifies the problem with this assumption.

According to the Georgia Charging and Sentencing Study database, McCleskey was assessed 1 point because the murder scene was bloody (A20), 1 point because the armed robbery was planned for more than 5 minutes (A23), 3 points for his prior armed robbery convictions (B1), 3 points for killing his victim during an armed robbery (B2), 3 points for murdering to obtain money (B4), 3 points for murdering a police office (B8), 3 points for killing to resist arrest (B10) and 1 point each for the seven evidentiary factors E1, E2, E4, E5, E6, E8, and E9. Therefore, McCleskey's index score is 24 which places his case in the midrange level of aggravation and mitigation. However, McCleskey should also receive an additional 26 points for bragging about the murder of Officer Schlatt to cellmate Offie Evans (A3). McCleskey's questionnaire indicates that it was unknown to the coder whether McCleskey had expressed pleasure with the killing. Furthermore, McCleskey should be granted 3 more points for holding 9 customers and employees of the Dixie Furniture Store as virtual hostages before Officer Schlatt arrived, putting them at great risk of death (B3). McCleskey's questionnaire correctly codes this feature but one item was incorrectly entered into the computer database. Finally, take away 8 points from McCleskey's score because all three of his coperpetrators, who were in the back of the furniture store at the time Officer Schlatt was shot in the front of the store, were sentenced to either 20 years or life (M2). This item was incorrectly coded in the database due to an error in the computer program that created this variable. Therefore, McCleskey's final corrected score is 45 points which bumps him out of the midrange into the highest aggravation category.

The data in McCleskey's own case proves that the data coders were unable to identify important aggravating factors which were known to the prosecution and the jury. Generally, the understatement of the incidence of aggravating factors in death penalty cases causes death penalty and non-death penalty cases to be erroneously categorized together in the "mid-aggravation range." Furthermore, since the vast majority of the death penalty cases are white victim cases, the "mid-aggravation range" would exhibit a higher death sentencing rate for white victim cases.

The District Court observed (580 F.Supp at 371) "The whole study rests on the presumption that cases with similar aggravation indexes are similarly situated. This presumption is not only rebuttable, it is rebutted, if by nothing else, then by common sense." He went on to explain that "there is no logical basis for the assumption that cases with similar aggravation indices are at all alike. Further, the aggravation index for any given case is a function of the variables that are included in the model. Any change in the

variables included in the model will also change the aggravation index of most, if not all, cases."

THE BARNETT STUDY

Arnold Barnett (1985) reexamined the data on Georgia homicide cases from the Procedural Reform Study and proposed a more generalized crosstabulation method for assessing racial bias in capital sentencing. Professor Barnett defined three dimensions for classifying homicide cases; (1) the certainty the defendant is a deliberate killer (DELIBERATE), (2) the status of the victim (STATUS), and (3) the heinousness of the murder (HEINOUS), along with elaborate rules for scoring each case.

The DELIBERATE dimension allows three values, 0, 1 or 2. Generally, a score of 0 indicates a weak case as to the certainty that the defendant was the killer or the deliberateness of the killing, 2 represents strong evidence of certainty and deliberateness, and a score of 1 is assigned to cases that fall in between. The STATUS dimension can take on 0 or 1, which corresponds roughly to victim is a stranger (STATUS = 1) and victim is a nonstranger (STATUS = 0). The HEINOUS dimension allows 0, 1 or 2. Generally, a score of 0 indicates the killing was in "self-defense", a score of 2 is consistent with a "vile" murder, and all other cases are assigned 1.

Each case was assigned a three-tuple (i,j,k) indicating their respective scores on the DELIBERATE (I), STATUS (j), and HEINOUS (k) dimensions. Barnett defined an overall measure of severity, or category, by summing the three scores for each case and compared death sentencing rates within each category by race of the victim. This chart is reproduced as Table VII.

TABLE VII
DEATH SENTENCING RATES BY RACE OF VICTIM AND CATEGORY**

CASE CATEGORY	BLACK VICTIM**	WHITE VICTIM**
CATEGORIES 0-2:	.01(184)	.01(189)
CATEGORY 3	.11(45)	.32(89)
CATEGORY 4:		
(1,1,2)	.75(8)	.84(64)
(2,0,2)	.57(7)	.55(11)
CATEGORY 5:	1.00(1)	.86(7)

* This is CHART A from Barnett (1985), pp. 1350.

** The numbers in parentheses represent the number of cases considered in the category.

Table VII shows roughly equal death sentencing rates by race of victim for all categories except category 3. Category 3 shows a 21 point higher death sentencing rate for killers of white victims, which is statistically significant. Barnett attempted to control cases in category 3 further by considering the prior record of each defendant, but this factor did not eliminate the significant disparity.

Barnett classification scheme does not require that each case contain one or more statutory aggravating factors. The disparity in death sentencing rates by race of victim in category 3 could be a direct result of Barnett's rules, which do not break out felony and nonfelony homicides. Every case in category 3 was assigned the score (1,1,1). Barnett characterizes homicides with a score of 1 on the DELIBERATE dimension as "Most 'common' slayings, such as killing during armed robberies or during barroom fights." But killing during the course of an armed robbery is a statutory aggravating factor. Killing in a barroom fight is not. As shown in Table II, whites are more likely to be killed during armed robberies (33.3% to 7.4%) and blacks are more likely to be killed due to disputes or during barroom

fights (64.0% to 35.3% for FAMILY, LOVER, LIQUOR, BARROOM FIGHT, and 72.7% to 44.2% for KILLING RESULTED FROM DISPUTE).

According to Barnett, STATUS = 1 indicates, generally, that the killer and victim were strangers. Killing a stranger is not a statutory aggravating factor. Killing a stranger who is a police officer, fireman, or judicial officer in the performance of his/her duties is a statutory aggravating factor. Table II shows that a higher percentage of white victims are police officers than black victims (3.5% to 0.6%). Furthermore, police officers are more likely to be killed due to a contemporaneous armed robbery. The third dimension, HEINOUS = 1 is a wide ranging default score assigned to homicides which were not motivated by self-defense and which were not terribly vile or gruesome.

It is important to note that Barnett's analysis was based upon the data and narrative summaries of homicides from the Procedural Reform Study. The Procedural Reform Study was the predecessor to the Georgia Charging and Sentencing Study and contains much less detail of the aggravating, mitigating, and evidentiary factors pertaining to each case. As with the crosstabulation method, Barnett's results could change if homicides are generally misclassified due to incorrect or missing information. Barnett acknowledges this potential threat to the analysis, and considers various aspects of this problems such as data collection errors. Ultimately, he discounts the importance of these errors to the final results, conceding that "Brief case descriptions can only crudely portray the credibility of the various witnesses, the eloquence of the opposing attorneys, and the emphasis placed in court on the various elements of the case." Barnett does not consider the possibility that the case summaries omit, as in McCleskey's case, important aggravating facts that were known to the prosecution and the jury.

7. CONCLUSION

The Racial Justice Act begins with the premise that overall racial disparities in death sentencing is a basis to infer racial bias in the sentencing system. This view ignores the existence of different racial homicide patterns. As a whole, black victim homicides in Georgia are less aggravated and more mitigated than white victim homicides. Accordingly, a higher percentage of killers of whites are sentenced to death than killers of blacks. The racial death sentencing patterns found in Georgia are not unique to Georgia. Similar aggregate racial death sentencing patterns have been identified by Bowers and Pierce (1977) in Florida, Texas, and Ohio, by Gross and Mauro (1984) in Mississippi, Oklahoma, Illinois, Arkansas, and Virginia, by Nakell and Hardy (1987) in North Carolina, and by Jacoby and Paternoster (1982) in South Carolina.

The Racial Justice Act would protect prosecutors and jurisdictions with equal racial death sentencing rates from charges of racial bias. But in Georgia, equal death sentencing rates by race of the victim is more suggestive of racial bias than higher death sentencing rates for white victim cases. Furthermore, to rectify the imbalance in death sentencing rates by race, Georgia prosecutors and juries would be required to consider race along with the aggravating, mitigating, and evidentiary facts of the case before deciding to seek or impose the death penalty.

Baldus et al. (1990), Kennedy (1988), Gross (1985), and others have argued that the low death sentencing rate for black victim cases is due, in part, to a lower value that the state of Georgia places on a black life. Following this line of reasoning, the equalization of death sentencing rates by race in Georgia would require that more death sentences be imposed on black defendants who kill black victims. But black on black homicides are the most mitigated of the four defendant-victim racial combinations.

The Racial Justice Act permits the prosecution to rebut a prima facie case of significant racial death

sentencing disparities by explaining the disparities through pertinent nonracial factors. The crosstabulation and regression methods emphasize the fact that this is not very difficult to accomplish. There is never a shortage of nonracial reasons one can offer for explaining why a defendant, convicted of murder, was or was not sentenced to death.

Both the Charging and Sentencing Study and the Barnett Study attempt to categorize defendants that are "similarly situated," based upon the aggravating, mitigating, and evidentiary factors in their case. Death sentencing disparities, by race, of "similarly situated" cases are interpreted as evidence of racial discrimination. A fair test of capital decisions made by Georgia prosecutors, juries, and trial judges, requires that the analysis be limited to "death eligible" defendants and all relevant information be considered that was known to the decision maker at the point in time that the capital decision was made. Yet every murder case is a unique combination of aggravating, mitigating, and evidentiary facts. The determination of these facts for a particular case is not always straightforward, as witnesses can give conflicting testimony at trial, or the prosecuting attorney and defense attorney can interpret the evidence differently. Cataloguing the facts of the case into simple categorical variables loses critical information that can mean the difference between life and death.

Justice Powell wrote in McCleskey (481 U.S. 279) "Most importantly, each particular decision to impose the death penalty is made by a petit jury selected from a properly constructed venire. Each jury is unique in its composition, and the constitution requires that its decision rest on consideration of innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense." Later, Justice Powell noted "Numerous legitimate factors may influence the outcome of a trial and a defendant's ultimate sentence, even though they may be irrelevant to his actual guilt. If sufficient evidence to link a suspect to a crime cannot be found, he will not be charged. The capability of the law enforcement agency can vary widely. Also, the strengths of the available evidence remains a variable throughout the criminal justice process and may influence a prosecutor's decision to offer a plea bargain or go to trial. Witness availability, credibility, and memory also influence the result of prosecutions. Finally, sentencing in state courts is generally discretionary, so a defendant's ultimate sentence necessarily will vary according to the judgement of the sentencing authority. The foregoing factors necessarily exist in varying degree throughout our criminal justice system."

At the same time that the District Court denied McCleskey's claim of racial bias in the Georgia sentencing system, the court threw out McCleskey's conviction and sentence on the grounds that one of the witnesses, Offie Evans (McCleskey's cellmate), was promised leniency for his testimony against McCleskey and this promise was not divulged to the jury. The 11th Circuit Court of Appeals disagreed and reversed the District Court on this issue. Baldus did not collect any data concerning promises to witnesses nor concerning most of the myriad technical issues which death-sentenced litigants regularly raise on appeal. Ironically, at the same time as McCleskey's lawyers argued that Baldus had controlled for every possible factor in his 230+ variable model that could conceivably cause a death sentence, they also argued that other factors were present that served to deny McCleskey a fair trial and could have drastically changed the outcome of his trial.

The criminal justice system affords each capital defendant an opportunity to a fair trial with impartial jurors. Two-hundred years of careful jurisprudence has attempted to preserve and improve the integrity of the trial process. The appellate courts rely upon voluminous records to carefully consider every aspect of a death penalty case to determine if the sentence is appropriate and if the trial conforms to the highest standards of fairness and equity. General statistics on homicide cases based on limited and incomplete data is a poor substitute for the judicial process.

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House Select Study Committee on Capital Punishment

December 19, 2005

Minutes

The House Select Study Committee on Capital Punishment held its first meeting on Monday, December 19, 2005, at 1:00 p.m. in Room 643 of the Legislative Office Building. Representative Joe Hackney, Co-Chair called the meeting to order. The following members of the Committee were present: Representative Beverly Earle, Co-Chair, Representatives Jeff Barnhart, Arlie Culp, Rick Eddins, Rick Glazier, Pricey Harrison, Hugh Holliman, Marvin Lucas, Paul Luebke, Danny McComas, Mickey Michaux, Earline Parmon, Bonner Stiller, Ronnie Sutton, Doug Vinson, Jennifer Weiss, Roger West and Winkie Wilkins. Copies of the meeting agenda and the Visitor Registration are attached, (Attachments I and II).

Representative Hackney welcomed the members and visitors and recognized Co-Chair Earle for opening comments. She stated that the Committee was not about abolishing the death penalty, but rather an attempt to insure that the right person is punished. She said that the Committee would work to identify and correct existing flaws in the system and welcomed input from interested parties.

Co-Chair Hackney said that he felt it was appropriate to have a forum for discussion of the problems and alleged problems in the administration of the death penalty in North Carolina and welcomed comment from all sides of the issue to allow for fair review.

Representative Hackney introduced the members of the Committee. He also introduced Ms. Susan Sitze and Mr. Hal Pell who would serve as Committee Counsel, and Ms. Emily Reynolds Freeman, the Committee Clerk.

Co-Chair Hackney stated that Chief Justice Lake, who was on the agenda, had informed the Co-Chairs earlier in the day that he would be unable to attend the meeting. He noted that the Committee would be briefed on the history of capital punishment law in North Carolina, and that the Committee would hear from several people had been invited to help identify issues for study.

Mr. Pell was recognized and presented a brief history of capital punishment. His power point presentation is included in the attachments to the minutes, (Attachment III). Mr. Pell also provided the members with copies of General Statute 14-17 and 15A-2000. They are included as Attachments IV and V.

Mr. Pell offered a summary of the judicial review process. He called attention to a chart that reviewed the stages in a death penalty case, (Attachment VI). Mr. Pell noted that a jury must find an aggravating factor in order to impose a death sentence and said that those aggravating factors are prescribed by statute and may be found in Chapter 15A-2000 (Attachment V). Mr. Pell discussed mitigating factors that are also included in

Chapter 15A-2000. He said that the state would try to prove one or more aggravating factors and the defense presents evidence relating to mitigating factors. The jury must find aggravating factors unanimously, but need not find mitigating factors unanimously. The jury must then weigh the mitigating factors and if they are insufficient to outweigh the aggravating factors, the jury may impose the death sentence.

Mr. Pell discussed the appeal process and the post-conviction process. Brief discussion followed regarding disclosure of files in the post conviction stage. Co-Chair Earle asked whether there was a penalty for not disclosing all information. Mr. Pell stated that currently there is no statute that makes this a criminal violation. Representative Harrison asked if other states provide criminal sanctions for failure to comply with disclosure. Mr. Pell said he was not aware of provisions of other states and would research that issue. Co-Chair Hackney added that the issue of disclosure would possibly be something that the Committee would like to study.

Mr. Pell continued with the discussion of the Federal Habeas Relief stage of judicial review and the clemency stage. The power point presentation is included in the attachments (Attachment VII).

Representative Glazier requested further information regarding the reversal rate in capital cases by the 4th Circuit over the last ten years versus the other circuits in the country.

Representative Sutton requested information on both the state and federal level regarding how much time elapses once all paperwork is sent forward to the next level before that case is heard.

Representative Luebke asked if there is clarity in the constitution as to guidelines for the governor when determining clemency. Mr. Pell replied that the constitution simply states that the governor has clemency power.

Representative Eddins requested that the Committee be provided with statistics regarding the number of people who have been convicted of murder versus the number who served time and are out on parole, and statistics on the total number of people who have been convicted of first and second-degree murder for the last 10-15 years.

Representative Vinson asked for information as to why convicted murders were taken off death row. Mr. Pell replied that such information would probably require going through records of each case.

Co-Chair Hackney noted that the Committee might wish to receive general statistical information and that there may be academic studies in this area that could prove helpful. He said that if there are areas of statistical inquiry that members of the Commission want, the request should be made to Mr. Pell. He also noted that persons outside the Commission were invited to offer suggestions to Mr. Pell.

Representative Harrison requested information regarding the number of people on death row as a result of the felony murder rule. Mr. Pell replied that the Administrative

Office of the Courts does not keep statistics of felony murder convictions because they are deemed to be first-degree murder whether they are felony murder or pre-meditated deliberate murder.

Representative Barnhart requested a list of the number of people who have been sent to death row since 1977, how long each has been there, and what their current status is. He also requested information regarding what the Supreme Court looks for when reviewing murder cases.

Judge Narley Cashwell, North Carolina Superior Court, was introduced to address the Committee. Judge Cashwell requested that the record reflect that he was not before the Committee as, nor did he purport to be a representative of the North Carolina Conference of Superior Court Judges, any other group or organization of judges, or of other individual judges. He stated that he neither represented nor spoke for any of those groups or individuals and that anything that he said or any opinion he expressed was his and his alone and that he suspected may be subject to being agreed upon or disagreed with by other members of the judiciary.

Judge Cashwell stated that as a superior court judge, he had no agenda, no goal and no opinion as to whether the law of the State of North Carolina should, or should not provide for capital punishment. He noted that he is sworn to uphold and apply the law and assure a fair trial regardless of the consequences, and that as a judge he had no opinion as to what the punishment for first-degree murder or for any other crime is or should be. He said that he supports the law of the state and therefore supports the law of capital punishment because it is the law until changed by the General Assembly.

Judge Cashwell stated that he had analyzed the mandates to the Committee and some of the issues that were to be studied, and had concluded that those issues regarding capital punishment may be grouped into three areas. Those areas are the guilt phase, sentencing and post-trial or post-sentencing review. He said that based on the mandates, issues that could be studied within the area of the guilt phase are: attorney competence and the guidelines and standards for attorneys who wish to represent defendants charged with first-degree murder; the issues of prosecutorial misconduct; and the issue of the felony murder rule and its impact. He noted that there must be an objective standard or measure of competence to determine whether an attorney's conduct in a given case is competent or not. He said that in the case of Strickland v. Washington, the United States Supreme Court established standards that our Supreme Court has adopted and is a test in part of what constitutes competence. He further stated that prosecutorial misconduct should also be considered within the context of the guilt phase. He said that such misconduct is more likely to exist in the guilt phase and is mostly centered in questions concerning the discovery of evidence or the extent to which the discovery of evidence is required of the state. He said that the enactment of expanded discovery statutes and the procedures with subsequent judicial review and interpretation would sufficiently address this issue. Judge Cashwell said consideration of the application of the felony murder rule to capital cases should be grouped within the guilt phase area. He said that the felony murder rule is a legal theory of a basis for a conviction of first-degree murder. He added that similarly, a murder based upon premeditation and deliberation is a legal theory of a basis for a conviction of first-degree murder. He said that the issue of felony murder as it

applies to capital punishment should lead one to certain questions. He asked if an interpretation of this issue for study suggest the felony murder rule should be repealed as a basis for first-degree murder? He stated that he had never had a death recommendation where the only legal basis for a first-degree murder conviction was felony murder. He said that when a death recommendation has occurred, the defendant's guilt was based upon either premeditation or deliberation alone, or upon he theory of both premeditation and deliberation and felony murder. He advised the Committee to bear in mind that the rules of law and evidence, which apply at a trial upon a charge of first-degree murder, also apply at a trial upon any other criminal charge even though the penalty may be different.

Judge Cashwell said that the study of issues within the area of the sentencing phase might include competence of counsel and prosecutorial misconduct, and also disproportionate racial impact and whether or not persons not guilty of first-degree murder are on death row. He suggested that the latter two issues are in large part issues of, or pertaining to jurors. He noted that how we ensure that the pools of jurors from which a trial jury is chosen includes sufficient numbers of minority citizens so that the jury reflects the community is an issue to be determined. Regarding the question of whether the death penalty is sought more often against minorities, Judge Cashwell said it had been his experience that district attorneys seek the death penalty based on the facts of the case and its strengths or weaknesses, and on the violent criminal history of the defendant, rather than upon the race of the defendant or the victim.

Judge Cashwell said that the state has an excellent post-conviction appropriate relief statute and is experienced in thorough appellate courts, both of which have granted relief to individuals whose guilt or innocence has been in question. He pointed out that the post-conviction statute that we have in North Carolina is not constitutionally mandated by the Constitution of the United States.

Judge Cashwell said that the guilt phase and the sentencing phase of any trial are similar but are not the same and that the issues in each should be addressed carefully, but individually. He urged the committee to scrutinize the offerings of those groups and individuals who either support or oppose capital punishment and seek out the input of defense attorneys, district attorneys and judges who actually have participated in such trials. He further urged the committee to request that the State Bar offer its thoughts on ways to address attorneys' situations who have been determined to be ineffective or incompetent, as well as of prosecutors who have engaged in misconduct with a view toward the State Bar finding a way of preventing a reoccurrence of these things.

Co-Chair Hackney asked Judge Cashwell if he felt that North Carolina had succeeded in making sure we have competent attorneys in death cases or if he felt additional legislation was necessary. He further asked if the resources were adequate for providing these competent attorneys. Judge Cashwell said that for the most part, North Carolina's creation of the Indigent Defense Services has resulted in a great job of establishing minimum standards. He said that in order to lure back those attorneys who are experienced defense attorneys more resources would be necessary.

Representative Sutton asked Judge Cashwell to comment on motions for appropriate relief and the time that elapses before they are scheduled for hearing. Judge Cashwell replied that in Wake County there have been very few motions under the current statute and that they have been moved within a matter of weeks after the paperwork has been filed. He said that he saw no problem with the committee studying the possibility of setting a mandatory time limit within which those motions should be heard.

Representative Weiss asked if Judge Cashwell had statistics regarding the number of potentially capital cases that are arraigned in Wake County in a typical year, how many cases are actually tried capitally and how many result in pleas of less than life. He replied that he did not bring any statistics, but that he was sure that the information could be obtained.

Representative Michaux asked Judge Cashwell to comment on the quality of representation particularly in capital cases noting that it is often said that the justice ones gets is the justice that one pays for. Judge Cashwell stated that in capital cases in his courtroom he did not feel that the fact that the attorneys were court appointed as opposed to being retained made a significant difference. He added that he felt it was his role as a judge to make sure that attorneys conduct a certain minimum performance. He added that the court appointed attorney is subject to monies for experts depending upon what the court allows and that the well-heeled defendant can utilize whatever resources they have. A copy of an outline of Judge Cashwell's remarks is attached to the minutes. While they reflect his thoughts, they are not an exact replication of his comments to the Committee, (Attachment VIII).

Representative Luebke suggested that the Committee look into the situation of the make-up of jury pools.

Mr. C. Branson Vickory, III, District Attorney, 8th Prosecutorial District and President, North Carolina Conference of District Attorneys was recognized. He said that the conference has taken the position that the changes that have been made in recent years have been such that the death penalty is still a viable punishment. He said that it is workable, it promotes justice, it protects the victims' as well as the defendants' rights and it properly punishes the worst murders.

Mr. Vickory spoke of prosecutorial misconduct and noted that district attorneys are held to a higher standard than most attorneys and have a more restrictive ethical code. He said that the role of the district attorney is to seek justice and not merely to convict. Mr. Vickory said that failure to comply or abide by discovery laws carries procedural penalties regarding the case, as well fines, judicial action with regard to whether or not the district attorney can practice in the court before a particular judge, or even as far as a jail sentence.

Mr. Vickory spoke of adequacy of counsel noting that Indigent Defense Services has helped with the creation of higher standards and has assisted in acquiring experts on behalf of defendants charged with capital crimes. He noted that the Center for Death

Penalty Litigation also serves as a source for defense attorneys representing capital defendants.

Mr. Vickory said that it is the position of the district attorneys that the death penalty is imposed based purely on conduct and not on race. He said that each case is unique and has to be looked upon on its on merits and looked upon with the aggravating factors and mitigating factors in mind. He noted that general population statistics are irrelevant and that the prison population is not a reflection of the society. Mr. Vickory said that if it was a goal of the Committee to reach some type of reflection of the community, it is not something that can be addressed within the legal or judicial system. He said that the death row population is a reflection of the general prison population. He said the Supreme Court reviews every death penalty case for passion and prejudice and also for proportionality. Mr. Vickory called attention to McClesky v. Zant where the United States Supreme Court ruled that the studies related to the death penalty and race produced not statistically significant evidence that the race of the victim or the defendant play a part in either the prosecution or the jury's capital decision.

Mr. Vickory spoke of innocence issues saying there are anti-death penalty reports that have indicated that there are over 100 innocent people that have been released from death row throughout the country. He urged the Committee to review such studies closely noting that many who are released from death row are not necessarily released because they are innocent. He said that in North Carolina all evidence that has ever been presented has indicated that there has been 100 % accuracy in detecting wrongful convictions before an actual execution, and that there is no proof that any innocent person has been executed in the state.

Mr. Vickory said that the judicial review process is fair and thorough and that the appellate process takes approximately 10 years to complete addressing any procedural errors at trial, and includes numerous safeguards afforded to the defendant.

Mr. Vickory noted that the General Assembly has passed legislation that has improved the capital litigation process including post-conviction discovery, the institution of the Office of Indigent Defense Service, DA discretion in capital cases, new discovery laws and the creation of various studies. He noted the need for additional resources to assist in carrying out the requirements of the discovery laws, more manpower and needed resources to allow for "e"discovery. He added that there have been problems in the adequacy of counsel field. He suggested that any attorney who comes into court and claims during a post-conviction hearing that he has been ineffective and incompetent in representing a defendant should not be allowed to continue to represent capital defendants and said that this might be an issue for the Committee to address.

Mr. Vickory closed by reading a statement of the position taken by the district attorneys on the death penalty. The statement noted that "The Conference of District Attorneys supports the penalty of death when the district attorney, after reviewing the specific facts of the case and applying the law finds it is a just punishment to pursue, and after a jury has heard all admissible evidence and finds that the nature of the crime or the individual merits its application. This appropriate application of the death penalty promotes the effective administration of criminal justice in North Carolina. The

Conference of District Attorneys encourages an honest and thorough examination of individual cases through appropriate judicial and executive review. The Conference opposes a death penalty moratorium, but supports a complete study of the procedures applicable to the death penalty process. Upon an accurate and unbiased assessment, the Conference of District Attorneys welcomes a legislative or public vote on the death penalty as a punishment for the most egregious murders." A copy of the entire statement is attached to the minutes, (Attachment IX).

A copy of the power point presentation is included in the attachments to the minutes, (Attachment X).

Representative Holliman asked how DA discretion had affected the number of first-degree murder cases. Mr. Vickory replied that he did not have statistics on that issue, but that he was possibly trying 50% fewer. Co-Chair Hackney stated that it might be helpful for the Conference to conduct a survey to determine the number.

Representative Stiller requested that each of the speakers provide the staff with a list of their recommendations.

Mr. Malcolm Ray (Tye) Hunter, Jr., Director, Office of Indigent Defense Services was recognized. He offered comment on a few questions that had been posed by Commission members earlier in the meeting. With regard to whether anyone had been executed based only on felony murder charges, Mr. Hunter stated that there had been three such executions in the past two years. He further stated that the impact of DA discretion had resulted in the number of trials being cut in half.

Mr. Hunter stated that the death penalty is rarely used against convicted murders in North Carolina. He said that he thought that the citizens of the state desired the death penalty that is reserved for a very small group of accurately identified "worst of the worst" cases. He said that since July 1, 2001, the Indigent Defense Services has been responsible for appointing and paying defense lawyers in capital cases and that approximately 1200 cases, originally charged with murder on or after July 1, 2001, have been closed. Of those cases, less than 1% ended in death verdicts. He said that 16% resulted in a conviction, as charged, of first-degree murder and received life sentences. He said that just more than 17% of the cases charged with first-degree murder were dismissed or were acquitted. He said that statistically speaking, of the people originally charged with a warrant of first-degree murder since July 1, 2001, there is almost the same chance of having the case dismissed or acquitted as being convicted as charged. Mr. Hunter added that about 34% of the first-degree cases end up in pleas or trials to second-degree murder.

Mr. Hunter said that North Carolina has a very broad death penalty statute and almost every homicide is charged as a first-degree murder. He added that the great majority of the first-degree murders are potentially a capital case under the current statute. He said that the broad statute does not result in a large number of death verdicts. Mr. Hunter stated that a reformed and more tailored statute, that would remove from the death penalty system those cases that are not going to end up being capital cases, would result in tremendous savings of resources. He added that a tighter statute would decrease

the opportunity for bias and arbitrary results. He said that there is a great opportunity for arbitrariness and bias to creep in when the minimum standards for having a case eligible to be a capital case are so low and so broad so that most intentional and some unintentional homicides are eligible. Mr. Hunter said that the current system also does not necessarily identify the "worst of the worst."

Mr. Hunter stated that currently there are 174 people on death row and that most were convicted prior to recent reforms. He said that many of the 174, if tried under recent reforms, would have not received the same verdict and that prosecutors would not have prosecuted them in the same way. He said that he would like to see the Commission take a look at this issue and determine whether there is some systematic way to look at those cases that were decided prior to recent reforms. A copy of Mr. Hunter's comments is attached to the minutes, (Attachment XI).

Mr. Jack Boger, Wade Edwards Distinguished Professor of Law, University of North Carolina at Chapel Hill was recognized. Professor Boger stated that the current capital statute is exceedingly broad and that the enactment of a narrower statute would result in avoiding the risk of arbitrariness. He suggested that the Commission review the statutes of Virginia and Massachusetts.

Professor Boger discussed racial disparities in North Carolina's statutes. He said that between July 1, 2001 and the present, there have been 128 capital trials in the state. Of that number, 75% involved African American, Native American, Latino or Asian defendants. He said that the census shows that whites are now 72% of North Carolina's population so there is almost an inverse relationship with roughly ¾ of the population being white and ¼ of the capital trials white. Professor Boger stated that a study he conducted of all capital cases between 1993 and 1997 and found that there were 1786 non-white victims and 1806 white victims. Of the 99 death sentences imposed during that period, 66 were for those whose victims were white and 33 for those whose victims were non-white. He further stated that there were large geographical disparities among districts and not just between rural and urban districts.

Professor Boger spoke regarding post-conviction hearings that were previously held for capital defendants and questioned whether the General Assembly should reinstate a guarantee of a full and fair post-conviction evidentiary hearing.

Professor Boger commented on the Innocence Commission established under the leadership of Chief Justice Lake and noted that while it has been a positive achievement, it is not the end of the problem in capital cases. He urged the members to make sure there is a way open for innocence to be an issue that can be heard and resolved in every capital case.

Professor Boger noted that recent reforms do not apply to a vast majority of people who are currently on death row, and suggested that the Commission might wish to determine whether there needs to be some retrospective application of those reformed procedures.

Professor Boger spoke briefly regarding the problem of race discrimination and Batson v. Kentucky as a remedy. He said that the way around this is to have a statute that would say that anytime a juror is removed and challenged on racial grounds, that juror must be replaced with someone of same race.

Professor Boger referred to a study, "The Cost of Processing Murder Cases in North Carolina," by Phillip Cook of Duke University that provides much information regarding the cost of imposing the death penalty.

Co-Chair Hackney stated to the Commission that he and Co-Chair Earle to set future meetings based on various topics and welcomed the input of the members as well as interested parties.

The meeting adjourned at 4:45 p.m.

Representative Beverly Earle
Co-Chair

Representative Joe Hackney
Presiding Co-Chair

Emily Reynolds Freeman
Commission Clerk

ATTACHMENTS:

Attachment I	Meeting Agenda
Attachment II	Visitor Registration
Attachment III	Hal Pell – Capital Punishment History Power Point handout
Attachment IV	General Statute handout (14-17)
Attachment V	General Statute handout (15A-20000)
Attachment VI	Hal Pell – Death Penalty stages chart handout
Attachment VII	Hal Pell – Judicial Review Process Power Point handout
Attachment VIII	Outline of Judge Cashwell's comments
Attachment IX	Statement - Conference of District Attorneys
Attachment X	District Attorney Branson – Power Point handout
Attachment XI	Tye Hunter comments

ATTACHMENT I

HOUSE SELECT STUDY COMMITTEE ON CAPITAL PUNISHMENT

Monday, December 19, 2005
1:00 PM
Room 643, LOB

AGENDA

I. WELCOME
Representative Joe Hackney, Co-chair
Representative Beverly Earle, Co-chair

II. CAPITAL PUNISHMENT HISTORY AND PROCEDURES
- Hal Pell, Staff Attorney

III. IDENTIFICATION OF ISSUES FOR STUDY

Chief Justice I. Beverly Lake, Jr.
North Carolina Supreme Court

Judge Narley Cashwell
North Carolina Superior Court

Honorable C. Branson Vickory, III
District Attorney, 8th Prosecutorial District
President, North Carolina Conference of District Attorneys

Malcolm Ray (Tye) Hunter, Jr.
North Carolina Appellate Defender

Jack Boger
Wade Edwards Distinguished Professor of Law
UNC – Chapel Hill

IV. COMMITTEE DISCUSSION

V. ADJOURN

ATTACHMENT II

VISITOR REGISTRATION SHEET

House Select Committee on Capital Punishment — December 19, 2005

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Brian Elderbroom	Common Sense Foundation
Christina Medlin	NCATL
Holly Bryan	NCATL
John Strange	PFADP
Tom Fewel	PFADP
JUSTIN HARVEY	PFADP
Ken Rose	CDPL
Max Rose	Student
Marty Cashwell	Superior Court Judge
Peg Dorer	Conference of D.A.s
Jay Jenkins	Conference of DAs

VISITOR REGISTRATION SHEET

House Select Committee on Capital Punishment — December 19, 2005

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Chet Hodgin	Victims of Violence PO Box 548, Jamestown NC 27282
Gerda Stein	CAPL
Danielle Carman	Indigent Defense Services
Tye Hunter	Indigent Defense Services
Mary Ann Talley	NCATL
Jack Boger	UNC Law School
John Goodman	Alley Assoc.
JEFF HUNT	CONF. OF D.A.'s
Charmaine Fuller	CJPC
David Neal	FTI
Mary Pollard	CDPL

VISITOR REGISTRATION SHEET

House Select Committee on Capital Punishment — December 19, 2005

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
John Madler	NC Sentencing Commission
Branny Vickory	District Atty - 8th District
Greg McLeod	NCAAO
Chad Hinton	Civitas Institute

History of Capital Punishment in North Carolina

House Select Committee on Capital Punishment

N.C. General Assembly

December 19, 2005

ATTACHMENT III

Early History

- Colonial America – English Common Law and NC Colonial Assembly legislation
- 1791 – States made death the exclusive and mandatory sentence for more than 200 offenses (including piracy, arson, rape, robbery and burglary)
- Until 1910 – Local Government power
- From 1910 to 1961, 361 executions

Furman v. Georgia, 1972

- Complete jury discretion is unconstitutional
- Arbitrary sentencing violates 8th Amendment
- Voids death penalty statutes in 40 states
- NC statute: death penalty mandatory; jury discretion to give life sentence

Response to *Furman*

- NC SCT – rules mandatory death sentence still in force
- 1973 – N.C. Legislature amends death penalty statute. Death penalty mandatory.
- Other States: Several other states use mandatory rule; others provide sentencing guidelines for judges and juries (Georgia, Texas, Florida)

Woodson v. North Carolina, 1976

- Constitutional requirement to replace arbitrary jury discretion with objective standards
- "No standards as to which first-degree murderers shall live and which shall die."
- Must allow particularized consideration of relevant aspects of character and record of each convicted defendant.
- 1976 – Supreme Court affirms capital punishment statutes in Georgia, Texas, and Florida

Modern Capital Punishment Statute

- 1977 – NC legislature rewrites capital punishment and sentencing laws.
- New sentencing statute – G.S. 15A-2000
- Bifurcated trial (separate sentencing trial)
- Aggravating and mitigating factors: Are mitigating factors insufficient to outweigh aggravating factors?
- Proportionality Review by NC Supreme Ct.

Post -1977 Changes

- Instructions (*McKoy v. North Carolina, 1990*) Jury may give effect to mitigating factor if only found by one juror—previously, unanimity requirement (50 cases sent back for resentencing)
- Life = Life (no parole) as instruction to jury (1994)
- Complete file disclosure by State (1996)
- Lethal injection sole method of execution (1998)
- DA discretion to bring case as non-capital (2001)
- Prohibition of capital punishment if mental retardation (2002); under 18 at time of murder (2005)

SUBCHAPTER III. OFFENSES AGAINST THE PERSON.

Article 6.

Homicide.

§ 14-17. Murder in the first and second degree defined; punishment.

A murder which shall be perpetrated by means of a nuclear, biological, or chemical weapon of mass destruction as defined in G.S. 14-288.21, poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree, a Class A felony, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life without parole as the court shall determine pursuant to G.S. 15A-2000, except that any such person who was under 17 years of age at the time of the murder shall be punished with imprisonment in the State's prison for life without parole. Provided, however, any person under the age of 17 who commits murder in the first degree while serving a prison sentence imposed for a prior murder or while on escape from a prison sentence imposed for a prior murder shall be punished with death or imprisonment in the State's prison for life without parole as the court shall determine pursuant to G.S. 15A-2000. All other kinds of murder, including that which shall be proximately caused by the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium, or cocaine or other substance described in G.S. 90-90(1)d., or methamphetamine, when the ingestion of such substance causes the death of the user, shall be deemed murder in the second degree, and any person who commits such murder shall be punished as a Class B2 felon. (1893, cc. 85, 281; Rev., s. 3631; C.S., s. 4200; 1949, c. 299, s. 1; 1973, c. 1201, s. 1; 1977, c. 406, s. 1; 1979, c. 682, s. 6; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1251, ss. 1, 2; c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; c. 662, s. 1; 1987, c. 693; 1989, c. 694; 1993, c. 539, s. 112; 1994, Ex. Sess., c. 21, s. 1; c. 22, s. 4; c. 24, s. 14(c); 2001-470, s. 2; 2004-178, s. 1.)

SUBCHAPTER XV. CAPITAL PUNISHMENT.

Article 100.

Capital Punishment.

§ 15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(a) Separate Proceedings on Issue of Penalty. –

(1) Except as provided in G.S. 15A-2004, upon conviction or adjudication of guilt of a defendant of a capital felony in which the State has given notice of its intent to seek the death penalty, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. A capital felony is one which may be punishable by death.

(2) The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. If 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, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. An alternate juror shall become a part of the jury in the order in which he was selected. If the trial jury is unable to reconvene for a hearing on the issue of penalty after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue of the punishment. If the defendant pleads guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. A jury selected for the purpose of determining punishment in a capital case shall be selected in the same manner as juries are selected for the trial of capital cases.

(3) In the proceeding there shall not be any requirement to resubmit evidence presented during the guilt determination phase of the case, unless a new jury is impaneled, but all such evidence is competent for the jury's consideration in passing on punishment. Evidence may be presented as to any matter that the court deems relevant to sentence, and may include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (e) and (f) of this section. Any evidence which the court deems to have probative value may be received.

(4) The State and the defendant or his counsel shall be permitted to present argument for or against sentence of death. The defendant or defendant's counsel shall have the right to the last argument.

(b) Sentence Recommendation by the Jury. – Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its deliberation in determining sentence. The court shall give appropriate

instructions in those cases in which evidence of the defendant's mental retardation requires the consideration by the jury of the provisions of G.S. 15A-2005. In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:

(1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), 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.

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned.

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.

(c) Findings in Support of Sentence of Death. – When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

(1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and

(2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,

(3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

(d) Review of Judgment and Sentence. –

(1) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of North Carolina pursuant to procedures established by the Rules of Appellate Procedure. In its review, the Supreme Court shall consider the punishment imposed as well as any errors assigned on appeal.

(2) The sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court upon a

finding that the record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death, or upon a finding that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, or upon a finding that the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The Supreme Court may suspend consideration of death penalty cases until such time as the court determines it is prepared to make the comparisons required under the provisions of this section.

(3) If the sentence of death and the judgment of the trial court are reversed on appeal for error in the post-verdict sentencing proceeding, the Supreme Court shall order that a new sentencing hearing be conducted in conformity with the procedures of this Article.

(e) Aggravating Circumstances. – Aggravating circumstances which may be considered shall be limited to the following:

(1) The capital felony was committed by a person lawfully incarcerated.

(2) The defendant had been previously convicted of another capital felony or had been previously adjudicated delinquent in a juvenile proceeding for committing an offense that would be a capital felony if committed by an adult.

(3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person or had been previously adjudicated delinquent in a juvenile proceeding for committing an offense that would be a Class A, B1, B2, C, D, or E felony involving the use or threat of violence to the person if the offense had been committed by an adult.

(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 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.

(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.

(f) Mitigating Circumstances. – Mitigating circumstances which may be considered shall include, but not be 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.

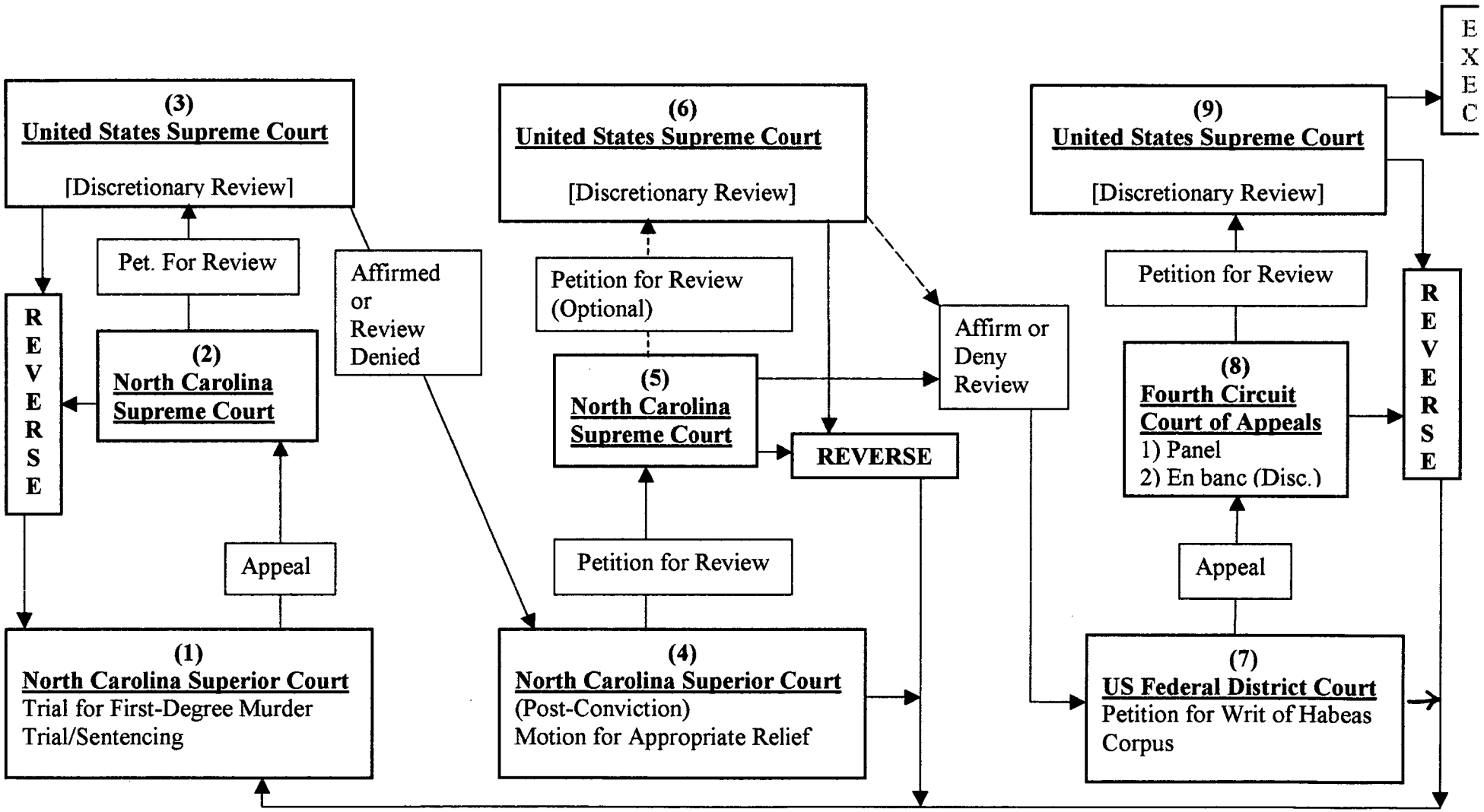
(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

(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. (1977, c. 406, s. 2; 1979, c. 565, s. 1; c. 682, s. 9; 1981, c. 652, s. 1; 1994, Ex. Sess., c. 7, s. 5; 1995, c. 509, s. 14; 2001-81, s. 1; 2001-346, s. 2.)

JUDICIAL REVIEW OF DEATH PENALTY CASES IN NORTH CAROLINA



ATTACHMENT VI

JUDICIAL REVIEW OF DEATH PENALTY CASES

House Select Committee on Capital Punishment
N.C. General Assembly
December 19, 2005

ATTACHMENT VII

Stages in a Death Penalty Case

- Trial/Sentencing
- Direct Appeal
- State Post-Conviction
- Federal Habeas
- Clemency Proceedings

Trial/Sentencing

(1) First Phase: Jury determines whether defendant is guilty or not guilty of first degree murder.

(2) Second Phase: For death sentence, jury must unanimously agree that mitigating factors are insufficient to outweigh aggravating factors

- Aggravating factors prescribed by statute
- State must prove aggravating factor(s) beyond a reasonable doubt
- Jury must unanimously agree on aggravating factors
- Mitigating factors considered (unanimity not req.'d)

Direct Appeal

- Automatic review by the North Carolina Supreme Court
- Bifurcation of trial allows for re-sentencing only
- Issues on appeal may include:
  - Jury selection
  - Sufficiency of evidence
  - Erroneous legal rulings
  - Ineffective assistance of counsel

Direct Appeal

- If conviction and sentence affirmed, defendant may petition the U.S. Supreme Court
- Certiorari review is discretionary
- If decision affirmed, or review denied, then the direct appellate stage is ended and the post-conviction stage begins.

State Post-Conviction Stage

- Statutory procedural provisions for capital cases
- 120 day time-limit for filing a Motion for Appropriate Relief (MAR)
  - Post-conviction counsel appointed
  - Limited grounds: Violation of constitutional rights, newly discovered evidence
  - MAR filed in the Superior Court where the defendant was tried
  - Judge appointed by the Senior Resident Superior Court Judge
  - District Attorney/N.C. Attorney General

Post Conviction Stage, cont'd.

- IAC claims: waiver of attorney-client privilege
- Trial counsel to provide MAR counsel with all files
- State to disclose all files (investigation and prosecution). "Interest of justice" exception—*In camera* review.
- Factual determinations—evidentiary hearing.

Post-Conviction Review, cont'd.

- MAR order –Petition for review by NC SCT. Review is discretionary.
- If NC SCT affirms, or denies review, the Def. may file a petition with the US Supreme Court for review, or proceed directly to federal court.
- Defendant must exhaust state court remedies before making federal constitutional claims in federal court.

Federal Habeas Relief Stage

- One year time limitation
- Petition for Writ of Habeas Corpus (prison warden named)
- Federal constitutional questions
- Defense attorneys appointed from a pool of qualified attorneys
- NC Attorney General's Office
- Petition filed in one of three federal district trial districts (Eastern, Middle, Western)—county where case originally tried

Habeas Relief, cont'd.

- Factual determinations—evidentiary hearing
- If Fed. District Court affirms, Defendant files for appeal to the Fourth Circuit Court of Appeals
- If Fourth Circuit Court of Appeals (panel) affirms—Petition for rehearing, or rehearing *en banc*
- Petition for review to the US Supreme Court. Review is discretionary.
- Denial of Petition or affirms—execution date set.

Clemency Stage

- Article III, Section 5(6)
- Petition to the Governor
- Hearing by the Governor

ATTACHMENT
VIII

State of North Carolina
General Court of Justice
WAKE COUNTY COURTHOUSE
P.O. BOX 351
RALEIGH, N.C. 27602

NARLEY L. CASHWELL
RESIDENT SUPERIOR COURT JUDGE

TEL: (919) 755-4100
FAX: (919) 715-4064

January 19, 2006

Ms. Emily Freeman
c/o Representative Joe Hackney
State Legislative Building
Raleigh, North Carolina 27601

Dear Ms. Freeman:

As you requested, I am enclosing a copy of my prepared remarks to the House Select Study Committee. Please forgive my delay in responding. I am now assigned to Alamance County and, as my remarks were handwritten, it took some time to prepare a typewritten copy. Finally, please note that this is not an exact copy of what I said to the Committee as I have a tendency to ad lib which I am sure I did, at least in part. Moreover, this copy does not contain the responses I gave to the questions asked by members of the Committee. With those caveats, I trust the enclosed meets your needs.

With kindest personal regards, I remain

Very truly yours,

Narley Cashwell

Narley L. Cashwell

NLC:tps

Enclosure

REMARKS OF THE HONORABLE NARLEY L. CASHWELL, SUPERIOR COURT JUDGE, TO THE HOUSE SELECT STUDY COMMITTEE ON CAPITAL PUNISHMENT – DECEMBER 2005

Representative Hackney, Representative Earle, members of the House Select Study Committee on Capital Punishment – I was honored by Mr. Pell's request to speak with you and it is a privilege to be here today.

Before I begin my remarks – and as members of the public and of the media are present – I respectfully request of this Committee that the record reflect that I am not before this Committee as – nor do I purport to be – a representative of the North Carolina Conference of Superior Court Judges, any other group or organization of judges, or of other individual judges. I neither represent nor speak for any of those groups or individuals.

Anything I say or opinion I may express is mine and mine alone – and I expect – maybe subject to being agreed or disagreed with by other members of the judiciary.

While my remarks to you are mine and mine alone – and are not based upon statistical, empiric or academic studies of capital punishment statutes or cases – they do not spring full blown from a vacuum.

I do not wish to appear self-aggrandizing, yet so that you may place what I say in context and better assess its credibility – please allow me an opportunity to briefly outline my background and experience.

I have been either a practicing trial attorney or a judge for over 30 years. From 1976 until 1982 I served as an Assistant District Attorney here in Wake County. As you are aware the current capital punishment statutes, N.C.G.S. 15A-2000 et seq., were enacted in 1977. While I was a prosecutor the first murder cases occurred to which the new laws applied and the procedures and processes for the trial of those cases were developed and settled.

Between 1977 and 1980 I personally represented the State at the trials of two separate individuals who were charged with first degree murder under the new statute.

As I recall one of the individuals was found guilty of or pled guilty to second degree murder and the death penalty was not an issue.

The other individual, John William Rook, was convicted on October 10, 1980 of the first degree rape, first degree kidnapping and first degree murder of Anne Marie Roche. John Rook was executed by lethal injection in September 1986. He was the third person in North Carolina to suffer the death penalty since the enactment of our current statute.

From 1986 to December 1990 I practiced as a criminal defense attorney. During that time I served as court-appointed counsel for indigent defendants and was admitted to the capital case appointment list. As a result I served as court-appointed counsel for a number of individuals charged with first degree murder. Most of those cases were resolved either by plea or trial upon lesser charges; however, there were two of my clients for whom the State sought the death penalty. Myself and co-counsel were particularly concerned in those cases because the facts and/or criminal histories of our clients lead us to believe the death penalty was especially likely.

Even though the State sought the death penalty, and although each man was convicted of first degree murder, in each case the jury recommended life imprisonment.

Finally, I have been privileged to serve the citizens of North Carolina as a Superior Court judge for 15 years. During that time I have presided over a number of cases wherein the State has sought the death penalty. These cases have been tried in urban counties such as Wake, in rural counties such as Johnston, and in counties like Cumberland that are both urban and rural. I have ordered and decreed that the death penalty be imposed.

In spite of my experience I found preparation of my remarks to you to be most difficult. While I frequently speak to civic, professional and academic groups and classes – and while I volunteer and teach at educational programs for attorneys and/or judges – I have never appeared at or before the legislature or any of its committees. Frankly, I do not know what to say nor how to say it – likewise, I do not know how I can assist you in fulfilling your task. I would prefer to simply respond to your questions. However, I am here and was tasked by Mr. Pell with addressing this committee – therefore, to paraphrase Admiral Farragut, "Damn the possible torpedos, full speed ahead."

I am accepting my role here not to lecture, nor pontificate, nor to lead you to a particular result, recommendation or decision. I believe it is my role to tell you of my experiences, thoughts and feelings as they relate to issues of capital punishment.

As a Superior Court judge I have no agenda, no goal and no opinion as to whether the law of the state of North Carolina should or should not provide for capital punishment. I have sworn to uphold and apply the law and to ensure a fair trial regardless of the consequences. I take my oath very seriously.

I am not an activist jurist – you are charged with making the law -- I simply enforce it.

As a judge I have no opinion as to what the punishment for first degree murder or any other crime is or should be.

Please do not conclude that I do not have strong personal opinions about capital punishment or the wisdom of other statutes, both criminal and civil – I do – however, I rarely express those opinions and do not expect to do so here as they are not germane to this discussion.

Suffice it to say that I support the law of North Carolina and therefore I support the laws of capital punishment because it is the law until changed by the legislature.

Having said that please permit me to offer you these thoughts.

In analyzing Speaker Black's mandate to this Committee and of some issues you are to study, I have concluded those issues regarding capital punishment may be grouped into three areas:

First -- the guilt phase of a first degree murder trial

Second – the sentencing phase of a first degree murder trial

Third – post-trial/post-sentencing review

It is my intention to speak in more detail to the first and second areas and very briefly upon the third.

Within the area of the guilt phase – one could place the issues of attorney competence and guidelines/standards for attorneys who wish to represent defendants charged with first degree murder; the issue of prosecutorial misconduct; and the issue of the felony-murder rule and its impact.

With regard to attorney competence, no one who does not meet a given level of experience nor a given number of years of practice should represent capital case defendants. The rules and guidelines established by Indigent Defense Services appear to establish reasonable requirements. And in Wake County, prior to IDS, the Superior Court had established lists of attorneys – with only the most experienced qualifying to serve in capital cases.

I have not found, in my experience, that competence of counsel was an issue in first degree murder trials. Yet we cannot select that person deemed to be the most competent of attorneys and clone them – there must be some objective measure of competence.

The more serious question is how to determine whether an attorney's conduct in a given case is competent or not. The Supreme Court in the Strickland vs. Washington case has established standards which our Supreme Court has followed.

All of us should be careful not to equate competence of counsel with the jury's verdict or recommendation. Too frequently I have found the logic to be expressed thusly by inmates in their petitions for appropriate relief:

"I was found guilty therefore my lawyer must have been inadequate or incompetent."

In my practice I found, and any attorney worth their salt should agree, that I did the best lawyering in cases where the jury still came back guilty.

We should be wary not to be Monday morning quarterbacks in assessing competence – trial strategies, tactics and courtroom decisions must be made on the spot – these are things which are easily second-guessed by folks who were not there and have never been there.

Finally, we should be careful not to hold all attorneys, as to their competence, to that of the high profile, darling of the media lawyer. My experience is that defense attorneys do not win cases, the State loses them because the jury weighs the State's evidence and is not satisfied beyond a reasonable doubt. A Not Guilty verdict can frequently, perhaps always, be rightly translated as Guilty But Not Proven verdict.

No jury in North Carolina, to my knowledge, has ever returned a verdict of innocent. In this context the Dream Team did not win the O.J. trial and while, because of the not guilty verdict and the media coverage, those defense lawyers are seen as the most competent of the competent – where does that leave David Rudolf and Tom Maher, whom all would agree are among the finest and most competent of criminal defense attorneys I know, when in the high profile cases of Ray Caruth and Michael Peterson, the jury verdicts were guilty.

Competence of counsel is a serious issue in all cases – not just first degree murder – however, standards of competence have been established. There are appellate standards against which to measure attorney trial conduct and our courts have and continue to address genuine instances of lack of competence. I suggest this issue must be addressed on a case by case basis.

Prosecutorial misconduct may also be considered within the context of the guilt phase. I would do so here, because while such misconduct may occur at the penalty phase – I suggest it is more unlikely there. I have found that any conduct of the prosecutors which could even remotely be labeled "prosecutorial misconduct" is centered in questions concerning the discovery of or the extent of the discovery of the State's evidence at the guilt phase.

Usually the evidence which the State will rely upon to support an aggravating circumstance is offered during the guilt phase or is evidence based upon the defendant's prior criminal history. On the other hand evidence to support a mitigating circumstance is uniquely within the knowledge and possession of the defendant and only offered at sentencing.

I trust that the enactment of the expanded discovery statutes and procedures with subsequent judicial review and interpretation will sufficiently address this issue.

Finally, consideration of the application of the felony-murder rule to capital cases should be grouped under the guilt phase area.

The felony-murder rule is a legal theory of a basis for a conviction of first degree murder. Similarly, a murder based upon premeditation and deliberation is a legal theory of a basis for a conviction of first degree murder.

Considering these theories, this issue has lead to certain questions.

Does an interpretation of this issue for study suggest that the felony-murder rule be repealed as a basis for first degree murder? Does it suggest that the (e)(5) aggravator be repealed?

My experience is that I have never had a death recommendation when the only legal basis for the first degree murder conviction was felony-murder. When a death recommendation has occurred, the defendant's guilt was based upon either premeditation/deliberation alone or on both premeditation/deliberation and felony murder.

In your study of these issues which I believe are related to the guilt phase of a first degree murder trial, please bear in mind that the rules of law and evidence which apply at a trial upon that charge also apply at a trial upon any other criminal charge.

The rules for the trial of possession of cocaine are the same as the are for the trial of first degree murder.

Issues which you have been tasked to study that may be placed within the area of the sentencing phase may include: competence of counsel and prosecutorial misconduct of which I have already spoken – and also disproportionate racial impact and whether or not persons not guilty of first degree murder are on death row.

I suggest to you that these latter two issues are, in large part, really issues of or pertaining to jurors.

The question of the racial makeup of the trial jury in any case has been addressed by the Supreme Court in Batson vs. Kentucky – which precludes minorities from being excused from service on a trial jury solely because of their race. That case established a procedure by which to determine improper use of preemptory challenges to affect the racial makeup of the jury.

From my experience the larger issue is how do we ensure that the pools of jurors from which a trial jury will be chosen will include sufficient numbers of minority citizens so that trial juries will reflect the community. For reasons that I cannot explain, even in counties with significant or even majority minority communities, the jury pool is frequently primarily Caucasian.

For my part in addressing this issue – I orient the jury pool by explaining how important it is that all citizens serve; that to serve is to honor those who fought and died to secure this right, and that to serve is to honor those who struggled and sacrificed to make it possible for minorities to be jurors. I then do not excuse anyone from jury service.

We must encourage all citizens to serve – we must put in place procedures which will provide accurate information for service of summons.

As to the issue or question of whether the death penalty is sought more often against minorities – my experience is that district attorneys seek the death penalty based on the facts of the case and its strengths or weaknesses and on the violent criminal history of the defendant rather than the race of either the victim or of the defendant.

To this day I have not sentenced either an African-American or a member of any other ethnic minority to death. John Rook was white, Anne Roche was white. Of the two defendants I represented – one was African-American, his victim was white; the other was white and his victim was white.

Finally, as to the question of individuals on death row who are not guilty of first degree murder.

Of course, the determination of guilt and of the sentence recommendation is for the jury. Please bear in mind that the backgrounds, education, life experiences and beliefs of jurors vary

from county to county – a fact situation which would lead to a guilty verdict in one area may not in another.

I presided over a trial in Johnston County where the defendant and another man robbed and killed a drug dealer, and shot or killed five other people – the jury recommended three death sentences.

I presided over a trial in Cumberland County with essentially the same facts and the jury recommended life imprisonment.

The defendant in Johnston County was white with victims white, African-American and Native American. The defendant in Cumberland County was African-American and victims were African-American and white.

In my experience most guilt phases are relatively direct, straightforward presentations of the State's evidence with the defense frequently putting on little or not evidence. There usually is little or no question that the defendant is guilty of some degree of homicide. The defense's strategy is simply to put before the jury as many lesser included offenses as possible.

We have placed in the hands of the good people of our state the responsibility to determine the credibility of witnesses, to resolve conflicts in their testimony, and to value the evidence in reaching a conclusion as to the guilt of the defendant and as to what sentence should be imposed.

If the jury does not determine guilt, or not – if the jury does not recommend the sentence, who will? Please consider carefully the options – and the ramifications of someone other than the jury determining life or death.

I do not intend to address the issues I would place in the area of post-trial/post-sentencing review. Those I will leave to appellate judges and to attorneys who practice in those courts.

I suggest to the Committee that North Carolina has an excellent post-conviction/appropriate relief statute and experienced and thorough appellate courts – both of which have granted relief to individuals whose guilt or sentence has been in question.

In closing, I respectfully suggest to you that the guilt phase and the sentencing phase of any trial are like fraternal twins – similar but not the same. The issues in each should be addressed carefully but individually.

Therefore, in your study of these issues, scrutinize carefully the offerings of those groups and individuals who either support or oppose capital punishment. Seek out the input of those persons, defense attorneys, district attorneys, and/or judges who have actually participated in capital case trials. Request the State Bar's thoughts on ways to address the situations of attorneys who were determined to be ineffective or incompetent as well as prosecutors who engaged in misconduct with a view toward preventing recurrence.

North Carolina has a capital punishment statute whose constitutionality has been tested and upheld – whose procedures and processes have been settled and found appropriate – and whose courts apply jury instructions which have survived appellate review and been found to be legally correct. Examine and study this law carefully.

WAYS TO MAKE THE DEATH PENALTY "PERFECT"

1. Raise the burden of proof – require each juror to find the defendant guilty and to recommend the death penalty beyond "any and all doubt".

2. Enact a penalty for the State's violation of the discovery rules to allow the judge to suspend the prosecuting attorney(s) law license(s).

3. Repeal certain aggravating factors.

4. Provide that the defendant's trial counsel are to be paid not less than $250.00 per hour.

5. Allow the defense attorneys a blank check with which to hire experts.

6. Encourage more minorities to serve on first degree murder juries.

Death Penalty

The Conference of District Attorneys is comprised of the 39 elected District Attorneys of the State of North Carolina. The Conference is statutorily empowered to cooperate with citizens and other public and private agencies to improve and promote the effective administration of justice. Every District Attorney is a constitutional officer charged with representing the people of this State with professionalism and integrity while seeking justice. Consistent with the collective and individual duties of the District Attorney, the Conference encourages policy that promotes justice in North Carolina.

The Conference of District Attorneys supports the penalty of death when:

> The District Attorney, after reviewing the specific facts of the case and applying the law, finds it is a just punishment to pursue, and;
>
> After a jury has heard all admissible evidence and finds that the nature of the crime or the individual merits its application.

This appropriate application of the death penalty promotes the effective administration of criminal justice in North Carolina.

The Conference of District Attorneys encourages an honest and thorough examination of individual cases through appropriate Judicial and Executive review. The Conference opposes a death penalty moratorium but supports a complete Legislative study of the procedures applicable to the death penalty process. Upon an accurate and unbiased assessment, the Conference of District Attorneys welcomes a legislative or public vote on the death penalty as a punishment for the most egregious murders.

House Select Committee on Capital Punishment



North Carolina Conference of District Attorneys

December 19, 2006

ATTACHMENT X

Prosecutors Held to a Higher Standard

Actions Scrutinized by:

- Defense
- Juries
- Judges
- Appellate Judges
- Media
- Constituents

Prosecutors Held to a Higher Standard

- More restrictive ethical code
- Defense makes a mistake = "error"
- Prosecution error = "prosecutorial misconduct"
- State Bar's grievance process is the remedy
  - No action
  - Private censure
  - Public censure
  - Suspend license
  - Revoke license

Adequacy of Counsel

- 2000: Creation of IDS
  - 2000 budget was $79.9 million
  - Budget has increased over 5 years to $92.7 million

Adequacy of Counsel

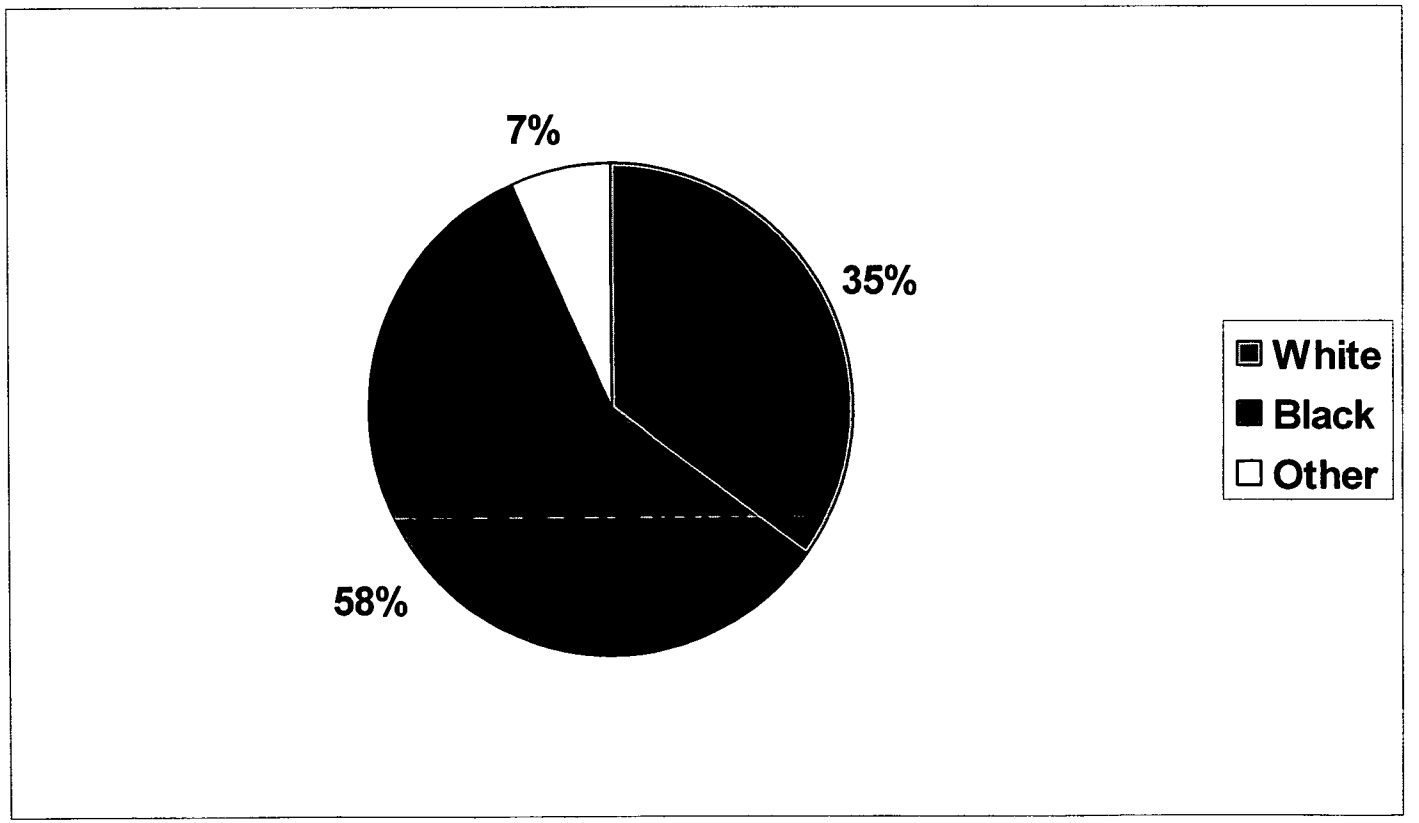
- Office of Indigent Services (IDS)
  - Establish higher qualification standards
  - Improved technical support for death penalty cases
  - Created Capital Defender
    - Staff of over 13
    - 4 offices across the state
    - Assist defense in capital cases
- Center for Death Penalty Litigation
    - Assist defense in capital cases

The Death Penalty & Race

- The death penalty is imposed based upon conduct ...not race.
- Each case is unique.
- General population statistics are irrelevant.

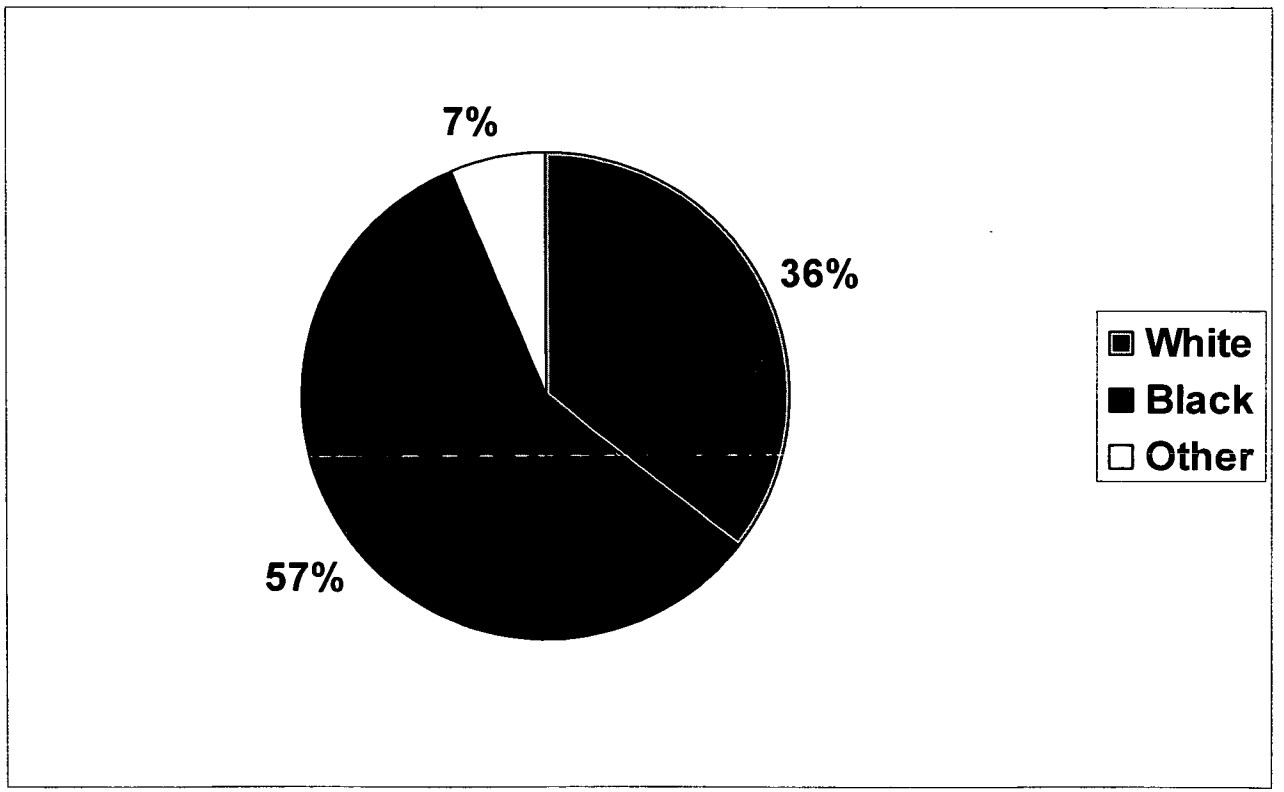
The Death Penalty & Race

Prison Population



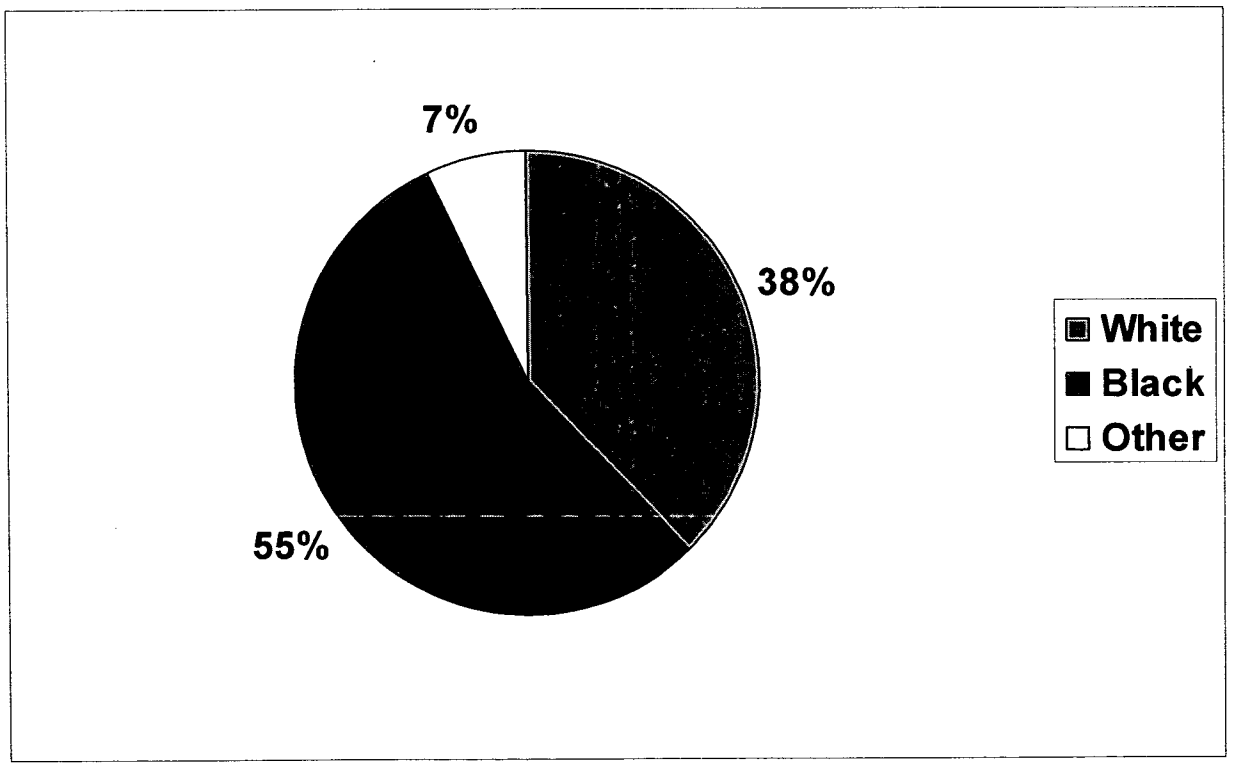
The Death Penalty & Race

1st Degree Murder Inmates



The Death Penalty & Race

Death Row Inmates



The Death Penalty & Race

- Current law already prohibits the use of juror challenges in a racial manner
- NC Supreme Court reviews every death penalty case for "passion or prejudice
- Appellate process continues to review the issue

The Death Penalty & Race

"Studies relating to the death penalty and race produce not statistically significant evidence that the race of the victim or defendant play a part in either the prosecution or the jury's capital decision.

-McCleskey v. Zant 454 U.S. 1093 (1981)

Innocence

Anti-death penalty activists report:

Over 100 "innocents" released from death row

Reality:

(a) sentence vacated = resentencing

(b) re-trial

= the process works

Innocence

U.S. – **possible** 30 actually innocent people have been sentenced to death since 1973

= 0.4% of total sentenced to death

= 99% accuracy rate for convictions

No innocents were executed

= 100% accuracy in detecting wrongful convictions

Judicial Review: Fair & Thorough

Appellate Process

Averages 10 years to complete

Addresses:

- Procedural errors at trial
- Proportionality
- Newly discovered evidence
- Ineffective assistance of counsel
- Re-investigation of case

1	NC Superior Court	Trial	1. Death/life sentence
2	NC Supreme Court	Appeal conviction and sentence, proportionality review	1. Affirm trial results
3	U.S. Supreme Court	Proportionality	1. Deny review 2. Order retrial or 3. Order re-sentencing hearing
4	NC Superior Court	Motion for Appropriate Relief: Re-investigation of case, New claims of evidence, or ineffective assistance of counsel	1. Deny special relief 2. Order retrial or 3. Order re-sentencing
5	NC Supreme Court	Review decision of #4	1. Deny review 2. Order retrial or 3. Order re-sentencing
6	U.S. Supreme Court	Review decision of #4	1. Deny or grant review
7	U.S. District Court	Petition for Habeas Corpus, Motion for Appropriate Relief: Re-investigation of case, New claims of evidence, or ineffective assistance of counsel	1. Deny or grant review
8	U.S. Court of Appeals	Review of #7	1. Dismiss appeal 2. Affirm or deny US District Court decision
9	U.S. Supreme Court	Review of #8	1. Deny or grant review
10	Governor	Clemency	Pardon, commute sentence, or delay in execution

Judicial Review: Fair & Thorough

Appellate process includes case reviews by:

- A minimum of 12 jurors
- A minimum of 47 judges
- The Governor

Innovations in North Carolina Capital Litigation

1996 – Post conviction discovery

1998 – Execution by lethal gas abolished

2000 –Capital Punishment & Race Bases

2000 – Office of Indigent Defense Services

Innovations in North Carolina Capital Litigation

2001 - General Assembly enacted:

- Minimum standards in capital cases
- D.A. discretion in capital cases
- No death penalty for Mentally Retarded
- DNA testing of convicted persons

2004 – Pretrial Open File Discovery

2005 - No death penalty for juveniles

Address to the House Select Committee on the Death Penalty
December 19, 2005

Chairs and Members of the House Select Committee:

Thank you for the invitation to speak briefly to the Committee about its important work. My name is Tye Hunter. For the last 5 years I've been the Executive Director of IDS—itself a product of the legislature and a study commission co-chaired by Rep. Hackney. Prior to that, I was the State Appellate Defender for 15 years. So my experience is as a practitioner, and over the last 5 years an administrator very involved in our criminal justice system.

On December 4, George Will, noted conservative columnist and pundit, appeared on the Sunday ABC news show, "This Week," and discussed the death penalty in connection with the then upcoming execution in California. He said, "Conservatives have had a brainstorm. The death penalty is a government program and that it is apt to be not very well done." The death penalty has been controversial for all of my professional career, but that controversy has not necessarily led to effective looks at reform. Most of the debate about the death penalty has seemed to focus on whether to have it, not how to make it better.

Some supporters of the death penalty have been reluctant to admit problems, fearing the slippery slope leading to abolition. Similarly, some abolitionists have not been interested in reform, hoping an unreformed death penalty will fall one day of its own weight. My hope is that the Committee will set aside this debate and look at the death penalty as a government program that will benefit from the same scrutiny and reform as other programs.

One important fact to realize about our current death penalty regime is that the death penalty is very rarely used against convicted murderers in North Carolina. My own view is that the people of North Carolina think we should have a death penalty, but that it should be reserved for a very small group of accurately identified "worst of the worst" cases.

Since July 2, 2001, IDS has been responsible for paying and appointing defense lawyers in capital cases. We have also kept data on what has happened with those cases where we appointed counsel. This study stopped July 1, 2005, but we can certainly update. According to

our data, approximately 1200 cases originally charged with murder on or after July 1, 2001 have been closed.

Out of all these cases, less than 1% (9) have resulted in a death sentence. Roughly 16% (185) resulted in a conviction for first-degree murder and a sentence of life without parole. Approximately 35% (399) were convicted of second-degree murder and 13% (147) were convicted of voluntary manslaughter. Another 11% (127) were convicted of involuntary manslaughter or some other felony, such as accessory after the fact of murder. More than 14% (167) had the charges dismissed and more than 3% (37) were found not guilty. Thus, more people were acquitted or had their murder charges dismissed (204) than were convicted as charged (194). Four times as many people were acquitted (37) as were sentenced to death (9). Slightly more that half (593) were convicted of 1st or 2nd degree murder while the remaining were convicted of offenses less serious than 2nd degree murder or nothing at all.

Let me share some more data. In the last four and a half fiscal years, North Carolina juries have sentenced people to death as follows:

01/02	02/03	03/04	04/05	05/06 (pending)
7	6	4	6	2

In the last four and a half years, there have been 125 capital trials and 25 death sentences. By comparison, in FY95/96, North Carolina juries returned 25 death sentences from sixty capital trials.

My comment on this data is that we have a very broad death penalty statute. Almost every homicide is charged as 1sto murder, and the great majority of 1sto murders are potentially capital cases. Other states have very different statutes with much narrower and more conservative standards to make a case eligible for the death penalty. Virginia is an example.

There are several consequences of our broad statutes. One we have seen over the last 4 years—not a lot of death verdicts. But having such a lot of cases to choose from has other negative consequences:

1) Tremendous expenditure of scarce judicial, prosecutorial and defense resources.

2) Great opportunity for arbitrariness and bias to creep in.

3) We do not necessarily get the accurately identified "worst of the worst." (Judge Cashwell anecdote, very similar cases in Johnston Co. and Cumberland Co. with different results)

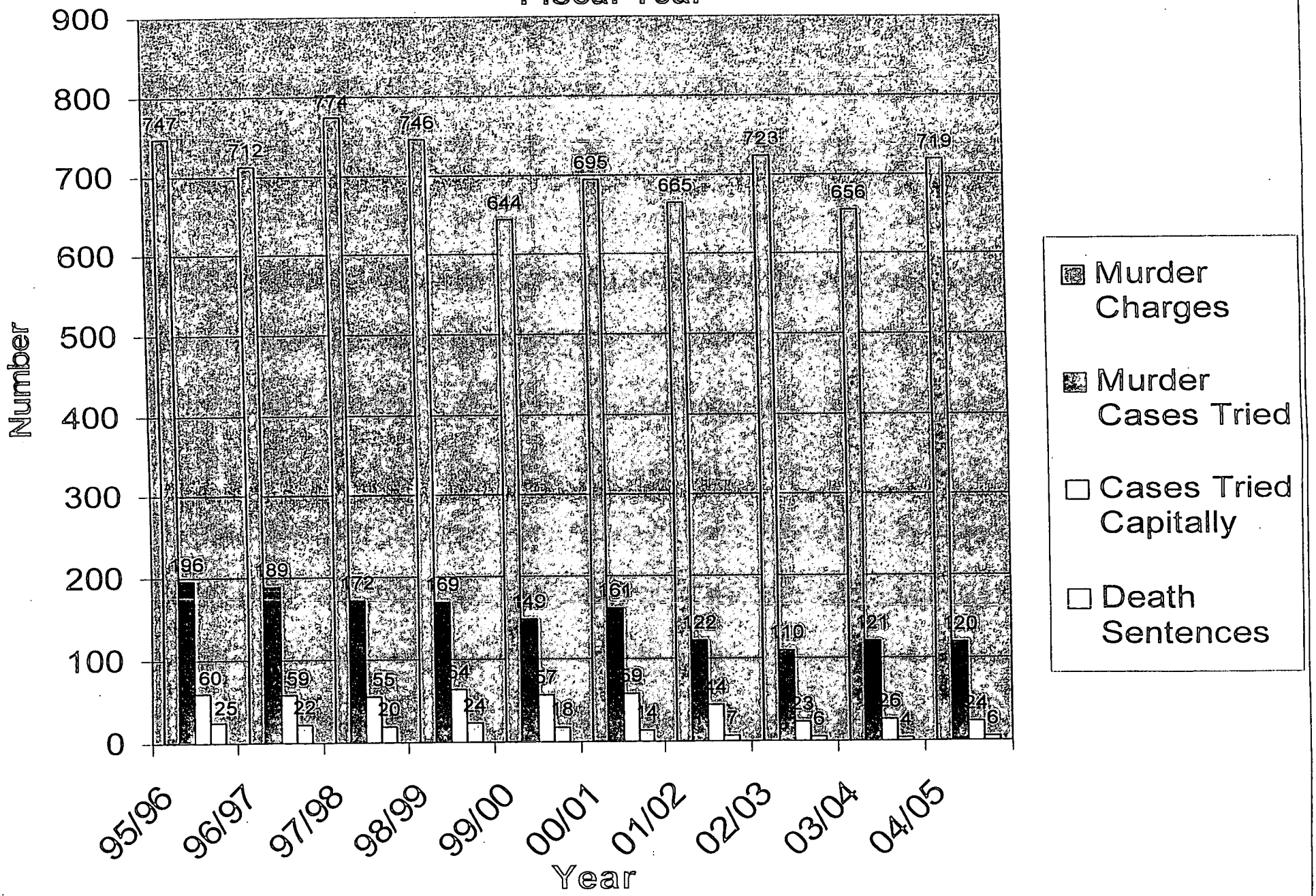
My suggestion is that we significantly narrow eligibility for the death penalty (lots of ways to do that) so that we concentrate our severely limited resources on some group of cases that are likely and appropriate death cases. Rather than start with hundreds of potential capital cases, we should start with a much smaller number.

A note about the current death row: One hundred seventy-four are currently on death row, most of these prior to IDS, prior to better counsel, prior to open file discovery at trial. Many would not have received the death penalty if tried today. We should look at some systematic way to look at those cases decided prior to recent reforms.

Thank you again or the opportunity to speak to this Committee and please call on me if I may be of assistance.

	A	B	C	D	K
1	[redacted]				
2	[redacted]				
3	Proceeded Capital = 2 Attorneys*	No. of Dispositions	% of Case Type**	Disposition	
4	Proceeded Capital	2	0.5%	Resen - Death	
5		3	0.8%	Resen - Life	
6		7	1.9%	Trial - SH Death	
7		29	8.0%	Trial - SH, Life	
8		18	4.9%	Trial - Guilty, 1st Murder LWOP	
9		5	1.4%	Trial - Guilty, 2nd Murder	
10		2	0.5%	Trial - Guilty, Vol. Mans	
11		12	3.3%	Trial - Not Guilty	
12		6	1.6%	Mistrial	
13		1	0.3%	Plea - SH, Death	
14		0	0.0%	Plea - SH, Life	
15		70	19.2%	Plea - 1st Degree, Life	
16		119	32.7%	Plea - 2nd Degree Murder	
17		14	3.8%	Plea - Access After	
18		15	4.1%	Plea - Other Felony	
19		16	4.4%	Plea - Vol. Mans	
20		5	1.4%	Plea - Invol. Mans	
21		29	8.0%	Vol. Dismissal	
22		0	0.0%	Vol. Dismissal with Leave	
23		1	0.3%	Abated	
24		2	0.5%	Not compotent to proceed	
25		8	2.2%	Other	
26		364	100.0%	Total	
27	Proceeded Non-Capital	42	5.5%	Trial - Guilty, 1st Murder LWOP	
28		27	3.5%	Trial - Guilty, 2nd Murder	
29		5	0.7%	Trial - Guilty, Other Felony	
30		15	2.0%	Trial - Guilty, Vol. Mans	
31		25	3.3%	Trial - Not Guilty	
32		2	0.3%	Not Guilty by Reason of Insanity	
33		1	0.1%	Mistrial	
34		14	1.8%	Plea - 1st Degree, Life	
35		242	31.6%	Plea - 2nd Degree Murder	
36		33	4.3%	Plea - Access After	
37		40	5.2%	Plea - Other Felony	
38		108	14.1%	Plea - Vol. Mans	
39		59	7.7%	Plea - Invol. Mans	
40		133	17.3%	Vol. Dismissal	
41		1	0.1%	Voluntary Dismissal with leave	
42		1	0.1%	Abated	
43		3	0.4%	Not Competent to Proceed	
44		16	2.1%	Other	
45		767	100.0%	Total	
46	Case Status Unknown	2	11.1%	Trial - SH, Life	
47		1	5.6%	Trial - Guilty, 2nd Murder	
48		1	5.6%	Trial - Guilty, Other Felony	
49		2	11.1%	Trial - Guilty, Vol. Mans	
50		1	5.6%	Not Guilty by Reason of Insanity	
51		5	27.8%	Plea - 2nd Degree Murder	
52		1	5.6%	Plea - Other Felony	
53		4	22.2%	Plea - Vol. Mans	
54		1	5.6%	Plea - Invol. Mans	
55		5	27.8%	Vol. Dismissal	
56		2	11.1%	Other	
57		18	100.0%	Total	
58	All	2	0.2%	Resen - Death	
59		3	0.3%	Resen - Life	
60		7	0.6%	Trial - SH Death	
61		31	2.7%	Trial - SH, Life	
62		60	5.2%	Trial - Guilty, 1st Murder LWOP	
63		33	2.9%	Trial - Guilty, 2nd Murder	
64		6	0.5%	Trial - Guilty, Other Felony	
65		19	1.6%	Trial - Guilty, Vol. Mans	
66		37	3.2%	Trial - Not Guilty	
67		3	0.3%	Not Guilty by Reason of Insanity	
68		7	0.6%	Mistrial	
69		1	0.1%	Plea - SH, Death	
70		84	7.3%	Plea - 1st Degree, Life	
71		366	31.7%	Plea - 2nd Degree Murder	
72		47	4.1%	Plea - Access After	
73		56	4.8%	Plea - Other Felony	
74		128	11.1%	Plea - Vol. Mans	
75		65	5.6%	Plea - Invol. Mans	
76		167	14.4%	Vol. Dismissal	
77		1	0.1%	Voluntary Dismissal with Leave	
78		2	0.2%	Abated	
79		5	0.4%	Not Competent to Proceed	
80		26	2.2%	Other	
81		1156	100.0%	Total	
82		934	80.8%	Percent Potentially Capital Cases End in Plea 2nd Degree or Less, Not Guilty, Dismissal***	
83		220	60.4%	Percent Proceeded Capital Cases End in Plea 2nd Degree or Less, Not Guilty, Dismissal***	
84		167	14.4%	Percent Potentially Capital Cases End in a Dismissal***	
85		29	8.0%	Percent Proceeded Capital Cases End in a Dismissal***	
86	*Disposition and cost data from all potentially capital cases that have gone through the Capital Defenders Office since July 1, 2001. * Dispositions include all known dispositions for all years of data.*				

Narrowing Trend from Murder Charges to Death Sentences by Fiscal Year



House Select Study Committee on Capital Punishment

February 2, 2006

Minutes

The House Select Study Committee on Capital Punishment met on Thursday, February 2, 2006, at 9:30 a.m. in Room 643 of the Legislative Office Building. Representative Joe Hackney, Co-Chair called the meeting to order. The following members of the Committee were present: Representative Beverly Earle, Co-Chair, Representatives Jeff Barnhart, Walter Church, Arlie Culp, Pete Cunningham, Rick Eddins, Pricey Harrison, Hugh Holliman, Marvin Lucas, Danny McComas, Mickey Michaux, Wilma Sherrill, Bonner Stiller, Ronnie Sutton, Joe Tolson, William Wainwright, Jennifer Weiss, and Winkie Wilkins. Copies of the meeting agenda and the Visitor Registration are attached, (Attachments I and II).

Co-Chair Hackney welcomed the members and visitors to the meeting. He announced the addition of four new members to the Committee. Those members are Representatives Church, Cole, Owens and Tolson. He also stated that two handouts had been distributed. The first was a letter from the Conference of District Attorneys that responded to questions that had been raised during the December 19, 2005 meeting of the Commission and offered suggested improvements to the capital case process, (Attachment III). A packet of information regarding inadequacy of counsel was provided by the North Carolina Academy of Trial Lawyers, (Attachment IV).

Ms. Susan Sitze, Counsel to the Committee, was recognized for an overview of statistical information that had been requested during the December meeting of the Committee. Ms. Sitze referenced handouts that each member had been given and noted that she and Hal Pell, Counsel to the Committee, had obtained some of the information that had been requested and were still in the process of gathering additional information. She noted that Mr. Pell was on active duty with the military and would not be present at the meeting. The first document discussed by Ms. Sitze showed all executions that have been carried out in North Carolina since the death penalty was reinstituted in 1977, (Attachment V). Ms. Sitze reviewed a handout showing a list of all offenders who are currently on death row in North Carolina, (Attachment VI). She noted that the "received" date on the list did not necessarily reflect the offenders' conviction date in all cases. She said that if a defendant had been granted a new trial and was removed from death row for that trial, the date would reflect the second time the person had been placed on death row, and not the time that the crime occurred. Ms. Sitze reviewed a chart showing persons removed from death row for various reasons, (Attachment VII). A handout regarding future possible executions was briefly discussed, (Attachment VIII). The document, prepared by the Office of the Attorney General, indicates current death row inmates who have completed, or are in the process of completing state and federal post-conviction proceedings, and could possibly face execution dates during 2006. Ms. Sitze discussed a packet of general statistical information regarding age, sex and race of murder victims.

The information was provided by the State Bureau of Investigation and reflects statistics for the year 2004, which is the most recent year that statistics are available, (Attachment IX).

Representative Harrison asked if information had been received regarding the breakdown of the felony murder rule. Ms. Sitze replied that she was in the process of attempting to gather that information, but that it was more complicated that a straight statistical print off. Co-Chair Hackney questioned whether this would be information that would be possible for staff to obtain, or if it would require a separate survey. Ms. Sitze replied that they probably would not be able to get a totally accurate breakdown of statistics, but rather a more general idea of approximate percentages.

Co-Chair Hackney noted that the topic of the days' meeting was adequacy of counsel. He reminded the Committee that the General Assembly had reformed the process of appointment of counsel some time ago and that the remainder of the meeting would focus on how that system works, how it is funded, how well it is funded and what, if any, suggestions might be made for additional improvements.

Mr. Douglas Holbrook, Fiscal Analyst, Fiscal Research Division, was recognized to offer cost data and statistics for capital trials. A handout was distributed to the Committee and is included in the attachments to the minutes, (Attachment X). He stated that capital trials are generally the most demanding type of case handled by the courts and that they place tremendous pressure on the prosecutor's office, on defense attorneys, on the court's time and on the Justice Department. He said that the most difficult cost factors to determine have to do with the courts system due to the complexity of their work. He referenced a study on costs of the death penalty completed by the Sanford Institute at Duke in 1993, but noted that it had become obsolete within a year of its publication. Mr. Holbrook stated that in order to better determine the court costs, an outside consultant would be needed.

Mr. Holbrook continued his presentation by commenting on Indigent Defense costs. He said that generally, capital representation for the defendant is done by the Indigent Defense Services' Capital Defender's Office. He said that if the Capital Defender's Office of the Office of Indigent Defense Services is provides representation through privately assigned counsel, they consider a case capital when a charge of murder has been entered and staff a case as if it were capital as long as there is a possibility that the trial could be capital and could involve the death penalty. He said that under current rules, the prosecutor is required to indicate whether he intends to seek the death penalty at a pre-trial conference that can take place a fair amount of time after indictment. Up until that time, the Office of Indigent Defense Services will fund 2 lawyers to staff a case either through the Capital Defender's Office or through privately assigned counsel until the point at the pre-trial conference when the District Attorney articulates whether or not the death penalty will be sought. He said that most of the work is done by the Capital Defender's Office and some is done through privately assigned counsel. If privately assigned counsel is assigned, two lawyers are staffed to the defendant at a rate of $85 per hour, whereas in any other criminal case, the rate would be $65 per hour for one lawyer.

Mr. Holbrook said that the budget for the Capital Defender's Office in 2003-04 was $1.1 million and that the Office of Indigent Defense Services expended $10.7 million through the Attorney Fee Fund for capital defense. He said that the number of cases handled by the Capital Defender's Office has grown. He said that the number of cases handled by the Fee Fund has not grown, but the costs of providing expert witnesses are included in the $10.7 million.

Mr. Holbrook said that the appellate work on the state side representing the prosecution is handled by the Department of Justice by 13 lawyers from the Capital Litigation Section with an overall budget of about $1.5 million.

Co-Chair Earle asked what determines whether a person is indigent. Mr. Holbrook replied that a person can request court-appointed counsel and a judge makes the determination based on the receipt of information that the defendant must provide. He added that in making that decision the judge will take into consideration the nature of the charge and the trial that is being faced.

Mr. Tye Hunter, Office of Indigent Defense Services, was recognized and confirmed that the decision is a judicial determination, but that if it is found that a defendant does have the resources for the defense, the Office of Indigent Defense will do all they can to insure that those resources go toward the cost of representation. He added that the process is complicated and that family members sometimes freeze assets.

Co-Chair Hackney added that everyone who is convicted and who has appointed lawyers gets a judgment entered against them automatically for the amount of the cost of that service.

Mr. Holbrook said that the Office of Indigent Defense Services has the authority to do a number of things and has a fairly aggressive process to recoup money from those who have been determined to not be indigent, or have assets available to them to defray the cost of their representation, and that they recoup several million dollars yearly, not just on capital cases, but on any type of case. Co-Chair Hackney noted that the Committee might wish to receive specifics on the amount of money that is recovered.

Representative Sherrill asked how much money is recouped. Mr. Hunter stated that they recoup about ten cents on the dollar from less serious cases, but that it is difficult to recoup any money if the defendant is sent to prison. Co-Chair Hackney added that the judgment expires after ten years.

Representative Wilkins asked if a judgment for recoupment is issued in every cased that involves indigent services and goes to final disposition in court. Mr. Holbrook replied that this is true if the defendant is found guilty.

Representative Holliman noted the drop in the number of capital cases and asked if there should not be an overall drop in allocations to the Indigent Defense Fund and to the Office of the Attorney General. Mr. Holbrook replied that the Office of the Attorney

General is still handling cases from the time that there were 60 or more yearly. He said that the Office of Indigent Defense Services is focusing more money into the Capital Defender's Office that does yield a savings, but the overall appropriation of that fund has continued to fall short each year. He said that the appellate work from previous years is stacked up and continues to require work.

Representative Eddins stated that he felt that there should be some immediate savings on the front end since there are not as many capital cases each year. Mr. Holbrook said that the Office of Indigent Defense Services has an annual report requirement regarding their expenditures, and that this year's budget added a requirement for them to look at ways to show savings.

Representative Cunningham asked how North Carolina's Indigent Defense Services compared to other states in the southeast. Mr. Holbrook replied that he did not know, and added that states differ in their requirements and in the way they conduct indigent representation making a comparison difficult. Representative Cunningham indicated that he would like to receive further information about a comparison.

Representative Cunningham asked how a decision is reached to determine the amount that is spent on each case. Mr. Holbrook replied that the General Assembly has authorized the Office of Indigent Defense Services to set rules for payment to privately assigned counsel. He added that some portion of the budget within the Office of Indigent Defense Services is for public defenders and that they are state employees whose compensation is set by the General Assembly in the budget bill.

Representative Wilkins asked if the Office of Indigent Defense Services pays for the services of private investigators. Mr. Holbrook replied that they do.

Representative Holliman asked how payment is determined for expert witnesses. Mr. Holbrook replied that there is an hourly fee set by the judges.

Co-Chair Hackney noted that there are 10 lawyers in the Department of Justice doing direct appeal and 13 lawyers doing post-conviction work for a total of 23 lawyers doing capital work.

Mr. Holbrook said that the group of 10 lawyers in the special prosecutions section handle all kinds of matters cannot determine how much of their time is being spent on capital work versus the other work that they do. He said that they do the direct appeals and that the Capital Litigation Section handles the Motions for Appropriate Relief.

Co-Chair Hackney noted that the Attorney General's Office was invited to make a presentation on today's program and declined to do so.

Representative Culp asked what accounted for the decline in the number of capital cases over recent years.

Ms. Sitze replied that the biggest factor that led to the decline is that prior to 2001, if a District Attorney charged first degree murder, there was absolutely no choice but to seek the death penalty. In 2001, the General Assembly granted prosecutors discretion in that they could still charge first-degree murder and choose not to seek the death penalty and only ask for life without parole.

Co-Chair Hackney added that many think that the improved representation provided by the Capital Defender's Office has also impacted the number of capital cases.

Mr. Robert Hurley, North Carolina Capital Defender, was recognized to address the Committee regarding quality of counsel issues. Mr. Hurley clarified a statement made by Mr. Holbrook who said that most of the representation is provided by the Capital Defender's Office. Mr. Hurley stated that most of the representation is provided by privately assigned counsel and that the Office of the Capital Defender probably handles less than 10% of the cases. He further stated that they do not automatically appoint two attorneys in first-degree murder cases. He said that they appoint two attorneys if there is a Rule 24 hearing and the state says it is going to seek the death penalty and the judge allows it, or if the prosecutor tells the first attorney that has been appointed that they plan to seek the death penalty. He said that under those circumstances, they will appoint a second attorney and that this occurs in about 30-40% of the cases.

Mr. Hurley stated that as the Capital Defender, he is responsible for appointing attorneys in every first-degree murder case including capital cases, is responsible for reviewing the applications of attorneys who apply to be on the capital roster, and for monitoring the performance of counsel who have been assigned to represent indigent defendants. He said that significant progress has been made since the Office of Indigent Defense Services has been established, but that the progress made at the trial level does nothing to help approximately 150 death row inmates who received the death penalty prior to the creation of IDS.

Mr. Hurley discussed the quality of counsel at the trial level and post-conviction level. He noted reasons for the improvement in the quality of counsel in North Carolina including an increase in the standards when selecting lawyers, mandatory consultation and mandatory continuing legal education as well as the fact that appointment of counsel is now done through the Office of the Capital Defender and not by the superior court judges in each county.

Mr. Hurley noted some concerns regarding maintaining the progress that has been made saying that prosecutors are over-charging and using the death penalty more than is warranted causing the Office of Indigent Defense Services and the Capital Defender's Office to expend a fair amount of money gearing up to defend these cases which has tremendous ramifications for the budgets of their offices and the Attorney General's office. He also noted concern regarding the hourly rate paid to attorneys handling capital cases and said that the availability of lawyers is stretched too thin.

Mr. Hurley discussed the quality of counsel received by those defendants who received the death penalty prior to the Office of Indigent Defense Services coming into existence in 2001 saying that many of those defendants would not have received the death penalty if they had been provided better representation. He urged the Committee to consider what to do about the people currently on death row. He said that this is a difficult and complicated problem because of the standard a defendant must meet in order to show ineffective assistance of counsel.

Mr. Hurley said that in three recent cases since 2001, the US Supreme Court has taken a closer look at the quality of representation in capital cases and has issued three decisions that are beginning to put teeth in what is meant by effective assistance of counsel. Those cases are Williams v. Taylor, Wiggins v. Smith and Rompilla v. Beard. Mr. Hurley encouraged the Committee to study those cases when considering the kinds of reforms that need to be made to North Carolina's death penalty statute.

Mr. Hurley made the following suggestions for consideration by the Committee:

- At the trial level, reduce the number of death eligible cases by making a person eligible for the death penalty only if convicted of pre-meditated and deliberate murder
- Narrow the list of aggravating circumstances by eliminating (e)(5) a murder committed during the commission of a specified felony; (e)(6) murder committed for pecuniary gain; (e)(9) the murder was especially heinous, atrocious, or cruel;
- Make jury instructions at capital sentencing hearings more understandable;
- Increase hourly rate that attorneys make for handling death penalty cases;
- Insure that the Office of Indigent Defense Services is fully funded;
- Mandatory requirement of an evidentiary hearing for every motion for appropriate relief that is filed, if a claim of ineffective assistance of counsel is raised;
- Create a claim based on ineffective assistance of post-conviction counsel;
- Create a ground of relief based on actual innocence;
- Reduce or eliminate the defense of procedural default

Representative Weiss requested that Mr. Hurley provide his recommendations to the members of the Committee.

Representative Wilkins asked if there are any counties in the state that do not have qualified attorneys for capital defense. Mr. Hurley said that some counties do not have qualified attorneys and said that he would provide a list of those counties to the

Committee. Representative Wilkins asked what is being done to attempt to recruit attorneys. Mr. Hurley replied that there is some attempt to recruit when time permits. He said that when there is not an attorney, one is brought in from surrounding counties to handle cases.

Representative Tolson asked what is needed to fully fund the Office of Indigent Defense Services. Mr. Hurley said that last year there was a shortfall of $7-8 million.

Representative Holliman asked if Mr. Hurley had received complaints of ineffective counsel since assigning attorneys to cases. Mr. Hurley said that he was not aware that any attorney he had assigned had been found to have been ineffective. However, he noted a concern regarding a case that was handled last year that may become the first to be found ineffective.

Co-Chair Hackney stated that Mr. Holbrook had checked on the recoupment of funds by the Office of Indigent Defense Services and that they collect approximately $10 million a year for indigent counsel paid and this money goes back into the general fund.

Mr. Henderson Hill, Attorney, Ferguson Stein Law Firm, Charlotte, North Carolina was recognized. Mr. Hill spoke regarding ineffective counsel and offered anecdotal comments regarding defending capital defendants both at the trial and appellate levels. Mr. Hill stated that the felony murder rule and the issue of procedural default should be studied by the Committee. He said that one of the biggest structural issues that the Committee should address is what to do about the 150 people who are on death row whose problems will not be captured, corrected or mitigated by the post-convictions system that is now in place. Mr. Hill also spoke of his concerns of race playing a part in the decision to seek death and in the selection of jurors, and urged the Committee to look at some form of the Racial Justice Act. Mr. Hill also stated that the Committee should consider a way to give victims an independent voice.

Representative Stiller commented on the racial makeup of juries, noting that in his experience, black jurors often ask to be exempted saying that they cannot judge another man. Mr. Hill responded that part of the challenge is getting the trial judges to give defense counsel enough leeway to talk with those jurors about their ability to consider the options.

Considerable discussion followed and Mr. Hill responded to several questions.

Co-Chair Hackney invited Mr. Hill to offer any proposals that he might have for the Committee to review.

Representative Stiller made a brief statement regarding the racial statistics that had been distributed to the Committee

Representative Harrison asked if Mr. Hill would offer specific recommendations regarding how to deal with racial issues.

Representative Barnhart reminded the Committee to remember as it goes forward that society, as a whole, is a stakeholder in this process.

The meeting was adjourned at 1:50 p.m.

Representative Beverly Earle
Co-Chair

Representative Joe Hackney
Presiding Co-Chair

Emily Reynolds Freeman
Commission Clerk

ATTACHMENTS:

Attachment I	Agenda
Attachment II	Visitor Registration
Attachment III	Letter from Conference of District Attorneys
Attachment IV	Handout – NC Academy of Trial Lawyers
Attachment V	Susan Sitze handout – Executions carried out under current death penalty statute
Attachment VI	Susan Sitze handout – Offenders currently on death row
Attachment VII	Susan Sitze handout – Offenders removed from death row
Attachment VIII	Susan Sitze handout – Future possible executions
Attachment IX	Susan Sitze handout - General statistical information
Attachment X	Doug Holbrook handout

ATTACHMENT I

HOUSE SELECT STUDY COMMITTEE ON CAPITAL PUNISHMENT

AGENDA

February 2, 2006
Room 643, Legislative Office Building
9:30 AM

WELCOME AND INTRODUCTION

Rep. Beverly Earle, Co-Chair
Rep. Joe Hackney, Co-Chair

- **Overview of Statistical Information Provided**

  -- Susan Sitze, Committee Counsel

- **Fiscal Information**

  -- Douglas Holbrook, Fiscal Analyst

- **Adequacy of Counsel Issues**

  -- Robert Hurley, North Carolina Capital Defender

  -- Henderson Hill, Ferguson Stein, Charlotte, NC

Committee Discussion

Instructions to Staff

ATTACHMENT II

VISITOR REGISTRATION SHEET

House Select Committee on Capital Punishment — February 2, 2006

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Howard Lunge	NCAJ
Mel Chilton	NCVAN
Tom [illegible]	NC VAN
Chet Hodgin	NCVAN
Cas Shaw	Raleigh
Alex Otten	Raleigh
~~Bob Hurley~~	~~Office of the Capital Defender~~
Elizabeth Hambourger	Center for Death Penalty Litigation
Scott Langley	Amnesty International
Justin Harvey	People of Faith Against the Death Penalty
Sarah Carucci	Common Sense Foundation

VISITOR REGISTRATION SHEET

House Select Comm. on Capital Financing 2-2-06

Name of Committee | Date

VISITORS: PLEASE SIGN BELOW AND RETURN TO COMMITTEE ASSISTANT

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Mel Chilton	NCVAN
[illegible]	DSI
[illegible]	NCVAN
Chet Hobbs	NC VAN
David Mills	COMMON SENSE FOUN
Brian Elderbroom	Common Sense Foundation
Mary Ann Tally	NCATL
James Lavey	
Wilma Lavey	NAACP
Holly Bryan	NCATL
Christina Madden	NCATL
[illegible]	[illegible]
Paola Ribadeneira	RCA
Mary Pollard	CDPL, Durham
[illegible]	D.A.'s Conference
JOE BREWER	DA - Person, Caswell 9A
Karen Wood	DA's Conference
Gerranda Lefiore	NAG (Neighbor Fighting Gangs)
Charmaine Fuller	CJPC
Kyle Hunter	DIDS
Dametrika Williams	grad student
Irene Nelson	OSBM
Chad Hunter	Civitas Institute
Sarah Owen	"
Kathryn DeBruhl	Meredith Student
LaFonda Jones	FAMM

ATTACHMENT III

Conference of District Attorneys
NORTH CAROLINA

Peg Dorer
Director

P.O. Box 25546
Raleigh, NC 27611

919.733.3484
919.715.0138

January 25, 2006

The Honorable Joe Hackney
North Carolina House of Representatives
2207 Legislative Building
Raleigh, North Carolina 27601-1096

Dear Representative Hackney:

Thank you for inviting the District Attorneys to participate in the first meeting of the House Select Committee on Capital Punishment. I hope that our input provided the committee with some insight on the issues facing District Attorneys with regards to capital cases.

At the meeting on December 19th, there were two questions directed to the Conference of District Attorneys to answer. As I recall, they were:

(A) How much effect has discretion had on the number of capital cases in the capital caseload, and
(B) What is the average expenditure of capital cases: defense vs. prosecutors.

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District Attorneys agree that prosecutorial discretion has lowered the number of cases tried capitally. However, the Conference of District Attorneys does not have any data collecting capabilities other than the statistical information we receive from the Administrative Office of the Courts. So I relayed the queries to the AOC Research and Planning Administrator. Mr. Kane reminded me that the *Criminal Information System* does not keep any kind of information that differentiates cases as capital. In fact the only information they have relative to capital cases is an annual survey they send out to District Attorneys asking for an estimate of the number of "death-qualified" juries they have each year. That survey is only as good as the responses they receive. So unfortunately, I am not able to provide you with answers to the committee's questions.

In response to your committee's quest for improvements to the capital case process, I have asked for input from a number of District Attorneys. Following are some thoughts they had:

1. Rule 24 hearings come too soon in the process. D.A.s need time to get complete law enforcement reports in order to make honest evaluations. The wording needs to comply with open file discovery rules.
2. Until a rule 24 hearing is set and the case is determined capital, IDS should not appoint 2 attorneys and attorneys should not be paid the $85 capital fee.
3. Law partners of people assigned to capital cases should not be able to bill as consultants if they are not assigned to the case.
4. Travel costs should be more seriously scrutinized.
5. Discovery efforts and costs are wholly absorbed by law enforcement and prosecutor offices, although they benefit the defense as well. Therefore support for technology in the area of automated discovery is of extreme importance. This will also allow all parties to know if and when a lawyer has availed himself or herself of the discovery.

I hope this information will help your committee in its efforts to improve the capital case process specifically, and the criminal justice system as a whole.

If the Conference or any of the elected District Attorneys can further assist you or your committee in anyway, please do not hesitate to call.

Sincerely,

Peg Dorer
Director

ATTACHMENT IV

North Carolina
ACADEMY of TRIAL LAWYERS
Protecting People's Rights

To: Members, House Select Committee on Capital Punishment
From: NC Academy of Trial Lawyers
Re: Adequacy of Counsel in Death Penalty Cases
Date: February 2, 2006

Enclosed please find an assortment of press clippings citing specific instances of inadequate representation of defendants in capital cases. Inadequacy of counsel has been a serious problem in capital cases throughout our history. We are fortunate to have implemented guidelines for capital counsel relatively recently, but a large majority of those currently on death row did not have the advantage of those reforms.

Should you have any questions, please do not hesitate to contact us.

Richard M. Taylor, Jr.
Chief Executive Officer

Holly M. Bryan
Legal Affairs Counsel

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Published: Nov 15, 2005 12:30 AM
Modified: Nov 15, 2005 08:43 AM

Extreme justice

North Carolinians in the last few days have seen the extremes of punishment that this state delivers to murderers.

Steven Van McHone, 35, a substance abuser from the age of 12, was executed Friday by lethal injection for the 1990 slaying of his mother and stepfather. McHone's appellate lawyers couldn't compensate for the failures of his trial lawyer, Terry Lee Collins. Witnesses testified before a jury that McHone had downed a bottle and a half of whiskey plus a pitcher of beer before killing Mildred and Wesley Adams Sr. in their Surry County home. Adams' son, Wesley Jr., saw the killings, but insisted at the trial that McHone was sober.

Collins' investigation didn't uncover a self-contradicting statement from the younger Adams that might have helped McHone during his trial's penalty phase. And former District Attorney James L. Dellinger Jr. didn't disclose the statement.

Now, prosecutors are required by a 2004 law to open all investigative files to defense lawyers in felony cases. What's more, Dellinger has been forced out of the D.A.'s office because of forgery charges, and Collins has been disbarred over a fake driver's license scheme.Separation from all contact with law-abiding people is proper punishment for convicted murderers. North Carolina recognizes as much now by sentencing only half a dozen or so killers to death every year. On close inspection, they increasingly seem to be, not necessarily the most egregious cases, but the unluckiest ones.

Luck, of a sort, was with biochemical researcher Ann Miller Kontz when Raleigh police began to suspect her in the 2000 arsenic poisoning death of her husband, Eric. Two of the state's top defense lawyers, Joseph B. Cheshire V and Wade Smith, took her case. They negotiated a bargain under which she pleaded guilty to second-degree murder and conspiracy to commit first-degree murder. Kontz, now 35, was sentenced to 25 to 31 1/2 years in prison.

Justice is supposed to be blind to class, the same as it is blind to race, sex, ethnic origin and so on. The cases of McHone and Kontz can't help but leave the impression that when it comes to class, which easily can influence the quality of a defendant's legal representation, Tar Heel justice has 20-20 vision.

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Posted on Wed, Oct. 16, 2002

The Charlotte Observer

Study raps death-row lawyering

1 in 6 of the attorneys in capital trials were disciplined by the bar

ANNA GRIFFIN
Raleigh Bureau

More than one in every six N.C. death row inmates was represented in court by a lawyer disciplined by the N.C. State Bar -- and one research group says that shows the need for a moratorium on executions in North Carolina.

A report released Tuesday by the Common Sense Foundation, a liberal-leaning Raleigh think tank, shows that 35 of the 208 people awaiting execution were represented at trial by lawyers disciplined by the State Bar. The Bar estimates that it has disciplined fewer than 1 percent of North Carolina's lawyers.

"There is no other way to fix the system except to start over with new trials for these people," said David Mills, who wrote the study. "This is really only scratching the surface of the problem. There's a huge number of people on death row who haven't had adequate representation. ...We need to stop what we're doing and take a long, hard look at the system."

The quality of counsel death-penalty defendants receive has been a hot issue in recent years. Nationally, more than of one-third of death sentences are reversed because defense lawyers failed to provide competent counsel, according to a Columbia University study.

Two years ago, the General Assembly took the appointment of capital lawyers out of the hands of judges. Now a 13-member commission selects which lawyers handle death-penalty cases.

Recent reforms also made it easier for defense lawyers to hire investigators and test evidence.

"We've made a lot of progress over the past two years," said Joe

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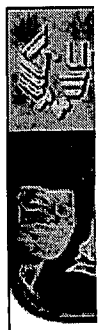
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Cheshire, a Raleigh lawyer and a member of the Indigent Defense Commission. "I'd be concerned about these statistics. Yes, they give me pause ... But without knowing what the discipline is, you can't make a judgment about whether a lawyer is competent or incompetent or honest or dishonest."

Anna Griffin: (704) 358-5940; agriffin@charlotteobserver.com.

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Posted on Tue, Oct. 22, 2002

Life or death matter

New report questions fairness of N.C. murder trials

North Carolinians support the death penalty for the worst of crimes -- premeditated murder. They also expect the state to conduct a fair trial with an adequate defense for a person who may be put to death if found guilty. The public doesn't want a guilty person to go free, but it doesn't want an innocent person to be convicted, either.

There's troubling evidence that the state's conduct of murder trials may not be as evenhanded in practice as it appears to be in principle.

A look at how the law works across the state reveals the first problem. When The Observer looked at murder cases a couple of years ago, it found disturbing variations in how the death penalty is applied.

Observer reporters found that a defendant's chances of getting a death sentence varied depending upon where the crime was committed, where the trial was held, who the prosecutor was and who the defense attorneys were. Murder defendants often don't have the money to hire a lawyer. The state has assigned lawyers to represent them, but has not made sure those lawyers have the experience and ability to do the job well.

A new report by the Common Sense Foundation in Raleigh reinforces concerns about the system. It examined the professional records of lawyers appointed to represent indigent defendants and found that more than one in six of those on Death Row were represented by lawyers who have been disciplined by the state bar.

The report asserts that "North Carolina has failed to provide fair trials for men and women facing the death penalty by repeatedly assigning some of the state's worst lawyers to try capital cases."

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The report -- available on the web at www.common-sense.org -- says that lawyers in 35 death cases had been disciplined by the state bar for a variety of abuses -- felonies, embezzlement, prejudicial conduct and failing to properly represent clients. Among them was Douglas Osborne, a lawyer who unsuccessfully defended a death case defendant shortly after being released from federal prison for possession of child pornography. Another was Charlotte lawyer Sharon Jumper, disbarred this summer for numerous violations, who also represented a death row inmate.

The American Bar Association has recommended that lead attorneys in capital cases have at least five years' criminal experience, including nine jury trials, and prior experience assisting in death cases. North Carolina has not adopted these minimum standards.

The state has moved, however, to improve its practices. Previously, judges assigned lawyers to poor defendants. The recently created Indigent Defense Commission will manage the process in the future and reduce the likelihood that poor defendants will get bad lawyers.

Fair trials work both ways. The public wants to make sure that the guilty are punished -- but it also wants to make sure that prosecutors have the right person. When bad lawyers represent those accused of the worst crimes, doubts naturally arise whether a trial was fair. The Common Sense report ought to renew the debate about adopting minimum standards for death case lawyers.

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EDITORIALS

Death penalty doubts resurface

10-22-02

News & Record

Adding to concerns about the fair administration of the death penalty, a new Common Sense Foundation report shows more than one in six current death row inmates was represented by court-appointed attorneys who have been disciplined by the North Carolina State Bar.

More chilling, attorneys disciplined by the Bar represented nearly 20 percent of the inmates put to death since the state renewed capital punishment in 1977. By contrast, the Bar estimates fewer than 1 percent of the state's lawyers have been singled out for discipline. These were not slaps on the wrist for some minor infraction. Some attorneys in question had committed felonies, and some later were disbarred.

One attorney the report cites is Douglas Osborne Jr. of Reidsville, who represented current death row inmate Kenny Neal in 1996. The state appointed Osborne just after his release from federal prison for child pornography charges. After the trial, jurors admitted that they knew about Osborne's felony conviction and it influenced their perception of his arguments.

Critics have argued that unless misconduct can be proved in the specific death penalty trial, it should be assumed that defendants had adequate representation. Others say that unless the state conspired to deny poor defendants representation, their convictions ought to stand unchallenged.

These arguments ignore the state's duty to be above reproach when making the irreversible decision to end a life. When appointing attorneys for the indigent, the state should adopt standards similar to a private consumer's. Most people would be loath to face a capital case

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relying on a lawyer who had been disciplined or suspended.

Poor representation tips the scales against someone not yet proved guilty. Even capital punishment supporters recognize the system's moral authority rests upon making every effort to eliminate bias. Aware that there are disparities, many thoughtful citizens on both sides of the issue support placing the state's 208 pending executions on hold until its system can be evaluated and reformed. For them, one person wrongly put to death after an inadequate trial is too many.

The General Assembly made great strides two years ago by creating a special oversight office for lawyers appointed to represent the poor. It replaced a system of Superior Court judges sometimes appointing their cronies or lawyers rumored to be incompetent. Raleigh Attorney Joe Cheshire, who has worked with indigent services and the state Bar, defends the new system but still favors a moratorium on executions.

The Common Sense study gives Gov. Easley another reason to consider a pause, too -- at least until our justice system receives a clean bill of health.

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Columnists

Mon, October 21, 2002

Death Penalty Caution

A recent study, modifications to state law and a growing trend toward restricting imposition of the death penalty together provide evidence that North Carolina should proceed with caution in carrying out the death penalty.

On Thursday, the Common Sense Foundation in Raleigh released a study showing that more than one in six death-row inmates had court-appointed attorneys whom the N.C. state bar had disciplined.

Not long ago, a survey by the National Law Journal found that more than half of death-row inmates in six Southern states had been represented by lawyers who had never before handled a capital case.

Such evidence that defendants facing death often get ineffective counsel, combined with other factors, suggests that the state should consider at least re-examining cases in which the inmate's counsel has been disciplined, even in another case. Of the attorneys listed in the Common Sense Foundation study, six have been disbarred. One had represented five death-row inmates.

Some states have stopped executing people while they address concerns about the fairness and reliability of the system. On Oct. 15, outgoing Illinois Gov. George Ryan opened a series of clemency hearings for almost all that state's death-row prisoners. The next day, he pardoned four inmates whom DNA evidence had exonerated. The crime took place in 1986; had they been on death row, they might already be dead.

Nebraska issued a moratorium on executions three years ago.

Nationally, 85 people have been found to be innocent and released from death row since 1973. It's reasonable to think that some of the 200-plus inmates on North Carolina's death row might be there because their attorneys were ineffective.

Within the last two years, North Carolina has outlawed executing the retarded and has given district attorneys more choice in asking for life without parole instead of the death penalty.

The U.S. Supreme Court has ruled that executing retarded people is unconstitutionally cruel. Just 12 years ago, Justice Sandra Day O'Connor said there seemed to be no national consensus on the question; now, the court says it's found one and remarked on "evolving standards of decency."

Sixteen states ban execution of the retarded; 12 have no capital punishment. Polls have showed that many people who favor the death penalty think a moratorium is appropriate. And support for the death penalty drops dramatically when life without parole is an option.

As North Carolina becomes more hesitant about executions, information about how many death-row inmates' lawyers have been disciplined raises more questions. Those cases, at least, may deserve another look.

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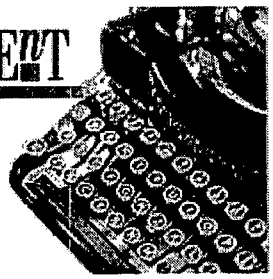
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REPORT CUTS THE CORD

INDEPENDENT ONLINE



Burtman

Criminal Injustice

BY BOB BURTMAN

No one's surprised to find drug addicts, thieves and sex offenders in criminal courtrooms. Just not sitting in the defense counsel's chairs. But in North Carolina, those facing the death penalty have often been represented by lawyers with nasty legal troubles of their own--including drug addicts, thieves and sex offenders.

October 16, 2002
BOB BURTMAN

Douglas Osborne was appointed to handle the trial of capital defendant Kenneth Neal in 1996. Osborne, a former Rockingham County prosecutor, had served a year in prison after his 1990 conviction on a child pornography charge--a crime that scandalized the community. Neal got the death penalty; later, juror Pam Williams testified in an affidavit that having Osborne as his lawyer sealed Neal's fate. "I do not feel that Kenneth Neal could have done any worse than to have Mr. Osborne as his attorney," Williams wrote. "As a jury we knew about Mr. Osborne's pornography offenses because we talked about them during deliberations." Last year, the state added another line to his rap sheet after Osborne neglected to file four years' worth of state tax returns.

Terry Collins was disbarred in 1998 after pleading guilty to forging birth certificates to help his DWI clients fraudulently obtain drivers licenses, for which he served jail time. Collins represented five inmates currently on death row. In the case of Frank Chandler, Collins apparently failed to disclose that he and his co-counsel had previously represented a key prosecution witness in various felony charges (unbeknownst to Chandler), a conflict of interest that may be grounds for reversal. All five inmates claim that Collins did not provide an adequate defense.

David Tamer surrendered his law license in 2000 for misappropriating client funds, including those of death-row inmate Blanche Taylor Moore. Tamer later pleaded guilty to felony embezzlement and received a suspended sentence. The disbarment followed a three-year suspension levied in 1994 for

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ethical violations and other misconduct. He also had a history of mental problems that impaired his ability to service his clients: In the weeks before Tamer was to argue an appeal on behalf of death-row inmate Willie Fisher (executed last year), he was hospitalized for depression.

According to a report just released by the Common Sense Foundation, "Life and Death Lottery: Capital Defendants and the Lawyers Who Fail Them," those cases are appallingly typical. No fewer than 35 inmates currently on death row--one out of every six--were represented by lawyers who have been disbarred, suspended or otherwise disciplined by the state. That list doesn't include at least four inmates who have already been executed. Michael McDougall, for example, had the misfortune of having Jerry Paul appointed to his case. A judge who reviewed McDougall's appeal found that Paul had "acted unethically or even criminally" while defending his client.

It also doesn't include lawyers who have thus far escaped sanctions for their behavior. Tom Portwood admitted to drinking half a fifth of rum every evening while representing three clients on trial for their lives. One weekend while on appointment to defend Nathan Bowie, Portwood registered a .43 blood alcohol content, a near-lethal level, after being tested in connection with a car crash. Portwood has claimed that his alcoholism didn't interfere with his performance, but he was also in the midst of a crumbling marriage and was being pursued by the IRS for $100,000 in back taxes. Serious doubts about his work in all three cases have made headlines.

Nor does the list include those who, through no fault of their own, were incapable of doing the best job for their clients. Tim Merritt was dying of cancer during the trial of Bobby Lee Harris and took prescription drugs to ease his severe pain; his co-counsel was so alarmed at Merritt's erratic and damaging behavior that on one occasion he asked him, "Whose side are you on?"

The courts have occasionally acknowledged that criminal defendants are entitled to at least the semblance of a defense. In North Carolina, at least seven cases have been overturned on bad-lawyer claims since the death penalty was reinstated in 1977. In reversing the conviction of Thomas Jack Brown, a Lumberton judge found 36 botches by his lawyer, Ertle Chavis. While a thorough defense takes hundreds of hours to prepare, Chavis spent fewer than 40.

But judges have been quite stingy with such rulings, partly because the burden of proof is tough to meet: Defendants must show not only that the lawyer's work was substandard, but that it had a bearing on the outcome of the case. Judges in North

Carolina also are well aware that a record of overturning capital convictions doesn't look very attractive on election resumés. How else to explain the lack of judicial sympathy for Russell Tucker, whose own attorney, David Smith, freely admitted sabotaging his defense by deliberately missing a filing deadline because he believed his client should die?

It goes without saying that all the attorneys in question were appointed by judges to represent poor defendants who could not afford to hire their own. Until recently, court-appointed lawyers were grossly underpaid and often inexperienced--David Junior Ward, for example, was assigned two attorneys with zero capital murder trials under their belts. Lead counsel DeLyle Evans specialized in real estate transactions and had previously handled one murder charge that was resolved before trial. Evans withdrew from the case because he lacked the ability to do the job, but a judge reappointed him, saying he couldn't find anyone else. Ward was sentenced to death and his appeals failed in large measure because of the lawyers' admitted lack of legal knowledge.

It also goes without saying that judges would never accept anything less than the best for their own defense. "If the standard was, would I allow this person to defend a member of my family, then judges would look at the quality of representation much differently than they do," says Bob Hurley, who in his role with the state's Indigent Defense Services assigns attorneys to potential death-penalty cases.

In 2000, the state legislature created Indigent Defense Services to fix some of the worst problems with the system of court appointments. The agency began operating last year, and Hurley says the change has already made a difference. The worst lawyers have been weeded out, and access to resources has been improved. "I think it's a very important first step," he says.

The numbers back him up. This year, juries have handed down only five death sentences. In 2001, the figure was 14, down from 18 the year before. "There's no question that the quality of appointments has improved," says Hurley.

Still, he says, it's too early to say the problem has been fixed. A lack of funds nearly drove many of the best lawyers from the program before the legislature added some cash in the waning days of the session, and budgetary concerns remain. A shortage of qualified attorneys plagues certain parts of the state, and the abilities of the attorneys on his eligibility list vary greatly. "It's not a list of the best and brightest in North Carolina," he says.

And the repair efforts do nothing to help those already on death row who had to take whatever lawyer they were given and were

dealt the dead man's hand. The astonishing number of death-row inmates who had malfeasant and incompetent lawyers "raises serious concerns about the legitimacy of their convictions and death sentences," says Hurley. "It shows how broken the previous system was."

So broken that some defendants had not one, but two iffy lawyers help shepherd them to death row. Glen Chapman was assigned both Tom Portwood and another lawyer with a history of alcohol abuse, Robert Adams. Convicted of neglecting to pay his state income taxes for three years, Adams was also found by the State Bar to have avoided an IRS lien (again for failure to pay taxes) by funneling money into an account maintained at Portwood's office. Since 1991, Adams has been disciplined six times by the bar.

This is not simply a question of essential fairness, or even whether the defendants were guilty or innocent of their crimes. The U.S. Supreme Court has ruled that the constitutional right to a lawyer means an effective lawyer, which one might reasonably assume excludes drug addicts and criminals. Until judges--or the state's elected officials, who should establish a moratorium on executions until these and other problems with the death penalty can be resolved--acknowledge that this is not simply a technical question, North Carolina's capital punishment system stands as a cynical example of criminal injustice at its worst. ■

Send your story tips, comments and apocalyptic declarations to Bob Burtman at burtman@indyweek.com

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GREENSBORO



Panel limits lawyer's practice

2-19-03

By MIKE FUCHS, Staff Writer
News & Record

A Greensboro lawyer who admitted sabotaging a death-row inmate's appeal has been banned from handling death penalty cases for three years.

The State Bar Disciplinary Hearing Commission also suspended David B. Smith's license for three years. But the group stayed that suspension on condition he doesn't represent capital murder defendants until 2006 and attends a lawyers' support group.

Smith, 54, did not return messages Tuesday left at his home and office.

In October 2000, Smith said in an affidavit he let his co-counsel Steve Allen miss a key state Supreme Court deadline for filing one of Russell Tucker's appeals. Smith said it wasn't Allen's fault. Smith said he made excuses to avoid working with Allen on the case or simply failed to show up. He said he knew Allen misunderstood the deadline but didn't correct him.

Tucker, 36, was scheduled to die Dec. 7, 2000, for the 1994 murder of Maurice Travone Williams, a Kmart security guard in Winston-Salem.

"I decided that Mr. Tucker deserved to die and I would not do anything to prevent his execution," Smith said in the affidavit.

After Smith's affidavit was filed, the state Supreme Court stayed Tucker's execution in November 2000. The justices granted the stay so Tucker could get new lawyers and review his appeal. He is still on death row.

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Allen, a member of the Disciplinary Hearing Commission, declined to comment Tuesday. Allen said he was not part of the commission panel that investigated Smith's conduct.

Lawyers Robert McClellan and John Bryson, who now represent Tucker, did not return messages Tuesday.

Last week, the Hearing Commission concluded Smith intentionally prejudiced or damaged Tucker's case.

But in not revoking his license, the commission found Smith's poor conduct was offset by reasons including his "good character and reputation," remorse, admitting wrongdoing and personal or emotional problems he was suffering at the time.

Smith, a former federal prosecutor in Greensboro, said in an interview in November 2000 he was motivated to come forward because he felt overwhelmed by depression and guilt.

The commission ordered Smith must also participate in the State Bar's Lawyer Assistance Program, a peer support group that helps attorneys struggling with mental health or substance abuse problems.

Ken Rose, director of the N.C. Center for Death Penalty Litigation, called the commission's ruling fair.

Rose has helped assist Tucker's defense.

"I think that they looked at all the factors including probably the most important one - that he ultimately came forward and acknowledged that he intentionally missed the deadline," Rose said. "I think given all the factors that's a reasonable and just outcome."

"I think that he is very fortunate to have been able to continue to practice, even though he cannot handle capital cases," said Guilford County Public Defender Wally Harrelson. "He did, as I understand it,immediately bring to light what he had failed to do and set about getting it taken care of. Obviously, the bar took that into consideration in meting out punishment."

Tucker's execution date has not been set, said Keith Acree, state Department of Correction spokesman.

Contact Mike Fuchs at 373-7077 or mfuchs@news-record.com

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Common Sense Says...

that people on Death Row often had the state's worst lawyers at trial.

One of the fundamental guarantees of our criminal justice system is the absolute right to trial. That right requires competent counsel for the defendant. This report examines how Carolina is meeting that basic requirement by taking an in-depth look at the lawyers who represented the men and women currently on North Carolina's death row. Almost all of th inmates could not afford to hire their own attorneys. Their lawyers were appointed by the state to try the most complicated and most important criminal cases considered by our cc system, cases where defendants are on trial for their lives.

The conclusion is clear and inescapable: North Carolina has failed to provide fair trials for and women facing the death penalty by repeatedly assigning some of the state's worst lawyers to try capital cases.

There are now 207 people on death row in North Carolina. More than one in six of them w represented at trial by lawyers who have been singled out for disciplinary action by the St Bar. These attorneys have committed felonies, embezzled money, intentionally prejudicec clients or failed to properly represent them.

One of those lawyers is Douglas Osborne, Jr. In 1991, Osborne was convicted of possessi child pornography and sent to federal prison for one year. As a result, his law license was suspended for five years. Immediately after his release from prison, his right to practice l was reinstated, and the state assigned him to represent Kenny Neal in a capital trial. It w Mr. Osborne's first capital case, and Mr. Neal received a death sentence. Later two jurors swore in affidavits that they had been aware of Mr. Osborne's child pornography convictic and that it was a factor when they considered his arguments to spare Mr. Neal's life. Mr. Osborne was later reprimanded by the Bar for "forgetting" to enter an appeal for another client, thereby forfeiting the client's right to appeal.

Another example is Sharon Jumper, an attorney from Charlotte. She was disbarred in Jun 2002 for numerous violations, including mishandling client funds, falsely accusing an assi district attorney during a murder trial, and failing to respond to inquiries from the State B a timely manner. She was also convicted of felony financial card fraud. One of Ms. Jumpe clients was Melvin Hardy, who is currently on death row. The state had appointed Ms. Jun to represent Mr. Hardy at his capital trial.

The Standards for a Trial Attorney

The professional standards for trial lawyers evolve as the court system, through preceder raises or lowers the bar for acceptable legal representation. The American Bar Associatior recommends that lead attorneys in a capital trial have at least five years of criminal defer experience, have prior experience in at least nine serious jury trials, and experience as counsel in a case where the death penalty was sought. North Carolina has not demanded these standards of capital attorneys.

Most of the defendants facing capital charges in North Carolina are indigent and unable tc afford a private attorney. Until recently, local judges assigned lawyers to poor defendants State leaders recognized the problems in this system and recently established the Indiger Defense Commission to manage the process.

That change may make it less likely that poor people get bad lawyers, but it is little consolation to the 207 men and women sent to death row under the system that the stat itself has recognized is flawed.

An Objective Measure of the Problem

One objective way to measure just how flawed the appointed counsel system has been in North Carolina is to use the lawyers' status with the profession's own licensing organizatic the State Bar.

North Carolina State Bar records show that at least **37** of the 207 men and women currer on death row were represented by attorneys disciplined by the Bar. That means **one in s inmates facing execution.** By contrast, the State Bar estimates that fewer than 1% of state's attorneys have been singled out for Bar discipline.

On February 21, 2000, Fred Williams pleaded guilty to one felony count of possession of cocaine and one misdemeanor count of possession of marijuana in Hart County Superior in Georgia. Due to his conviction, his law license was suspended for three years. Earlier ir career, he represented Norris Taylor in his capital trial. Taylor is now on death row.

Of the 21 North Carolinians executed since the death penalty was reinstated in 1977, **fou** nearly 20%, were represented by attorneys who were disciplined by the Bar.

David Tamer, who represented Blanche Taylor Moore as well as Willie Fisher (Fisher was executed last year), was disbarred in 2000 for misappropriating funds. During the time th represented Ms. Moore, he was suffering from severe depression and mental health probl and had to seek professional help.

The Limits of Disciplinary Action

This study shows the number of death-penalty defense attorneys who have been disciplin by the State Bar, but it only begins to count the number of incompetent lawyers who are regularly appointed to do capital defense work. Stories abound of lawyers who sleep thro large portions of capital trials or who spend few hours researching and preparing for trial. Lawyers with severe substance abuse problems often elude formal discipline, yet their performance can be devastating to a client.

For example, attorney Tom Portwood represented three capital defendants who ended up death row. Portwood admitted to drinking 12 shots of rum every night during the trial of Ronnie Frye. Frye was executed last year. Yet Portwood has never been formally disciplin the State Bar, so despite affidavits from his co-counsel that state that Portwood was ineffective at trial, Portwood is not included in this study.

Conclusion

A person on trial for his or her life should be guaranteed representation by two competen attorneys with at least some experience in capital defense. This study shows that for year North Carolina has been sending men and women to death row without the benefit of adequate representation at trial.

The attorneys listed in this study have been disciplined by the State Bar, which is an extremely rare and severe punishment for attorneys in North Carolina. Yet despite the ra Bar discipline, one in six current death row inmates were represented at trial by an attorr who has been penalized by the Bar in some fashion. This report does not include informat about lawyers who provided ineffective representation in death penalty cases, only about those who have been singled out by the State Bar.

Some reforms to this broken system are already underway, such as the creation of Indige Defense Services, set up in 2001 to coordinate the legal defense of North Carolinians whc could not afford their own attorneys.

IDS may well improve the representation system by imposing minimum standards for cap trial attorneys and setting up a system of accountability. Any reform brought forth at the level by IDS, however, will not help the 207 people who are already on Death Row in Nor

Carolina.

Recommendations

The heated debate about capital punishment continues in North Carolina, but both oppon and supporters of the death penalty believe that people facing the ultimate punishment deserve a fair trial.

The state of North Carolina has recognized that for years there were problems with the w lawyers were appointed to represent indigent clients. North Carolina Bar data shows that state was right, that poor capital defendants who were forced to rely on court-appointed lawyers often were denied that basic right to a competent defense.

Now that the state has moved to reform that system, it must also finally provide a fair tri the men and women on North Carolina's death row who were represented by lawyers wh have been disciplined by the Bar.

New trials should be granted to each of those 37 death row inmates. Fairness and justice demand no less.

The following inmates currently on North Carolina's death row were represented by trial attorneys who have been disciplined by the State Bar:

Inmate	Attorney
Billy Anderson	Jerry Redfern
Terry Ball	Maynard Harrell
Kyle Berry	William Peregoy
Shawn Bonnett	Maynard Harrell
Michael Braxton	Jimmie R. "Sam" Barnes
Terrance Campbell	Maynard Harrell
Desmond Carter	Doug Hux
Frank Chambers	William Causey
Frank Chandler	**Terry Collins**
Glenn Chapman	Robert Adams
Daniel Cummings	Michael Ramos
Jerry Cummings	**Edward Bodenheimer**
Johnny Daughtry	Cindy Huntsberry
Keith East	**Terry Collins**
John Fleming	Jimmie R. "Sam" Barnes
James Gell	Maynard Harrell
Melvin Hardy	**Sharon Jumper**
Edward Hartman	Jimmie R. "Sam" Barnes
Michael Holmes	Cindy Huntsberry
James Jaynes	Michael Edney
Marcus Jones, Sr.	Samuel Popkin
Steven McHone	**Terry Collins**
Leroy McNeill	**James Blackburn**
Blanche Taylor Moore	**David Tamer**
Carl Moseley	**Terry Collins**
Kenneth Neal	Doug Osborne, Jr.
George Page	Larry Eubanks
Rex Penland	**Terry Collins**
Michael Reeves	Jerry Redfern
Christopher Roseboro	**Curtis Harris**
Donald Scanlon	Lee Castle
Clinton Smith	Jimmie R. "Sam"
Reche Smith	Maynard Harrell
Davy Stephens	Cindy Huntsberry
Norris Taylor	Fred Williams
Rodney Taylor	William Peregoy
Ronald Valentine	Regina Moore

Violations

A: Violating Professional Rules of Conduct

B: Conviction of a Criminal Act

C: Dishonesty, Fraud, Deceit, or Misrepresentation

D: Financial Dishonesty, Fraud, or Deceit

E: Conduct Prejudicial to the Administration of Justice

F: Intentionally Prejudicing or Damaging Client

G: Failure to Represent Client in a Diligent and Adequate Manner

Category Pctg. Of Attys Committing

A 32.0%

B 41.0%

C 27.0%

D 27.0%

E 18.0%

F 0.5%

G 45.0%

The most frequent violation was the failure to diligently and adequately represent their cli
The second most committed violation was engaging in a criminal act.

DISCIPLINED ATTORNEYS AND DEATH ROW CLIENTS

The following is a complete list, by attorney's name, of all lawyers who have clients curre
on death row AND have been disciplined by the State Bar:

Attorney Client Proceeding Order Date Order

Attorney	Client	Proceeding	Order Date	Order
Adams, Robert	G.Chapman	Grievance	4/30/97	Censure
	W.Bowie	Disciplinary	11/20/97	2 yr. Susp./stay
		Disciplinary	6/11/99	stay extended
		Disciplinary	5/8/00	3 yr. susp., stay
		Reinstatement	4/5/01	Reinstated
Barnes, Jimmie R.	E.Hartman	Disciplinary	6/21/01	5 yr. Susp.

	C.Smith J.Fleming M.Braxton			
Blackburn, James	L.McNeill	Surrender	4/16/93	DISBARRED
Bodenheimer, Ed	J.Cummings	Grievance Disciplinary	5/7/92 9/9/92	Reprimand DISBARRED
Castle, Lee	D.Scanlon	Grievance	10/30/01	Censure
Causey, William	F.Chambers	Disciplinary	5/10/93	Warning Letter
Collins, Terry	K.East S.McHone R.Penland F.Chandler C.Moseley	Disciplinary	6/10/98	DISBARRED
Edney, J. Michael	J.Jaynes	Grievance Disciplinary	5/17/97 6/11/99	Reprimand 2 yr. Susp., stay
Eubanks, Larry	G.Page	Disciplinary	2/8/85	Public Censure
Harrell, Maynard	J.Gell Reche Smith S.Bonnett T.Ball	Grievance	11/10/00	Reprimand
Harris, Curtis	C.Roseboro	Grievance Grievance Grievance Disciplinary	11/3/97 11/3/97 11/2/98 12/8/98	Reprimand Reprimand Reprimand DISBARRED
Huntsberry, Cindy	D.Stephens J.Daughtry M.Holmes	Grievance	8/21/91	Public Censure
Hux, Doug	D.Carter	Grievance	2/6/02	Reprimand
Jumper, Sharon	M.Hardy	Grievance Judicial Grievance Disciplinary	3/13/00 10/23/01 5/26/01 6/13/02	Reprimand Susp. 90 days Reprimand DISBARRED
Moore, Regina	R. Valentine	Disciplinary	2/23/95	Censure
Osborne, F.Douglas	K. Neal	Disciplinary	11/18/91	Susp. 5 yrs.

		Grievance	8/9/96	Reprimand
		Grievance	2/14/00	Censure
Peregoy, William	K.Berry R.Taylor	Grievance	8/10/93	Reprimand
Popkin, Samuel	M.Jones	Disciplinary	6/12/91	1 yr. susp., 3 st
		Grievance	8/21/91	Public Censure
		Disciplinary	4/16/92	3 yr. susp., 2 st
		Reinstatement	9/13/93	Reinstated
		Grievance	9/13/96	Censure
Ramos, Michael	D.Cummings	Disciplinary	7/5/89	Public Censure
Redfern, Jerry	B.Anderson	Grievance	2/16/92	Reprimand
	M.Reeves	Grievance	8/2/92	Censure
Tamer, David	B.T.Moore	Surrender	4/14/00	DISBARRED
Williams, Fred	N.Taylor	Disciplinary	9/21/00	3 yr. susp., stay
		Reinstatement	3/23/01	Reinstated

Procedure for Disciplinary Proceedings

The State Bar is the organization that tracks and maintains the quality level of licensed attorneys in North Carolina. Once an attorney passes the Bar exam and is given the auth to practice law, he or she agrees to uphold and follow the Bar's Rules of Professional Con These rules serve as a code that dictates acceptable and unacceptable actions and behavi for attorneys practicing law in the state. The primary reason that attorneys are sanctione the Bar is for engaging in professional misconduct, which is specified by Rule 8.4 in the R of Conduct. Though these are not the only rules that f broken merit disciplinary response, are the ones violated at the highest rate.

Rule 8.4 states that it is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or inc another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official;

(f) knowingly assist a judge or judicial officer in conduct that is a

violation of applicable rules of judicial conduct or other law; or

(g) intentionally prejudice or damage his or her client during the course of the profession

relationship, except as may be required by Rule 3.3.

Potential Disciplinary Actions

The Bar has designated several types of orders that can be made against an attorney onc they have been found guilty of violating the Rules of Conduct. Disbarment is the most se\ punishment the Bar can impose, but once disbarred, an attorney can seek to reinstate his her license after five years. The other disciplinary actions serve as warnings to help corre misconduct. Here are the primary potential actions, listed by level of severity:

1. Letter of Warning
2. Reprimand
3. Censure
4. Suspension and/or Stay
5. Disbarment

The Process

For an attorney to be disciplined by the State Bar, someone must file a formal complaint notice of grievance against the attorney. The Bar decides if the complaint has enough me pursue, and then notifies the attorney in question that a grievance has been filed. As stat Rule .0112(c) of the Discipline and Disabilities Rules, a lawyer must respond to a letter of notice within 15 days with "a full and fair disclosure of all the facts and circumstances pertaining to the alleged misconduct."

The matter will then be heard by a Grievance Committee, which meets quarterly. This committee can issue disciplinary orders up to a censure. If the committee feels that an attorney's violations deserve suspension or disbarment, the matter is then sent to the Disciplinary Hearing Committee, which will then make the final decision as to whether a sanction should be imposed, and if so, what action should be taken. Each committee also the authority to dismiss a charge.

Report written by Frances Ferris, a student at UNC-Chapel Hill and an intern at the Comm Sense Foundation.

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Execution Ends Debatable Case

Law: Ronald Wayne Frye was a murderer, but his attorney was a drunk, and jurors were never told of Frye's hellish childhood.

By JEFFREY GETTLEMAN, TIMES STAFF WRITER

August 31 2001, Los Angeles Times

ATLANTA -- North Carolina prison officials executed a man early today whose lawyer admitted he drank 12 shots of rum a day during the penalty phase of his murder trial. With all legal avenues exhausted, North Carolina Gov. Mike Easley rejected Ronald Wayne Frye's appeal for clemency Thursday night, saying there was no doubt that "the defendant senselessly and brutally killed and robbed an elderly, innocent man."

Earlier Thursday, the U.S. Supreme Court denied a stay of execution. State and lower federal courts had turned down Frye's numerous requests for a retrial. He was executed by lethal injection at Raleigh's Central Prison.

Frye, a 42-year-old construction worker, robbed his landlord in 1993 and stabbed him to death with a pair of scissors. There is no doubt he committed the crime, but during the penalty phase of his trial, Frye's lawyer presented little evidence of a nightmarish childhood that might have swayed a jury into sparing his client's life.

The court-appointed lawyer, Tom Portwood, admitted he was drinking heavily during the case, downing nearly a pint of 80-proof rum every afternoon. He also revealed he was in a car wreck about the same time and was found with a near-lethal blood-alcohol level of 0.44%-- at 11 a.m.

"This case completely violates our sense of fairness," said Stephen J. Dear, executive director of People of Faith Against the Death Penalty, a North Carolina group calling for a death penalty moratorium. "This man essentially didn't have a lawyer, and if we think that's a fair trial, then our death penalty system is completely out of control."

Frye's is the latest case to raise troubling questions about the effect of bad lawyers in death penalty trials. Earlier this month, a panel of federal judges overturned the murder conviction of a Texas death row inmate because his court-appointed attorney had slept through substantial portions of his trial.

Frye's lawyers said he would not have been sentenced to death had the jury known the full story of his hellish upbringing. When Frye was 4, his alcoholic parents gave him away at a diner. His new father beat him with a bullwhip, leaving such severe scars on his back that police still use the photographs at child abuse seminars. Frye started sniffing glue at age 10, then turned to cocaine. He was shuffled from family to family, six changes in all, before he dropped out of high school. He was a crack-addicted construction worker when he sank a pair of scissors into his landlord's chest in a Hickory, N.C., trailer park. He owed the landlord money and was facing eviction.

"None of this justifies what he did, but had the jury known how he grew up, they would have felt mercy for him," said Frye's appellate lawyer Marilyn Ozer.

The U.S. Supreme Court has ruled that a defense lawyer has the responsibility to present "mitigating" factors about a client's background--child abuse, drugs, an especially tough environment--that might persuade a jury to spare a client's life.

None of Frye's family members was called to the witness stand. A psychologist did testify but shared little about Frye's childhood.

After he was convicted of first-degree murder of the 70-year-old landlord and sentenced to death, a new set of court-appointed lawyers based an appeal on Portwood's admitted incompetence. In 1997, Portwood detailed his drinking habits at a hearing and admitted he had not worked on the Frye case outside of court. He never drank before court appearances, he testified, though doctors said Portwood would have been still intoxicated in the morning from the quantity of rum he downed in the afternoon and evening.

Portwood, still practicing law in Hickory, did not return phone calls Thursday.

Two jurors have said they might have voted for life without parole had Portwood offered evidence of Frye's past.

The Frye case comes at a time when the death penalty is an increasingly controversial issue in North Carolina and beyond. This month, Easley, a Democrat, signed a bill into law that prohibits the execution of mentally retarded people.

A push is intensifying across the country for a moratorium on executions. Revelations of wrongful convictions, the advent of DNA technology, stories about inept lawyers and a nationwide decrease in crime have led many people to reexamine the value of executing criminals.

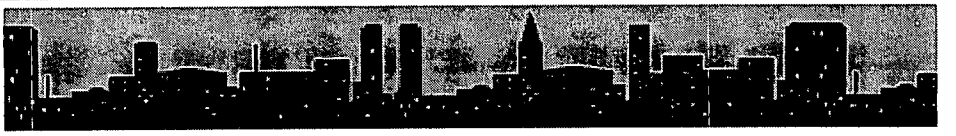
Several North Carolina cities have passed resolutions urging state legislators to halt executions. Eighteen people have been put to death in North Carolina since a nationwide moratorium was lifted in 1977.

In an interview Tuesday, Frye said he was ready to die. "I gave this to the Lord a long time ago," Frye told the Charlotte Observer. "I cherished life--and I still do."

Times researcher Edith Stanley contributed to this story.

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Uncertain justice

Incompetent defense undermines death penalty

Those accused of murder face trial for the worst crime in our system of justice and are subject to the most severe penalty: execution. By law and by any measure of fairness, they are entitled to an adequate defense before a jury decides whether they are guilty and, if so, whether they should be killed for their crimes.

In an investigation of capital punishment in North and South Carolina, The Observer found that in too many cases defendants are represented by incompetent lawyers poorly prepared for trials.

If these were traffic cases or breakings and enterings, the consequences would not be so extreme. But in capital punishment cases, where the death sentence takes the life of a defendant and ends forever any opportunity to correct a legal error or free a wrongly convicted person, an incompetent defense marks our system as fatally flawed. It puts that institution on the same footing of moral indifference as those who would casually condone murder. Murder is wrong; tolerating executions of defendants who have an inadequate defense is equally wrong.

In many cases, of course, appeals courts reverse death sentences because of inadequate or incompetent defenses. Defenders of the death penalty contend that this proves the system works. It does nothing of the kind. If the system worked right, it would not allow incompetent defenses in the first place, saving taxpayers potentially millions of dollars in retrials and preventing potential travesty.

The Observer's investigation showed incompetent defenses are not isolated. As the case of Ricky Frye in today's news report demonstrates, incompetent defenses that don't provide jurors sufficient information to make a fair decision can have terrible consequences. Had the jury in Ricky Frye's case had all the information about his horrifying and dehumanizing treatment as a boy, a juror told The Observer, he would not have been sentenced to death.

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Without that information, the jury decided the death sentence was in order. The N.C. Supreme Court has ruled that his defense was not so inadequate that jurors might have decided differently had they known the full circumstances. Unless a federal appeals court steps in and insists that he be tried with competent lawyers defending him, Ricky Frye could be executed in 2001.

This mocks the very notion of justice. It is a system where the wealthy and middle-income citizens can afford to hire good lawyers, but where the poor have little choice but to be represented by whatever lawyer they can get. Too often that means an inadequate defense - and higher chances of conviction and execution.

Policymakers in the Carolinas should impose a moratorium on executions until they can ensure that defendants have competent legal representation from the start. A moratorium isn't about whether the death penalty is right or wrong. It's about whether the penalty is equitably applied. Executions should halt until injustice clearly has been rooted out of the process.

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With lives on line, attorney turned to drink

3 Capital appeals allege shoddy work

By LIZ CHANDLER
Staff Writer

Hickory lawyer Tom Portwood remembers feeling out of control.

In three days, he was set to defend a man against the death penalty - and all he could do was drink.

An alcoholic for years, he'd handled capital cases before. But this time, Portwood says, he wasn't competent.

He hit bottom that Friday in 1996.

He was due at a final strategy session for a father accused of killing his baby. He staggered in late, smelling boozy and carrying not a briefcase - but his dog. He cuddled "Tigger" on his lap while his co-counsel and investigator discussed the looming trial. Then, without any contribution, Portwood went home.

Something had to be done, lawyer Ted Cummings decided. The law says every death penalty defendant is entitled to two attorneys, but Cummings felt alone in this case. The stakes were higher than ever, he says, because this client had been wrongly accused.

Cummings confronted Portwood. Then he phoned the trial judge.

That Monday, Portwood withdrew from the case, and Cummings went on with a new partner to win his client's freedom.

Now, appellate lawyers have challenged Portwood's performance in three other death penalty cases.

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In appeals, they say his work fell woefully below professional standards - and that three men stand to be executed, even though their lawyer performed poorly.

Portwood drank so much, the lawyers contend, it impaired his mental acuity and kept him from putting in crucial after-hours work.

Portwood says he never went to court drunk, but admits he drank at least a pint of rum a night while handling the three cases.

"The hallmark of any alcoholic is denial, but I don't think I performed at a sub-par level," says Portwood, 57, a mild-mannered former dentist who took up law at 42.

"It's their job in an appeal to challenge a lawyer's performance. But I can understand their arguments, and I think they have some validity."

A death verdict

The cases date back to 1993.

Portwood's spiral had already begun, he says. His wife wanted a divorce. The IRS wanted nearly $100,000 in back taxes. And Portwood worked grueling hours - as a dentist and a lawyer - to pay off debt amassed from "living beyond my means."

He pushed plea bargains some days, and pulled teeth on others. In the evenings, he poured navy grogs, mixing rum with tap water the way the British navy did.

His addiction was so severe that a year earlier, when the car he was riding in crashed, doctors recorded his blood alcohol content at 0.436percent - a near fatal level.

The first trial now under scrutiny came in February 1993. Nathan Bowie, a popular former football player at Newton-Conover High, was charged with two counts of murder. His defense seemed strong, Portwood says: Bowie was avenging an attack on his aunt - and prodded by his uncle - when he shot two men.

Prosecutors offered a plea bargain of 20 years in prison. But Bowie, 19, believed he'd do better in court.

Portwood was appointed lead attorney. His co-counsel was two years out of law school. As they prepared the case, Portwood admits he drank most nights - and he continued throughout the trial.

The jury quickly found Bowie guilty. When it came time to decide

mother to explain why his life should be spared.

Portwood presented no social service records showing how alcohol and drugs ripped apart Bowie's family. No testimony came from the orphanage where Bowie spent six years and developed his own alcohol problems as a teen. And no psychologist spoke to help the jury understand how Bowie got involved in such a bad situation.

It is those omissions the appellate lawyers challenge. The U.S. Supreme Court has ruled that a defense lawyer has the responsibility to present "mitigating" factors about their client's background - from childhood, schools, work and family life - that might persuade a jury to spare a client's life.

Portwood became the first lawyer to lose a Catawba County death penalty case in 18 years. He'd been practicing law about eight years, after scaling back his dentistry to attend law school at Campbell University near Buies Creek.

In retrospect, Portwood says, he wasn't as effective in Bowie's case as he might have been.

"I may have made some mistakes. I probably should have packed the courtroom, and put more people up to paint a fuller picture of Nathan. It just never crossed my mind the jury would vote to kill him."

Co-counsel Mark Killian goes a step further. In an affidavit, he outlines several ways he and Portwood failed. He also says he had virtually no death penalty training and alludes to Portwood's drinking problems.

"Based on my current experience and knowledge," Killian says in the 1997 affidavit, "I believe that Nathan Bowie deserves a new trial."

A second try

Two months after losing the Bowie trial, Portwood accepted another death penalty case. An unemployed construction worker named Ronnie Frye was charged with killing his landlord.

Portwood teamed up with lawyer Ted Cummings. They divvied up duties, with Cummings taking on the trial's guilt-or-innocence phase, and Portwood responsible for Frye's life-or-death hearing.

The evidence against Frye seemed overwhelming.

He had returned home late one night to find a note on his trailer: "Notice to Ronald Frye. This place has leased. Get your stuff out. I mean now."

The next day, Frye's landlord was found dead, a pair of scissors in his chest - and Frye's eviction notice on the floor.

A guilty verdict seemed inevitable. The real question was whether Portwood could persuade a jury to spare Frye's life.

Portwood's task was to humanize Frye. He had to dig up evidence that helped explain how Frye might come to kill.

But Frye, 35, had trouble talking about his painful past. He also told Portwood he didn't want his family dragged in to testify.

So Portwood faced a critical choice: He could accept Frye's reticence and offer a shallow snapshot of Frye at trial. Or he could push Frye, and dig out details that might win a jury's sympathy.

Experts say lawyers must go around resistant clients, particularly those on trial for their lives. An investigation of a client's background is crucial, the U.S. Supreme Court has ruled. That's the only way a defendant and his attorney can fully understand what's possible at trial.

But Portwood decided not to interview Frye's family - or anybody else. No friends, no teachers, no doctors or social workers, not even the brother who knew Frye so well.

Six months elapsed. Portwood continued drinking at night and on weekends, he says.

Finally, 11 days before trial, Portwood hired a psychologist to study Frye.

Dr. Jerry Noble quickly realized the case was in trouble, he says. He needed time he didn't have to build Frye's trust. He was surprised to learn he'd be the only witness trying to save Frye's life.

Noble would later criticize Portwood's trial preparation as "modest," saying the lawyer provided "little" background information, with obvious gaps in Frye's history. Never, in 40 death penalty cases, had Noble been given so little time and documentation to prepare his expert analysis.

Life or death?

It took 82 minutes for the jury to find Frye guilty. Then came time to decide his fate.

Portwood called two people to testify on Frye's behalf.

A Catawba County jailer told jurors Frye had been "an average to above-average" prisoner. Then psychologist Noble gave a brief report about Frye's difficult life - based solely on the little Frye had shared.

Frye grew up in several dysfunctional families and an orphanage. His alcoholic foster father abused him, Noble told the jury. Frye recalled being "whipped repeatedly by his foster father with a bullwhip," Noble said.

When school officials discovered "scabbing and scarring" left by beatings, authorities took Frye from his foster home, Noble said.

As a teen, Frye turned to alcohol and drugs, then quit high school.

Noble told the jury Frye's ability to distinguish right from wrong had been diminished by his turbulent life and drug abuse.

When Noble finished, Portwood offered nothing to corroborate the psychologist's testimony. No mother. No brother. No "foster" father, who admits in court documents that only "a beast" would have treated Frye the way he had.

Prosecutors destroyed Portwood's case. They hammered on the point that everything Noble told the jury had come from Frye himself - a man likely to say anything to save his own life.

The real story

Jurors never heard the full truth about Ronnie Frye's childhood.

They didn't know that as a boy, Frye had been given away to strangers. Or that he bounced between six households and an orphanage. They didn't know how bad the beatings really were.

Appellate lawyers found nearly a dozen witnesses willing to share details and pictures.

According to their appeal: Frye was the second of three boys born to poor, alcoholic parents who fought constantly. When the couple split up, the boys moved with their mother to a tiny, rat-infested apartment.

Soon, Frye's mother gave up trying to care for her unruly, malnourished children.

Most compelling, the appeal says, is the story of how Frye was handed over to strangers - and what happened to him then.

Steve and Cleo Ford were filling their car with gas when they heard that a Hickory woman was giving her children away.

They met Carolyn Frye at restaurant. She introduced 4-year-old Ronnie and his 5-year-old brother David. Then she handed her boys a bag of candy and announced that the Fords were their new mama and daddy.

No papers were signed, no authorities involved when Ronnie Frye became Ronnie Ford.

The new family settled into the Ford's home in Hudson, northwest of Hickory. Ronnie's new parents were surprised to learn the boys hadn't been toilet trained, and could eat only with their hands.

On a trip, the boys bought a souvenir bullwhip, and Steve Ford began using it on the children, the appeal says. Ford beat Ronnie so badly in fourth grade that witnesses reported "bloody stripes" covered the 9-year-old from neck to ankles.

Police arrested Steve Ford, who was found guilty of the assault in District Court. The Hudson police chief saved the pictures to show at child abuse seminars.

Authorities removed the boys from the Fords' home, splitting up the brothers and sending Ronnie to an orphanage. Both boys cried for days, and now remember the separation as one of their most traumatic moments.

With a little investigation, appellate lawyers argue, Portwood could have presented a sympathetic portrait of Frye - one that might have won mercy from the jury.

"A juror imagining a toddler given away like an unwanted kitten, whipped like a mule, then ripped from everybody who he knew would have a different view of Ronnie Frye," the appeal says.

Indeed, one juror says more detail might have made a difference. Richard Hoover remembers several jurors weeping as they debated how to punish Frye.

"Nobody really wanted to kill him," says Hoover. "We were looking for reasons not to, but there wasn't much to go on."

After two hours and 50 minutes, the jury voted for execution.

"Some of that stuff about his childhood came out, but his lawyer could have done a lot more," says Hoover. "If I had known all the details, I might have voted differently. I think it would have made a difference to a lot of the jury."

Appeals filed

Portwood lost his third straight death penalty case in 1994.

He drank even more, he says, while representing Glen Chapman, a Hickory housepainter charged with killing two acquaintances.

This time, Portwood's co-counsel was Bob Adams, who also has a history of alcohol abuse and problems with the IRS, according to the N.C. Bar, which recently suspended him from practicing law.

And this time, Portwood gave a psychologist just one day to prepare testimony that might help spare his client's life. The psychologist warned he wouldn't say nice things about Chapman. But Portwood called him to testify anyway.

The psychologist told the jury Chapman was prone to violent behavior and blamed others for his problems - sealing Chapman's death sentence.

Even prosecutor Jason Parker was surprised by the sentence. He had offered Chapman a plea bargain of 20 years in prison.

By 1995, Portwood's law practice began falling apart.

"All I was doing was drinking, then sleeping, then getting up to drink again," he says. "I knew something bad was going to happen if I didn't get help."

Then, Portwood was appointed to defend Marcus Stewart, the father accused of killing his baby - and the case he was later pulled off because of his drinking. Portwood left his practice in 1996 and checked into a rehab center.

Appeals courts will soon examine Portwood's work in the cases of Nathan Bowie and Glen Chapman.

As for Ronnie Frye, a Superior Court judge ruled Portwood hadn't performed so poorly that he prejudiced the jury's verdict. The N.C. Supreme Court agreed.

The question moves to the 4th U.S. Circuit Court of Appeals this month. Without a reprieve, Frye could die next year.

Starting over

Tom Portwood has quit drinking, he says. He's divorced now, and has given up dentistry.

He has started a new business - a travel agency - to make extra money.

"I wanted something to fall back on," he says.

He still practices law. He moved his office to Morganton - and he's taking up death penalty cases again.

"We can all get better at what we do," Portwood says. "I look at those cases as learning experiences. Hopefully, they will make me a better lawyer next time." Bowie Chapman

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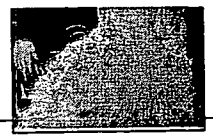
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MONDAY, SEPTEMBER 11, 2000

CAROLINAS EDITION

UNCERTAIN JUSTICE: THE DEATH PENALTY ON TRIAL

Lawyers, inadequate defense cited in a third of death case reversals

SECOND OF FIVE PARTS

By LIZ CHANDLER
Staff Writer

Across America, incompetence among defense lawyers has emerged as a key reason some convicted killers get death sentences while others don't.

Lawyers have fallen asleep during trials or come to court drunk. Some perform so poorly their clients are convicted on shaky evidence, or condemned to die when lighter punishment is warranted.

In the Carolinas, the problem is made worse by the states' low standards for capital defense lawyers, and an antiquated lawyer-appointment system.

"We certainly rank among the lower tier of states when it comes to the quality of defense we provide people on trial for their lives," says UNC Chapel Hill law professor Rich Rosen, who studies and opposes the death penalty. "Nobody's as bad as Texas, but we have horror stories, too."

Nationally, more than of one-third of death sentences are reversed because defense lawyers failed to provide competent counsel, Columbia University found.

Allegations of inadequate counsel have been raised in appeals in a majority of the Carolinas' 480 death sentences.

Since 1977, when the Carolinas restored capital punishment, at least 15 death verdicts have been overturned because of poor lawyering at trial. And at least 16 other death row inmates – including three who were executed – were represented by lawyers who have been disbarred or disciplined for unethical or criminal conduct.

Professional lawyers' groups in both states acknowledge problems but say most attorneys provide solid representation in death penalty cases.

"When someone's life is on the line, most lawyers are going to take that very seriously," says Root Edmonson, deputy counsel for the N.C. Bar, which investigates and disciplines lawyers.

But N.C. lawmakers believe the problem is so serious they have created a commission to weed out inadequate defense lawyers.

"Some of the lawyers doing this work are heroes, but in other cases, it's pretty scary," says Dick Taylor, who heads the N.C. Academy of Trial Lawyers.

Among troubling examples:

Please see **DEFENSE** / *page* **6A**



JEFF WILLHELM

Lawyer Tom Portwood's work in three death penalty cases fell below standards, appeals allege. Portwood admits he was an alcoholic while handling the cases. Here, he represents Derek Hawkins, who pleaded guilty in July to killing a Hickory cab driver. Story, 6A.

THE CHARLOTTE OBSERVER

UNCERTAIN JUSTICE: THE DEATH PENALTY ON TRIAL

Lawyers' poor performance blamed in a third of death penalty reversals

ABOUT THIS SERIES:

MONDAY:
Capital punishment in the Carolinas is so flawed, the risk of executing an innocent person is growing.

TODAY:
Some Carolinas lawyers perform so poorly in death penalty cases they jeopardize their clients' lives.

TUESDAY:
"Death Penalty Donnie" makes waves with no-holds-barred prosecution of S.C. capital cases.

WEDNESDAY:
Race of victim – and killer – influences death penalty cases, raising fairness questions.

THURSDAY:
The Carolinas allow execution of killers with mental retardation; many states don't. A debate intensifies.

DEFENSE *from 1A*

In Rock Hill, lawyer Newton Pough mistakenly called his client Sterling Spann by the name "Stanley" some 20 times during his 1982 trial. Spann was convicted on circumstantial evidence, and his lawyer Ed Johnson admits: "He did not get a fair trial. We were underfunded and unprepared." Among other things, the lawyers missed evidence that a serial killer actually may have killed Spann's alleged victim – the second of three elderly York County women raped and strangled within five months. When that evidence was spelled out on appeal, the S.C. Supreme Court last year ordered a new trial, and Spann was freed from prison after 18 years. Prosecutors say they may try the case again next year.

■ Terry Lee Collins lost five clients to death row, and appeals allege he failed in numerous ways. Collins, of Dobson, near Winston-Salem, was disbarred for forgery in 1998. Though having a disciplinary record doesn't necessarily mean a lawyer handled cases poorly, it can raise questions about his skills and integrity.

■ In Charlotte, a judge found lawyer Jerry Paul "acted unethically or even criminally" in a highly publicized 1980 capital case. Paul's client, Michael McDougall, alleged in appeals that Paul lied about his qualifications, was impaired by medication during trial, solicited false testimony and furnished drugs to him in jail. But McDougall didn't get a new trial – and was executed in 1991 – because he couldn't prove Paul's behavior affected the jury verdict. Paul was later disbarred for unethical work in other cases.

■ In Lumberton, a judge cited 36 ways lawyer Ertle Chavis failed his client. Chavis spent less than 40 hours preparing a defense for murder defendant Thomas Jack Brown, a task that typically takes hundreds of hours. He never talked to key witnesses for the 1985 trial, and in some interviews, he didn't take notes. "I did the best I could under the circumstances," Chavis says. The judge overturned Brown's death sentence and prosecutors allowed Brown to plead to lesser charges.

"Typically, on the defense side, it's amateur hour," says John Blume, a Columbia capital defense lawyer and professor at Cornell University. "A lot of these lawyers are unskilled and lazy. They really don't care if they lose – as long as they get paid."

Since most murder defendants are poor, they rely on court-appointed lawyers to defend their lives. But the high stress and low pay of capital trials sharply limits the pool of lawyers willing to take death penalty cases.

That often leaves lawyers who can't attract paying clients and rely instead on courts to supply – and pay for – a stream of criminal defendants.

Glaring examples of lousy lawyering have made national news.

In Atlanta, for example, the court-appointed attorney for Aden Harrison, a black man, was 83-year-old James Venable, a former imperial wizard of the Ku Klux Klan. A judge who reversed the death sentence said the lawyer abandoned his client, and slept through a "good deal" of the 1986 trial. Harrison wound up with 20 years in prison; his lawyer was later disbarred for other matters.

In Alabama, Judy Haney's court-appointed lawyer came to trial so drunk that he was held in contempt and sent to jail. He resumed representing her the next day but failed to mention that Haney, accused of contracting for her husband's death, was a battered spouse. Her 1988 death sentence was later reduced to life in prison.

Claims of ineffective counsel are often hard to prove. The U.S. Supreme Court set a tough standard in 1984, saying appeals courts must start with the "strong presumption" that a lawyer's performance was reasonable.

To reverse a case, the defendant must prove not only that his lawyer's performance fell below competency guaranteed by the Sixth Amendment, but also that the jury's decision would likely have been different without the errors.

In two Houston cases, defense lawyers slept through significant portions of the capital trials of Calvin Burdine (1987) and George McFarland (1992). In both cases, prosecutors' evidence was never challenged, and a defense was never mounted. Yet the Texas

Continued on next page

nings, he poured navy grogs, mixing rum [illegible] "Based on my current

From preceding page

Court of Criminal Appeals upheld both death sentences, saying the defendants didn't prove their sleeping lawyers harmed their trial. A federal court later intervened to order a new trial for Burdine. But McFarland appears headed for execution, since the U.S. Supreme Court declined to hear his appeal.

Recently, however, the high court did make an example of a Virginia lawyer, who did virtually nothing to persuade a jury to spare his client's life.

The April decision was the court's first reversal on grounds of ineffective assistance since capital punishment was restored, and it spelled out basic expectations for defense lawyers. Lawyers can't wait, for example, until a week before trial to begin preparing a death penalty case, the court said. And they must return phone calls of potential witnesses.

"The sad thing about that decision is that the lawyer's performance was far better than what we see every day in North Carolina," says Charlotte defense lawyer Jim Cooney, who has handled 20 capital cases and consulted in 20 more.

In Onslow County, on the N.C. coast, Willie Gladden got a death sentence – even though a second jury later found lighter punishment was warranted. Gladden was convicted in 1983 of killing his girlfriend's husband. In his original trial, his lawyer presented no evidence during the punishment phase that might help save Gladden's life. Lawyer Gene Gurganus never contacted Gladden's mother, sister or two teachers who offered to speak on his behalf. He also ignored offers of assistance from a Marine Corps lawyer who knew Gladden.

The U.S. Supreme Court has ruled that defense lawyers should present "mitigating factors" about their client's background – mental problems, childhood traumas, work and school history, family life – that might persuade the jury to spare the client's life. In Gladden's case, an appellate judge concluded that "because of inexperience," Gurganus failed to provide adequate counsel. At a new trial, when they heard details of Gladden's turbulent life, jurors ordered prison – not death – for Gladden.

Some states – including New York, New Jersey and Colorado – run multimillion-dollar capital defender offices that provide teams of lawyers and investigators for people in death penalty trials.

The Carolinas offer no such statewide public defender system. Some, primarily urban, counties have public defenders, who generally provide experienced representation. But most Carolinas counties rely on private court-appointed lawyers to defend accused killers.

Many are hardworking lawyers who vigorously defend their clients, and a small network of death penalty specialists has developed. Capital litigation offices in Durham and Columbia, funded by fees and grants, offer training and advice for lawyers who want help.

But low pay keeps many lawyers away from court-appointed death penalty cases. North Carolina pays $85 an hour, while South Carolina pays $50 hourly before trial and $75 during trial – rates far below the $200 to $300 an hour top lawyers command from private clients.

In addition, both states require far less training for capital lawyers than what's recommended nationally.

The American Bar Association, for example, recommends that lead lawyers in death penalty cases have five years of criminal litigation experience, including nine jury trials of complex cases and apprenticeship in one capital case.

Carolinas lawyers need only five years of practicing any kind of law, with some experience in criminal cases. North Carolina requires lead lawyers to have experience in one previous capital case; South Carolina requires no previous death penalty work.

"If you need brain surgery, you don't ask a urologist to perform the operation," says Blume, the Columbia defense lawyer. "But that's exactly what we do in capital cases by asking general practice lawyers to do death penalty work."

The Carolinas also use a traditional, politically infused system to appoint capital lawyers.

Typically, judges choose from a short list of local lawyers who qualify and volunteer for capital cases in their counties. Judges strive to keep the business local to limit the state's expenses and maintain local lawyers' support, sometimes refusing offers from better-qualified death penalty lawyers elsewhere.

Because Carolinas judges are elected, they can be sensitive to public opinion. Like lawyers' disciplinary groups in both states, judges seldom reprimand lawyers who perform poorly.

"If a lawyer does a lousy job, the judge doesn't want to sanction him because it was the judge who appointed him," says UNC professor Rosen. "A lot of times you'll see a bad lawyer get appointed to case after case – and everybody knows he's bad."

Judges routinely reduce the fees they authorize for court-appointed lawyers, prompting some lawyers to quit accepting cases. Their views vary on how much the state should spend for capital work, despite the states' recommended wages. Judges also control how much, if any, money the defense gets for investigators and forensic experts.

"It is widely believed among defense lawyers that you can get punished for your advocacy," says N.C. Appellate Defender Tye Hunter, whose office handles death penalty appeals. "Lawyers tell me all the time that they worry about doing something that will offend or upset the judge. If they do, they're afraid their fee will be lowered."

Much could soon change in North Carolina.

In July, state lawmakers approved a reform plan that takes capital lawyer appointments out of the hands of judges. The plan sets up a 13-member commission to manage legal defense for indigent defendants in all criminal cases. That commission, beginning in July 2001, will impose new standards and select which lawyers should handle death penalty defense.

"It's in nobody's interest to have incompetent defense lawyers," says the trial lawyers' Taylor. "You have to spend a lot money on new trials. And you're just increasing the risk of sentencing innocent people to death."

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ATTACHMENT V

North Carolina Department of Correction Go to...

Executions carried out under current death penalty statute

Last updated January 23, 2006

	Photo	Name	Sex	Race	Date Executed	County of Conviction	Method of Execution	Victim(s)
1		James W. Hutchins	M	W	3/16/84	McDowell	Lethal Injection	Roy Huskey W/M Owen Messersmith W/M Pete Peterson W/M
2		Velma M. Barfield	F	W	11/2/84	Bladen	Lethal Injection	Stuart Taylor W/M
3		John William Rook	M	W	9/19/86	Wake	Lethal Injection	Ann Marie Roche W/F
4		Michael McDougall	M	W	10/18/91	Mecklenburg	Lethal Injection	Diane Parker W/F
5		John S. Gardner	M	W	10/23/92	Forsyth	Lethal Injection	Richard Adams W/M Kim Miller W/F
6		David Lawson	M	W	6/15/94	Cabarrus	Lethal Gas	Wayne Shinn W/M
7		Kermit Smith	M	W	1/24/95	Halifax	Lethal Injection	Whelette Collins B/F
8		Phillip Ingle	M	W	9/22/95	Rutherford	Lethal Injection	William Fred Davis W/M Margaret Shufford Davis W/F
9		Ricky Lee Sanderson	M	W	1/30/98	Iredell	Lethal Gas	Sue Ellen Holliman W/F
10		Zane Hill	M	W	08/14/98	Buncombe	Lethal Injection	Randall Hill W/M
11		John Noland	M	W	11/20/98	Mecklenburg	Lethal Injection	Troy Milton W/M Cindy Milton W/F
12		James Rich	M	W	03/26/99	Greene	Lethal Injection	Paul Gwyn W/M
13		Harvey Lee Green	M	B	09/24/99	Pitt	Lethal	Sheila Marlene Bland W/F

							Injection	John M. Edmundson W/M
14		Arthur Martin Boyd	M	W	10/21/99	Surry	Lethal Injection	Wanda Phillips Hartman W/F
15		David Junior Brown	M	B	11/19/99	Union	Lethal Injection	Shelly Diane Chalflinch W/F Christina Chalflinch W/F
16		Michael E. Sexton	M	B	11/9/2000	Wake	Lethal Injection	Kimberly Crews W/F
17		Willie Ervin Fisher	M	B	03/09/2001	Forsyth	Lethal Injection	Angela Johnson B/F
18		Clifton Allen White	M	W	08/24/2001	Mecklenburg	Lethal Injection	Kimberly Ewing W/F
19		Ronald W. Frye	M	W	08/31/01	Catawba	Lethal Injection	Ralph Childress W/M
20		David Junior Ward	M	B	10/12/01	Pitt	Lethal Injection	Dorothy Mae Smith B/F
21		John Hardy Rose	M	W	11/30/01	Haywood	Lethal Injection	Patricia Stewart W/F
22		Ernest West Basden	M	W	12/6/02	Duplin	Lethal Injection	Billy White W/M
23		Desmond Keith Carter	M	B	12/10/02	Rockingham	Lethal Injection	Helen Purdy W/F
24		William Quentin Jones	M	B	8/22/03	Wake	Lethal Injection	Edward Peebles B/M
25		Henry L. Hunt	M	I	9/12/03	Robeson	Lethal Injection	Larry Jones I/M Jackie Ransom I/M
26		Joseph Bates	M	W	9/26/03	Yadkin	Lethal Injection	Charles Jenkins W/M
27		Edward Hartman	M	W	10/3/03	Northampton	Lethal Injection	Herman Larry Smith Sr W/M

28		Joseph Timothy Keel	M	W	11/7/2003	Edgecombe	Lethal Injection	John Simmons W/M
29		John Dennis Daniels	M	B	11/14/2003	Mecklenburg	Lethal Injection	Isabelle Daniels Crawford B/F
30		Robbie Lyons	M	B	12/5/2003	Forsyth	Lethal Injection	Stephen Stafford W/M
31		Raymond Dayle Rowsey	M	W	1/9/2004	Alamance	Lethal Injection	Howard Rue Sikorski W/M
32		Sammy Crystal Perkins	M	B	10/8/2004	Pitt	Lethal Injection	Lashenna Moore B/F
33		Charles Wesley Roache	M	W	10/22/2004	Haywood	Lethal Injection	Mitzi Phillips W/F Katie Phillips W/F
34		Frank Chandler	M	W	11/12/2004	Surry	Lethal Injection	Doris Poore W/F
35		William Dillard Powell	M	W	3/11/2005	Cleveland	Lethal injection	Mary Gladden W/F
36		Earl Richmond	M	B	5/6/2005	Cumberland	Lethal Injection	Helisa Hayes B/F Philip Hayes B/M Darien Hayes B/F
37		Steven McHone	M	W	11/11/2005	Surry	Lethal Injection	Mildred Adams W/F Wesley Adams Sr. W/M
38		Elias Syriani	M	O	11/18/2005	Mecklenburg	Lethal Injection	Teresa Yousef Syriani W/F
39		Kenneth Boyd	M	W	12/2/2005	Rockingham	Lethal Injection	Thomas Dillard Curry W/M Julie Curry Boyd W/F
40		Perrie Simpson	M	B	1/20/2006	Rockingham	Lethal Injection	Jean Ernest Darter W/M

The Death Penalty

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ATTACHMENT VI

North Carolina Department of Correction Go to...

Offenders on Death Row

Last updated January 20, 2006

There are currently 173 offenders on Death Row

To search for a specific name or DOC number press CTRL-F on your keyboard

Download this list as an Excel spreadsheet (.xls)

Received	DOC #	Last Name	First Name	Sex	Race	County of Conviction
7/30/79	0401049	Taylor	Norris C.	M	B	New Hanover
2/21/80	0442913	Williams	Larry D.	M	B	Cabarrus
9/11/80	0324142	Pinch	Michael E.	M	W	Guilford
11/15/83	0052205	Brown	Willie	M	B	Martin
8/21/85	0234897	Laws	Wayne A.	M	W	Davidson
11/5/90	0207779	Jennings	Patricia W.	F	W	Wilson
11/16/90	0288088	Moore	Blanche T.	F	W	Forsyth
11/22/91	0265106	McCollum	Henry L.	M	B	Cumberland
12/19/91	0351933	Rose	Clinton R.	M	W	Rockingham
3/12/92	0100579	Davis	Edward E.	M	W	Buncombe
3/25/92	0353186	Rouse	Kenneth B.	M	B	Randolph
5/14/92	0339314	Reeves	Michael M.	M	W	Craven
5/19/92	0347839	Robinson	Eddie C.	M	B	Bladen
9/23/92	0264009	McCarver	Ernest P.	M	W	Cabarrus
10/1/92	0294214	Moseley	Carl	M	W	Forsyth
10/19/92	0084604	Conaway	John L.	M	B	Richmond
2/5/93	0039561	Bowie	Nathan	M	B	Catawba
2/5/93	0039569	Bowie	William	M	B	Catawba
3/17/93	0272408	McLaughlin	Elton	M	B	Bladen
4/1/93	0057308	Burke	Rayford L.	M	B	Iredell
4/21/93	0058316	Burr	John	M	W	Alamance
4/28/93	0104984	Decastro	Eugene	M	B	Johnston
5/18/93	0156518	Gregory	Warren	M	B	Pitt
5/27/93	0251740	Lynch	David	M	W	Gaston
6/1/93	0021418	Barrett	Jeffrey	M	B	Northampton
6/7/93	0030124	Best	Norfolk	M	B	Columbus
7/8/93	0063592	Campbell	James	M	W	Rowan
9/3/93	0141374	Garner	Daniel	M	W	Robeson
10/4/93	0099090	Daughtry	Johnny R.	M	W	Johnston

10/8/93	0054499	Buckner	George C.	M	W	Gaston
11/3/93	0441726	Williams	James E.	M	W	Randolph
11/20/93	0217191	Jones	Levon J.	M	B	Duplin
11/20/93	0149506	Goode	George E.	M	B	Harnett
11/22/93	0343075	Richardson	Martin A.	M	B	Union
12/8/93	0012311	Atkins	Randy L.	M	W	Buncombe
12/16/93	0153856	Gray	William	M	W	Lenoir
2/3/94	0017060	Ball	Terry L.	M	W	Beaufort
3/10/94	0071799	Chambers	Frank J.	M	B	Rowan
3/10/94	0020590	Barnes	William L.	M	B	Rowan
4/20/94	0221506	Kandies	Jeffrey	M	W	Randolph
4/29/94	0453231	Wooten	Vincent M.	M	B	Pitt
5/4/94	0120038	Elliott	John R.	M	W	Davidson
6/14/94	0082151	Cole	Wade L.	M	B	Camden
8/5/94	0348505	Robinson	Marcus	M	B	Cumberland
8/12/94	0166056	Hardin	Alden	M	B	Mecklenburg
9/15/94	0438643	Wilkinson	Phillip	M	W	Cumberland
9/29/94	0143501	Geddie	Malcolm	M	B	Johnston
11/16/94	0072845	Chapman	Glenn E.	M	B	Catawba
12/16/94	0095279	Cummings	Daniel	M	I	Brunswick
1/25/95	0443375	Williams	Marvin E.	M	B	Wayne
4/30/91	0085045	Connor	Jerry W.	M	W	Gates
2/7/95	0420511	Walker	Charles	M	B	Guilford
2/9/95	0478925	Stroud	Isaac J.	M	B	Durham
2/24/95	0404386	Thomas	James E.	M	B	Wake
3/15/95	0368820	Sidden	Tony M.	M	W	Alexander
3/24/95	0036850	Bond	Charles P.	M	B	Bertie
4/28/95	0233526	Larry	Thomas M.	M	B	Forsyth
5/22/95	0497100	Woods	Darrell C.	M	B	Forsyth
6/1/95	0492102	Richardson	Timothy	M	B	Nash
6/16/95	0061528	Cagle	Richard	M	W	Cumberland
7/20/95	0463160	Moody	Patrick L.	M	W	Davidson
7/22/95	0180479	Morganherring	William	M	B	Wake
10/6/95	0487180	Warren	Leslie	M	W	Buncombe
10/27/95	0393145	Strickland	Darrell	M	I	Union
10/31/95	0511057	Hill	Jerry Dale	M	W	Harnett
11/8/95	0511998	East	Keith B.	M	B	Surry
11/10/95	0275678	McNeil	John D.	M	B	Cumberland

11/14/95	0414853	Tyler	Stacey A.	M	B	Hertford
12/20/95	0388922	Stephens	Davy G.	M	W	Johnston
2/21/96	0413011	Tucker	Russell	M	B	Forsyth
2/26/96	0495163	Neal	Kenneth	M	B	Rockingham
4/9/96	0528622	McNeill	Elmer R.	M	W	Wake
4/18/96	0499258	Murillo	Eric F.	M	W	Richmond
4/26/96	0310202	Page	George F.	M	W	Forsyth
4/26/96	0238344	LeGrande	Guy T.	M	B	Stanly
5/10/96	0376917	Smith	Jamie L.	M	B	Buncombe
5/14/96	0246186	Locklear	Robbie D.	M	I	Robeson
6/5/96	0471315	Billings	Archie L.	M	W	Caswell
6/20/96	0506556	Guevara	Angel	M	O	Johnston
7/23/96	0440399	Williams	David K.	M	B	Bertie
8/9/96	0405380	Thomas	Walic C.	M	B	Guilford
9/27/96	0037215	Bonnett	Shawn D.	M	B	Martin
10/2/96	0510234	Davis	James F.	M	W	Buncombe
10/15/96	0434355	White	Melvin L.	M	B	Craven
8/15/94	0156529	Gregory	William	M	B	Davie
11/15/96	0275780	McNeil	LeRoy	M	B	Wake
11/19/96	0412440	Trull	Gary A.	M	W	Randolph
12/12/96	0320825	Peterson	Lawrence E.	M	B	Richmond
1/29/97	0422350	Wallace	Henry L.	M	B	Mecklenburg
2/18/97	0539901	Taylor	Terrence	M	B	Lenoir
3/24/97	0311966	Parker	Johnny S.	M	W	Sampson
4/8/97	0571536	Fleming	John H.	M	B	Northampton
5/26/97	0130851	Flippen	Samuel	M	W	Forsyth
7/3/97	0176701	Hedgepath	Rowland	M	W	Halifax
7/3/97	0538027	Cheek	Jamey	M	W	New Hanover
7/15/97	0255136	Mann	Leroy	M	B	Wake
8/22/97	0585797	Davis	Phillip	M	B	Buncombe
8/29/97	0352024	Roseboro	Christopher	M	B	Gaston
9/10/97	0033802	Blakeney	Roger	M	B	Union
11/4/97	0488288	Mitchell	Marcos	M	B	Wake
11/11/97	0095361	Cummings	Jerry	M	I	Robeson
11/14/97	0134151	Fowler	Elrico	M	B	Mecklenburg
11/18/97	0552017	Moses	Erroll	M	B	Forsyth
11/21/97	0043529	Braxton	Michael	M	B	Halifax
12/11/97	0597164	Lawrence	Jimmie	M	B	Harnett

3/5/98	0599379	Williams	John	M	B	Wake
3/27/98	0137368	Frogg	Danny	M	W	Forsyth
4/7/98	0587681	Holman	Allen	M	W	Wake
4/13/98	0507433	Smith	Clinton	M	B	Halifax
4/24/98	0158506	Grooms	Timmy	M	W	Scotland
5/13/98	0591301	Golphin	Kevin	M	B	Cumberland
5/13/98	0590940	Golphin	Tilmon	M	B	Cumberland
6/1/98	0155512	Greene	Gary	M	W	Caldwell
7/23/98	0542024	Hyde	Johnny	M	I	Onslow
8/28/98	0388640	Steen	Patrick	M	W	Mecklenburg
9/3/98	0584095	Brewington	Robert	M	I	Harnett
10/23/98	0472274	Taylor	Rodney	M	B	New Hanover
11/23/98	0226428	King	James	M	B	Guilford
12/18/98	0490944	Hardy	Melvin	M	B	Mecklenburg
2/4/99	0280127	Meyer	Jeffery	M	W	Cumberland
2/22/99	0330166	Prevatte	Ted	M	W	Stanly
3/2/99	0515143	Thibodeaux	Raymond	M	W	Forsyth
3/18/99	0580028	May	Lyle	M	W	Buncombe
4/1/99	0311386	Parker	Carlette	F	B	Wake
5/18/99	0125241	Fair	Nathaniel	M	B	Wake
5/22/99	0542384	Call	Eric	M	W	Ashe
5/27/99	0654009	Wiley	Keith	M	B	New Hanover
6/3/99	0654093	Anthony	William	M	W	Gaston
6/4/99	0206197	Jaynes	James	M	W	Polk
7/8/99	0291861	Morgan	James	M	B	Buncombe
7/13/99	0139378	Gainey	David	M	B	Harnett
10/26/99	0007328	Anderson	Billy	M	B	Craven
11/12/99	0491889	Barden	Iziah	M	B	Sampson
11/18/99	0670167	Nicholson	Abner	M	B	Wilson
12/09/99	0130628	Fletcher	Andre L.	M	B	Rutherford
02/07/00	0199877	Hyatt	Terry A.	M	W	Buncombe
02/09/00	0561692	Hooks	Cerron T.	M	B	Forsyth
04/10/00	0349019	Robinson	Terry L.	M	B	Wilson
04/11/00	0544664	Queen	Eric D.	M	B	Cumberland
05/17/00	0688223	Squires	Mark L.	M	B	Pitt
07/06/00	0626944	Walters	Christina	F	I	Cumberland
08/11/00	0051026	Brown	Paul A.	M	B	Wayne
08/31/00	0434845	White	Timothy L.	M	W	Forsyth

09/08/00	0189289	Holmes	Michael D.	M	B	Johnston
11/9/00	0217326	Jones, Sr.	Marcus Douglas	M	W	Onslow
3/19/01	0486636	Carter	Shan E.	M	B	New Hanover
4/19/01	0702066	Garcia	Fernando L.	M	O	Wake
5/29/01	0223210	Kelly	George Malcolm	M	B	Cumberland
6/6/01	0561943	Haselden	Jim E.	M	W	Stokes
7/19/01	0428143	Watts	James Hollis	M	W	Davidson
8/24/01	0592464	Bell	Bryan Christopher	M	B	Onslow
10/25/01	0742512	Miller	Clifford Ray	M	O	Onslow
3/14/02	0379083	Smith	Reche	M	B	Washington
3/28/02	0064125	Campbell	Terrance	M	B	Pender
5/29/02	0765397	Smith	Wesley Toby	M	W	Rowan
10/23/02	0612123	Augustine	Quintel	M	B	Brunswick
11/14/02	0406487	Thompson	John Henry	M	B	Guilford
6/14/03	0290634	Moore (Al-Bayyinah)	Terry (Jathiyah)	M	B	Davie
7/15/03	0507467	McNeill	Jimmy	M	B	Scotland
9/26/03	0113234	Duke	Jeffrey Neal	M	W	Gaston
10/8/03	0133102	Forte	Linwood Earl	M	B	Wayne
11/18/03	0005091	Allen	Scott D.	M	W	Montgomery
12/18/03	0120236	Elliott	Terrance R.	M	B	Moore
3/10/04	0562597	Berry	Kyle O.	M	W	New Hanover
3/17/04	0509565	Hurst	Jason Wayne	M	W	Randolph
5/6/04	0014016	Badgett	John Scott	M	W	Randolph
9/8/04	0523493	Cummings	Paul Dewayne	M	B	New Hanover
2/7/05	0801680	Polke	Alexander C.	M	I	Randolph
2/8/05	0150949	Goss	Christopher	M	W	Ashe
6/14/05	0245105	Locklear	Dane Jr.	M	I	Robeson
7/11/05	0667195	Lane	Eric Glenn	M	W	Wayne
8/24/2005	0762634	Taylor	Eddie Larmar	M	B	Harnett
9/9/2005	0526698	Raines	William H.	M	W	Henderson

Demographics

	Male	Female	Total
White	**63**	**2**	**65**
Black	**95**	**1**	**96**
Indian	**8**	**1**	**9**
Other	**3**	**0**	**3**
Total	**169**	**4**	**173**

North Carolina Department of Correction

ATTACHMENT VII

Go to...

Persons removed from Death Row

since North Carolina's death penalty was reinstated in 1977

DOC#	Last Name	First/Middle Name	Date Received	Race	Sex	Age when remvd	Conviction County	Date Removed	Disposition Comments
0429648	Webster	Daniel	10/18/77	W	M	51	Davie	11/06/77	Suicide 11/06/77
0106745	Detter	Rebecca Case	09/27/78	W	F	37	Forsyth	01/02/80	Rec'd Life 01/02/80; Paroled
0211984	Johnson	Norman Dale	03/24/78	W	M	24	Alexander & Cleveland	05/02/80	Rec'd Life 05/02/80 and 10/09/80 Respectively
0149648	Goodman	Buck Junior	10/17/78	W	M	38	Cumberland	05/22/80	Rec'd Life 05/22/80; Died 05/30/89
0216306	Jones	James Calvin	10/21/77	I	M	35	Robeson	10/09/80	Rec'd Life 10/09/80; Paroled 12/92
0074681	Cherry	Johnny Raeford	03/18/78	B	M	23	Mecklenburg	12/05/80	Rec'd Life 12/05/80
0383288	Spaulding	Cardell	06/30/78	I	M	40	Wake	12/07/80	Rec'd Life 12/07/80
0373445	Small	James Lenard	04/27/79	W	M	36	Robeson	03/19/81	Rec'd Life + 10 Years 03/19/81, Paroled 9/12/2000
0369212	Silhan	Stephen	03/22/79	W	M	25	Columbus	07/31/81	Rec'd Life 07/31/81
0201365	Irwin	Lavern Ray	09/24/80	W	M	29	Wayne	02/18/82	Rec'd Life 02/18/82
0202758	Jackson	Henry Louis	09/04/82	B	M	37	Union	08/29/83	Rec'd Life 08/29/83
0258671	Martin	Thurman	02/15/80	W	M	34	Scotland	10/05/83	Natural Death 10/05/83
0164102	Hamlette	William E.	06/20/80	B	M	27	Person	10/05/83	New Trial May 81; Rec'd 20-30 Yrs 2nd Degree Murder 09/04/81; Released 11/85
0288839	Moore	George Jr.	05/24/79	B	M	21	Robeson	10/17/83	Re-Sent Ordered 10/17/83 (serving life for another murder) Rec'd life 11/8/01r
0208040	Jerrett	Bruce Franklin	04/03/82	W	M	33	Alleghany	10/17/83	Rec'd Life 10/17/83
0227951	Kirkley	Clinton Rondale	09/23/81	W	M	21	Mecklenburg (2)	11/18/83	Rec'd Life + Life 11/18/83
0037020	Bondurant	Robert Carlman	04/01/82	W	M	35	Surry	12/06/83	Rec'd Life 12/06/83, Paroled 2/3/2000
0199590	Hutchins	James W.	09/25/79	W	M	50	McDowell	03/16/84	Executed 03/16/84 By Lethal Injection
0387070	Stanley	Charles David	10/08/82	W	M	52	Edgecombe	03/26/84	Rec'd Life 03/26/84, Natural death 1/7/00
0291193	Moose	William Dennis	10/08/82	W	M	29	Burke	07/27/84	Rec'd Life 07/27/84
0024543	Beal	John	09/22/82	W	M	28	Lincoln	09/17/84	Rec'd Life 09/17/84

		Vincent							
0182962	Hill	Eldred Leon	10/02/82	B	M	28	Henderson	09/17/84	Rec'd Life 09/17/84
0019092	Barfield	Margie Bullard	12/04/78	W	F	45	Bladen	11/02/84	Executed 11/02/84 by Lethal Injection
0164049	Hamlet	Jerome Jr.	04/27/83	B	M	44	New Hanover	11/26/84	Rec'd Life 11/26/84
0457654	Young	Phillip Lee	05/16/83	W	M	19	Watauga	02/19/85	Rec'd Life 02/19/85
0350031	Rogers	Charles Gene	03/28/84	B	M	40	Wayne	04/02/86	Rec'd Life 04/02/86
0299197	Gambrell	Lloyd Phillip	06/15/84	B	M	36	Forsyth	08/29/86	New Trial Ordered 08/29/86; Rec'd Life for 2nd Degree Murder
0351432	Rook	John William	10/28/80	W	M	21	Wake	09/19/86	Executed 09/19/86 by Lethal Injection
0391600	Stokes	Freddye Lee	06/02/82	B	M	17	New Hanover	02/03/87	Rec'd Life 02/03/87
0208897	Johnson	Bobby Ray Jr.	10/19/83	W	M	24	Guilford	04/06/87	Rec'd Life 04/06/87
0315959	Payne	Randy Joe	01/25/85	W	M	30	Davidson	07/27/87	New Trial Ordered 07/27/87; Rec'd Death 02/11/88; Re-Sent Ordered 04/23/91; Rec'd Death 09/28/92; Suicide 08/28/98
0339165	Reese	Michael Ray	05/19/83	B	M	25	Northampton	11/25/87	Rec'd Life 11/25/87
0050504	Brown	Leon	10/25/84	B	M	16	Robeson	02/03/88	New Trial Ordered 02/03/88; Murder Dismissed and Rec'd Life for Rape 06/05/92
0285415	Mitchell	Larry Ray	03/28/86	B	M	33	Surry	03/29/88	New Trial Ordered 03/29/88; Rec'd 40 Years 11/27/90 for 2nd Degree Murder
0022223	Barts	Earl Jackson	06/08/84	W	M	43	Alamance	04/28/88	New Trial Ordered 04/28/88; Rec'd Life 05/03/88
0448214	Wilson	Michael Ray	11/25/84	W	M	25	Granville	05/05/88	Re-Sent Ordered 05/05/88; Rec'd Life 01/18/91
0352447	Ross	James Keith	08/22/85	W	M	33	McDowell	05/05/88	New Trial Ordered 05/05/88; Rec'd Life 03/27/89
0380070	Smith	Terrie William	03/27/85	W	M	21	Edgecombe	07/28/88	Re-Sent Ordered 07/28/88; Rec'd Life 01/08/92
0268329	McDowell	Robert Henry	12/11/79	B	M	29	Johnston	10/03/88	New Trial Ordered 10/03/88; Rec'd Life for 2nd Degree Murder 07/25/90
0417876	Vereen	James	12/08/83	B	M	35	Vance	10/11/88	Natural Death 10/11/88
0325175	Piver	Rayford Clayton	03/21/88	W	M	45	New Hanover	10/25/88	Suicide 10/25/88 in Brunswick County Jail
0028848	Benson	Jon Lee	01/15/86	O	M	24	Onslow	10/26/88	Rec'd Life 10/26/88

0178882	Hennis	Timothy Bailey	07/06/86?	W	M	28	Cumberland	10/26/88	New Trial Ordered 10/26/88, Not Guilty 04/19/89, Released
0258918	Mash	David James	11/26/86	W	M	22	Wilkes	10/26/88	New Trial Ordered 10/26/88; Rec'd Life 08/11/89
0049190	Brown	Duane Lee	11/04/87	B	M	29	Durham	10/25/89	New Trial Ordered 10/25/89; Rec'd Life 01/12/90
0146975	Gladden	Willie James	04/16/83	B	M	22	Onslow	11/02/89	Rec'd Life 11/02/89
0045045	Bridges	Winfred Ed	01/25/88	B	M	25	Granville	11/29/89;	New Trial Ordered 11/29/89; Rec'd Life 10/31/90
0100672	Davis	Eugene Jr	11/15/85	B	M	20	Wake	12/27/89	Re-Sent Ordered 12/27/89; Rec'd Life 06/11/91
0081135	Coffey	Fred Howard Jr.	10/20/87	W	M	42	Mecklenburg	03/01/90	Re-Sent Ordered 03/01/90; Rec'd Death 05/22/91; Re-Sent Ordered 05/07/94; Rec'd Life 08/31/95
0095301	Cummings	Edward Lee	05/06/87	B	M	46	Hoke & New Hanover	03/21/90	Re-Sent Ordered 03/21/90 (Hoke) & 12/09/02 (New Hanover) Rec'd two life sentences 8/21/01
0165216	Handy	William Kenneth	04/03/87	W	M	19	Onlsow	05/30/90	Re-Sent Ordered 05/30/90; Rec'd Life 11/13/90
0327601	Porter	William Howard	12/09/86		M	52	Robeson	05/30/90	Re-Sent Ordered 05/30//90; Natural Death 06/03/99
0271862	McKoy	Dock Jr.	08/08/85	B	M	65	Stanly	08/15/90	Re-Sent Ordered 08/15/90 Died in prison 7/29/2004
0048492	Brown	Bobby Ray	09/28/85	W	M	43	Rockingham	08/15/90	Resent Ordered 08/15/90; Rec'd Life 06/06/91
0251802	Lynch	Gregory Stewart	10/17/85	B	M	33	Rutherford	08/15/90	New Trial Ordered 08/15/90; Rec'd Life 08/28/92
0357783	Sanders	Stanley	07/03/82	B	M	29	Transylvania	09/18/90	Re-Sent. Ordered 09/18/90 (Serving Life for Rape)
0357685	Sanderson	Ricky Lee	06/02/86	W	M	27	Davidson	09/18/90	Re-Sent Ordered 09/18/90; Rec'd Death 06/03/91; Re-Sent Ordered 04/08/94/ Rec'd Death 11/03/95; Executed 01/30/98 Gas
0379483	Smith	Roger Lee	05/18/88	B	M	22	Northampton	02/27/91	Re-Sent Ordered 02/27/91; Rec'd Life 08/20/91
0333663	Quesinberry	Michael Ray	06/13/85	W	M	23	Randolph	03/27/91	Re-Sent Ordered 03/27/91; Rec'd Life 12/03/91
0195681	Huff	Everett R.	07/06/87	W	M	28	Cumberland	04/23/91	Re-Sent Ordered 04/23/91; Rec'd Life 09/28/92
0333782	Quick	Harold Vernard	09/01/87	B	M	29	Richmond	07/02/91	Re-Sent Ordered 07/02/91; Rec'd Death 12/19/91; Re-Sent Ordered 01/11/94; Rec'd Life 09/27/95
0037216	Bonney	Thomas Lee	11/30/88	W	M	45	Camden	07/02/91	Re-Sent Ordered 07/02/91

0220756	Joyner	Richard Wayne	05/25/89	W	M	17	Nash	07/02/91	Re-Sent Ordered 07/02/91; Rec'd Life 04/02/92
0011291	Artis	Roscoe	08/31/84	B	M	43	Robeson	09/03/91	Re-Sent Ordered 09/03/91; Rec'd life w/o parole 7/10/01
0154457	Green	Harvey Lee Jr	06/28/84	B	M	24	Pitt (2)	09/03/91	Re-Sent Ordered 09/03/91; Rec'd Death 09/03/92; Executed 09/24/99 by Lethal Injection
0244410	Lloyd	Oscar	08/01/85	B	M	43	Cherokee	09/03/91	Re-Sent Ordered 09/03/91; Rec'd Life 05/27/93
0290431	Moore	Roston	03/01/88	B	M	37	Alamance (2)	09/03/91	Re-Sent Ordered 09/03/91; Rec'd Life + Life 05/01/92
0046899	Brogden	Donald Rex	08/25/88	W	M	41	Duplin	09/03/91	Re-Sent Ordered 09/03/91; Rec'd Death 01/23/92; Re-Sent Ordered 07/02/93; Rec'd Life 01/28/94
0268244	McDowell	James Courtney	08/26/88	B	M	21	Durham	09/03/91	Death Sentence Vacated and Rec'd Life Instead 09/03/91
0455820	Wynne	Carl Smiley	11/10/88	W	M	21	Halifax	09/03/91	Re-Sent Ordered 09/03/91 (?); Rec'd Life
0276270	McPhail	Frederick W.	04/27/89	W	M	26	New Hanover	09/03/91	Re-Sent Ordered 09/03/91; Rec'd Life 03/11/93
0213690	Johnston	Joe Cephus Jr.	05/05/89	W	M	26	Halifax	09/03/91	New Trial Ordered 07/15/92; Rec'd Life 08/24/94 for 1st Degree Murder
0386206	Stager	Barbara Terry	05/19/89	W	F	40	Lee	09/03/91	Re-Sent Ordered 09/03/91; Rec'd Life 08/31/93
0268058	McDougall	Michael Van	07/25/80	W	M	25	Mecklenburg	10/18/91	Executed 10/18/91 by Lethal Injection
0019841	Barnes	Elwell	12/24/85	I	M	56	Robeson (2)	10/24/91	Re-Sent Ordered 10/24/91 for Both; Died 9/19/01 of natural causes
0069649	Case	Jerry Douglas	03/29/86	W	M	29	Gaston	11/07/91	New Trial Ordered 11/07/91; Rec'd Life 08/19/92 for 2nD Degree Murder
0413587	Turner	Claude David Jr.	09/23/88	W	M	24	Cumberland	12/26/91	Re-Sent Ordered 12/26/91; Rec'd Life 11/09/93
0054246	Buchanan	Lenwood E	07/26/89	B	M	22	Wake	12/26/91	Re-Sent Ordered 12/26/91; Rec'd Life 09/21/92
0262009	Maynard	Anson Avery	12/11/81	I	M	39	Cumberland	01/13/92	Commuted to Life 01/13/92 by Gov. James Martin
0286956	Monroe	Casey Jack	04/17/86	B	M	23	Scotland	02/20/92	New Trial Ordered 02/20/92; Rec'd Life 10/25/95 for 2nd Degree Murder
0287410	Montgomery	Rodney Lee	06/14/90	B	M	23	Mecklenburg	06/25/92	New Trial Ordered 06/25/92; Rec'd Life 12/08/93 for 1st Degree Murder
0182421	Hightower	Bobby Ray	11/16/88	B	M	23	Guilford	07/15/92	New Trial Ordered 07/15/92; Rec'd Life 10/21/93 for 1st Degree Murder

0209000	Johnson	Caeser Lamont	12/03/89	B	M	23	Wake	07/15/92	Re-Sent Ordered 07/15/92; Rec'd Life 02/25/93; Natural Death 03/25/00
0404505	Thomas	Jesse L.	05/15/90	B	M	45	Nash	07/15/92	New Trial Ordered 07/15/92; Rec'd Life 07/20/95; New Trial Ordered 05/29/97; Rec'd Life 12/10/97 for 1st Degree Murder
0294746	Moss	Bobby Ray	01/31/90	W	M	35	Duplin	08/06/92	New Trial Ordered 08/06/92; Rec'd Life 10/02/92 for 1st Degree Murder
0063587	Campbell	James Bryan	05/24/90	W	M	30	Graham	08/06/92	New Trial Ordered 08/06/92; Rec'd Life 009/06/95 for 2nd Degree Murder
0446095	Willis	James Earl	11/02/87	W	M	22	Robeson	09/24/92	Re-Sent Ordered 09/24/92
0090226	Cox	Donna Sue	11/02/87	W	F		Robeson	09/24/92	Re-Sent Ordered 09/24/92, Rec'd life 8/15/01
0415745	Upchurch	James Bartlett	01/30/90	W	M	21	Pasquotank	10/21/92	Re-Sent Ordered 10/21/92; Rec'd Life 09/21/93
0141007	Gardner	John Sterling Jr.	09/23/83	W	M	25	Forsyth	10/23/92	Executed 10/23/92 by Lethal Injection
0253757	Mahaley	Marilyn Rudd	12/17/90	W	F	35	Alamance	12/09/92	Re-Sent Ordered 12/09/92; Rec'd Life 07/26/94
0326842	Pope	James F. III	10/07/88	W	M	30	Durham & Wake	01/07/93	New Trial Ordered for Both 01/07/93; Rec'd Life + Life 09/14/93 for 2nd Degree Murder (2 CTS)
0440756	Williams	Douglas Jr.	11/14/81	B	M	23	Edgecombe	05/25/93	Rec'd Life 05/25/93 Died 2/5/04
0095573	Cunningham	Calvin C.	05/05/91	B	M	45	Mecklenburg	06/24/93	New Trial Ordered 06/24/93; Rec'd Life 04/08/94 for 1st Degree Murder
0143357	Gay	Yvette	08/10/91	B	F	28	Beaufort (3)	09/30/93	Re-Sent Ordered 09/30/93, Rec'd Life 4/6/2001
0345856	Robbins	Phillip Thomas Jr.	11/11/83	B	M	36	Durham	11/05/93	Rec'd Life + Life 12/14/2001
0379497	Smith	Roland Douglas	09/16/85	W	M	38	Burke	01/23/94	New Trial Ordered 01/23/94; Rec'd 35 Yrs. 02/18/99 for 2nd Degree Murder
0194160	Howell	Franklin Dwayne	11/27/91	W	M	26	Johnston	01/23/94	Re-Sent Ordered 01/23/94; Rec'd Life 03/31/95
0154006	Green	Alton Garner	11/14/85	W	M	45	Wake (3)	03/02/94	Re-Sent Ordered 03/02/94; Rec'd Life +Life+Life 11/15/96
0022128	Barton	Herbert Jr.	06/05/92	I	M	22	Robeson	03/24/94	Re-Sent Ordered 03/24/94, Rec'd life 11/7/01
0234694	Lawson	David	06/06/81	W	M	26	Cabarrus	06/15/94	Executed 06/15/94 by Asphyxiation
0458590	Zuniga	Bernardino	02/29/85	O	M	29	Davidson	06/17/94	Re-Sent Ordered 06/17/94; Rec'd Death 09/28/95; Re-Sent Ordered 05/28/98

0306101	Oliver	John Wesley	05/24/79	B	M	28	Robeson (2)	07/12/94	Re-Sent Ordered 9/27/83 and 1/25/94. Rec'd 2 life terms 11/8/01
0062810	Camacho	Frederick	12/17/91	O	M	35	Mecklenburg	08/15/94	New Trial Ordered 08/15/94; Rec'd Life 04/18/95 for 2nd Degree Murder
0056353	Bunning	Robert Earl	10/26/92	W	M	57	Guilford	12/12/94	Re-Sent Ordered 12/12/94; Rec'd Death 07/25/95; Re-Sent Ordered 06/06/97; Rec'd Life 10/27/97
0016146	Baker	Ronnie Wayne	04/29/92	W	M	43	Wilson	01/19/95	Re-Sent Ordered 01/19/95; Rec'd Life 12/18/98. Died in prison - natural causes 7/26/2005
0377788	Smith	Kermit	04/30/81	W	M	23	Halifax	01/24/95	Executed 01/24/95 by Lethal Injection
0196014	Huffstetler	David Earl	05/19/83	W	M	37	Gaston	09/15/95	Natural Death 09/15/95
0200469	Ingle	Phillip Lee	02/19/93	W	M	31	Rutherford (2)	09/22/95	Executed by 09/22/95 by Lethal Injection
0194143	Howell	Eddie Loyd	09/28/94	W	M	32	Burke	05/22/96	Re-Sent Ordered 05/22/96; Suicide 09/03/98 While Safekeeper
0131312	Flowers	Wendell	10/06/94	B	M	41	Rowan	05/22/96	Governor Hunt Commuted to Life Without Parole on 12/15/99
0236997	Lee	Daniel Brian	01/27/90	W	M	23	Watauga	01/11/97	Natural Death 01/11/97
0217634	Jones	Milton Ray	08/16/95	B	M	32	Onslow	07/25/97	Re-Sent Ordered 07/25/97; Rec'd Life 01/27/99
0051795	Brown	Thomas Jack	02/07/85	W	M	31	Robeson	11/24/97	New Trial Ordered 11/24/97; Rec'd Life 08/09/99 for 2nd Degree Murder
0501967	Jackson	Richard Allen	11/22/95	W	M	26	Buncombe	04/23/98	New Trial Ordered 04/23/98; Rec'd 300-379 mos. 03/03/00 for 2nd Degree Murder
0450979	Womble	Curtis Ray	03/04/94	B	M	18	Columbus	07/22/98	Rec'd Life 07/22/98 for 2nd Degree Murder
0183941	Hill	Zane Brown	10/03/90	W	M	54	Buncombe	08/14/98	Executed 08/14/98 by Lethal Injection
0303094	Noland	John Thomas	11/06/82	W	M	34	Mecklenburg (2)	11/20/98	Executed 11/20/98 by Lethal Injection
0330785	Price	Ricky Lee	09/24/87	W	M	29	Person	11/23/98	Suicide 11/23/98
0342151	Rich	James David	08/28/95	B	M	23	Greene	03/26/99	Executed 03/26/99 by Lethal Injection
0345281	Rivera	Alfred Milton	10/25/97	W	M	26	Forsyth (2)	04/29/99	New Trial Ordered 04/29/99; Found Not Guilty 11/22/99
0296093	Munsey	Charles Wayne	06/13/96	W	M	48	Wilkes	05/14/99	New Trial Ordered 05/14/99; Natural Death 09/17/99 as a Safekeeper

0497381	Barrow	James William	11/27/96	W	M	35	Johnston	08/12/99	New Trial Ordered 08/12/99, Rec'd 2 life sentences without parole 2/16/01
0040300	Boyd	Arthur Martin Jr.	03/23/83	W	M	38	Surry	10/21/99	Executed 10/21/99 by Lethal Injection
0048990	Brown	David Junior	10/20/80	B	M	32	Union (2)	11/19/99	Executed 11/19/99 by Lethal Injection
0031776	Bishop	Steven Mark	04/27/94	W	M	34	Guilford	01/10/00	New Trial Ordered 01/10/00, Convicted 2nd deg. murder, Rec'd life
0596484	Rogers	Ronald	12/09/97	O	M	29	Richmond	07/06/00	New Trial Ordered 07/06/00; Released to Co. via Writ 06/26/00
0422053	Wall	Robert William	02/03/93	W	M	50	Northampton	08/24/00	Natural Death 08/24/00 (CP Hospital)
0363767	Sexton	Michael Earl	09/25/91	B	M	25	Wake	11/09/00	Executed 11/09/00 by Lethal Injection
0068748	Carter	Marcus Lewis Jr.	04/10/92	B	M	24	Wayne	11/21/00	Governor commuted to life without parole 11/21/00
0626711	Israel	Yahweh	09/22/98	B	M	38	Wake	01/10/01	New Trial Ordered 01/10/01, Convicted 2nd deg. murder 8/24/01, Rec'd 25 yrs, 11mos.
0130006	Fisher	Willie	02/04/93	B	M		Forsyth	03/09/01	Executed 3/9/01
0325786	Poindexter	Ronald	12/02/99	W	M		Randolph	05/24/01	NC Supreme Court ordered new trial 5/24/01. Moved to Randolph Co. Jail.
0003825	Allen	Antoine	08/0501	B	M		Forsyth	6/28/01	NC Supreme Court ordered new trial. Convicted and rec'd life without parole 3/1/02.
0663909	Gillespie	Marshall	08/05/99	B	M		Forsyth	6/28/01	NC Supreme Court ordered new trial; Pled guilty to 2 counts 2nd deg. murder, Rec'd 39-48 years
0433349	White	Clifton A.	02/04/94	W	M	43	Mecklenburg	8/24/01	Executed 8/24/01
0137605	Frye	Ronald	11/17/93	W	M	42	Catawba	8/31/01	Executed 8/31/01
0013955	Bacon	Robert	2/19/91	B	M	41	Onslow	10/2/01	Commuted to life without parole by Gov. Mike Easley
0351533	Roper	James	4/27/98	W	M	63	Burke	10/10/01	Died natural death 10/10/01
0423876	Ward	David Junior	4/14/92	B	M	40	Pitt	10/12/01	Executed 10/12/01
0169136	Harris	Bobby Lee	7/29/92	W	M	35	Onslow	10/22/01	Death sentence vacated, re-sentenced to life 4/8/03
0244472	Lloyd	Willie	7/23/99	B	M	38	Alamance	10/30/01	NC Supreme Court ordered re-sentencing on 10/25/01. Rec'd life w/o parole 8/7/02.
0351877	Rose	John Hardy	5/12/92	W	M	43	Haywood	11/30/01	Executed 11/30/01
0424263	Ward	Michael	12/15/98	B	M	24	Halifax	12/4/01	NC Supreme Court ordered re-sentencing on 11/12/01

0247519	Long	Gary	9/16/99	W	M	52	Rowan	1/9/02	NC Supreme Court ordered re-sentencing 1/7/02. Re-sentenced to life without parole on 11/18/03.
0006059	Alston	Charlie Mason	11/3/92	B	M	42	Warren	1/10/02	Sentence commuted to life in prison without parole by Gov. Mike Easley
0113234	Duke	Jeffrey Neal	3/22/01	W	M	33	Gaston	1/25/02	Two death sentences vacated by NC Supreme Court 11/8/01. Released to custody of Gaston Co. sheriff to await new trial. Re-sentenced to death 9/26/2003.
0615966	Jones	Kevin D.	4/21/00	W	M	26	Forsyth	2/26/02	NC Supreme Court ordered re-sentencing on 2/21/02. Received life sentence 9/21/2005.
0201793	Ivey	Eddie	11/17/98	W	M	52	Robeson	2/27/02	NC Supreme Court ordered new trial 2/1/02. Convicted 1st Degree murder, rec'd life sentence 4/28/03
0372569	Skipper	Sherman E.	2/19/92	W	M	59	Bladen	3/15/02	Resentenced to two consecutive life sentences 3/15/02 **MR**
0488590	Canady	Carlos	11/22/99	I	M	31	Robeson	4/16/02	NC Supreme Court ordered new trial on 3/27/02. Serving remainder of a 10 year sentence for larceny.
0238618	Lemons	Edward	8/18/95	B	M	34	Wayne	4/22/02	Died of natural causes
0350537	Rogers	Lionel L.	04/14/00	B	M	38	Halifax	6/3/02	NC Supreme Court ordered re-sentencing 5/30/02. Continued serving 626-770 months for other crimes. Received life without parole for murder charge. 4/26/04
0091357	Craig	Andrew W.	3/4/82	B	M	57	Cabarrus	7/23/02	Death sentence vacated 7/12/02 in Cabarrus Superior Court. Serving life +50 years
0009243	Anthony	Francis	3/4/82	B	M	62	Cabarrus	7/23/02	Death sentence vacated 7/12/02 in Cabarrus Superior Court. Serving life +50 years
0176476	Heatwole	George F.	11/9/94	W	M	44	Moore	9/02/02	Died of natural causes
0290634	Moore	Terry D.	12/14/99	B	M	39	Davie	9/6/02	New trial ordered 9/5/02. Re-sentenced to death 6/13/03
0022268	Basden	Ernest	4/9/1993	W	M		Duplin	12/6/02	**Executed 12/6/2002**
0068237	Carter	Desmond	7/5/1993	B	M		Rockingham	12/10/2002	**Executed 12/10/2002**
0651806	McClain	Robert	6/25/99	B	M	29	Mecklenburg	12/13/02	Death sentenced vacated; re-sentenced to life in prison **MR**
0562597	Berry	Kyle O.	3/30/01	W	M	24	New Hanover	1/14/03	NC Supreme Court ordered re-sentencing on 1/9/03. Re-sentenced to death 3/10/2004.
0678436	Millsaps	James	11/22/00	B	M	47	Wilkes	1/14/03	NC Supreme Court ordered

									re-sentencing on 1/9/03. Re-sentenced to life without parole 2/23/2004.
0564016	Kemmerlin	Christene	10/18/00	W	F	34	Rockingham	1/14/03	Death sentence vacated. Life w/o parole imposed by NC Supreme Court
0143603	Gell	Alan	3/3/98	W	M	28	Bertie	1/16/03	Judge Cy Grant vacated death sentence and ordered new trial on 12/16/02. Gell was acquitted and released 2/18/2004.
0163746	Hamilton	Jerry L.	3/5/97	W	M	44	Richmond	5/6/03	Judge Michael Beale ordered new trial on 4/22/03
0219316	Jones	William Quentin	11/03/87	B	M	35	Wake	8/22/03	Executed 8/22/03
0197656	Hunt	Henry L.	12/24/85	I	M	58	Robeson	9/12/03	Executed 9/12/03
0023098	Bates	Joseph	11/9/94	W	M	35	Yadkin	9/26/2003	Executed 9/26/03
0214462	Jones	Brandon	8/15/201	B	M	33	Gaston	10/1/03	Death sentence vacated, re-sentencing ordered 9/11/03 by NC Supreme Court. Re-sentenced to life without parole at expiration of all other sentences.
0302865	Nobles	Cornelius	9/10/97	B	M	39	Sampson	10/1/03	Death sentence vacated, re-sentencing ordered
0172549	Hartman	Edward	10/20/94	W	M	39	Northampton	10/3/03	Executed 10/3/03
0547365	Anderson	Melanie S.	9/26/96	F	W	40	Wilkes	10/6/03	Death sentence vacated 7/24/2003. Re-sent. to life in prison **MR**
0222263	Keel	Joseph Timothy	3/30/93	M	W	39	Edgecombe	11/7/2003	Executed 11/7/2003
0098115	Daniels	John	9/25/90	M	B	46	Mecklenburg	11/14/2003	Executed 11/14/2003
0304240	Norwood	Lorenza	6/17/94	M	B	41	Nash	11/24/2003	Death sentence vacated, life sentence imposed 8/29/03. Moved from death row 11/24/2003. **MR**
0347829	Robinson	Dwight L.	6/2/92	M	B	45	Guilford	12/1/03	Death sentence vacated, life sentence imposed 11/7/03 by Judge Howard Greeson **MR**
0592535	Valentine	Ronald O.	2/1/00	M	B	34	Hertford	12/2/03	NC Supreme Court ordered re-sentencing 12/1/03. Re-sentenced to life 9/7/2004.
0252465	Lyons	Robbie J.	5/6/94	M	B	31	Forsyth	12/5/03	Executed 12/5/2003
0353653	Rowsey	Raymond Dayle	10/1/93	M	W	32	Alamance	1/9/2004	Executed 1/9/2004
0037028	Bone	Anthony	2/5/99	M	B	43	Guilford	2/3/2004	Death sentence vacated, life sentence without parole imposed **MR**
0281791	Miller	General	2/1/93	M	B	54	Robeson	2/19/2004	Died of natural causes 2/19/2004
0666808	Matthews	Parrish	5/26/01	M	B		Edgecombe	3/15/2004	NC Supreme Court ordered

		Lorenzo							new trial. Convicted of 1st degree murder and sentenced to life without parole 2/24/2005
0763486	Maske	Michael	5/10/02	M	B	26	Forsyth	3/15/2004	NC Supreme Court ordered resentencing. Held at Central Prison as safekeeper.
0493734	Leeper	Jonathan E.	2/22/2000	M	B	28	Mecklenburg	5/13/2004	Mecklenburg Superior Judge Jesse Caldwell vacated two death sentences and imposed two sentences of life without parole.
0186563	Hoffman	Johnathan	11/14/1996	M	B	50	Union	5/24/2004	New trial ordered 4/30/04 on both murder and robbery w/firearm convictions.
0510801	Boggess	Todd C.	3/24/97	M	W	29	Durham	9/3/2004	NC Supreme Court ordered new trial ordered new trial 9/2/04. Moved to safekeeper housing 9/3/2004
0684814	Tirado	Francisco E.	04/11/00	M	O	23	Cumberland	9/3/2004	NC Supreme Court ordered resentencing 9/2/2004. Moved to regular population to serve remaining sentences.
0138201	Fullwood	Michael L.	8/19/1994	M	B	48	Buncombe	9/3/2004	8/16/2004 - US District Court - Western District of NC orders re-sentencing hearing 9/3/2004 - Fullwood moved to Buncombe Co Jail. 12/12/05 - Re-sentenced to two consecutive life terms.
0546715	Scanlon	Donald	6/9/1998	M	W	46	Durham	9/27/2004	Durham Superior Judge Ronald Stephens vacated death sentence and imposed life without parole.
0385535	Spruill	Johnnie	11/4/1992	M	B	51	Northampton	9/30/2004	Northampton Superior Judge Cy Grant vacated death sentence and imposed life without parole. MR
0420511	Gibbs	Renwick	11/14/1991	M	B	40	Beaufort	10/1/2004	Beaufort Superior Judge William Griffin vacated three death sentences and imposed three life sentences without parole. MR
0319156	Perkins	Sammy	12/15/93	M	B	51	Pitt	10/8/2004	Executed 10/8/2004
0345539	Roache	Charles	4/25/01	M	W	30	Haywood	10/22/2004	Executed 10/22/2004
0072498	Chandler	Frank	7/20/1993	M	W	32	Surry	11/12/2004	Executed 11/12/2004
0187200	Holden	Russell	5/9/1995	M	W	48	Duplin	12/14/2004	Judge Russell Lanier vacates death sentence 10/8/2004 and imposes life sentence MR
0005205	Allen	Timothy L.	12/6/1985	M	B	50	Halifax	1/25/2005	4th Circuit Court of Appeals finds error in sentencing and remands case to county for re-sentencing.
0329098	Powell	William	4/30/1993	M	W	58	Cleveland	3/11/2005	Executed 3/11/2005

0325786	Poindexter	Ronald	1/29/2002	M	W	56	Randolph	4/8/2005	NC Supreme Court ordered re-sentencing 3/4/2005
0696838	Champan	Lamorris	11/02/2001	M	B	22	Johnston	4/28/2005	NC Supreme Court vacated death sentence and ordered re-sentencing after US Supreme Court ruled execution of juveniles unconstitutional.
0567544	Walters	Travis LeVance	4/5/2001	M	B	24	Robeson	5/5/2005	Death sentence vacated by NC Supreme Court 5/4/2005 after US Supreme Court ruled execution of juveniles unconstitutional. To be re-sentenced in Robeson County.
0343602	Richmond	Earl	06/01/1995	M	B	43	Cumberland	5/6/2005	Executed 5/6/2005
0216650	Jones	John Wesley	8/16/1990	M	B	56	Jones	5/15/2005	Died of natural causes 5/15/2005
0001694	Adams	Thomas Mark	9/2/1995	M	W	34	Iredell	5/27/2005	Death sentence vacated in Iredell Superior Court 5/9/2005 after US Supreme Court ruled execution of juveniles unconstitutional.
0185502	Hipp	Anthony	5/22/1996	M	B	56	Rowan	9/8/2005	Rowan Superior Court judge Larry Ford finds Hipp to be mentally retarded and vacates death sentence. Sentenced to life without parole. 8/1/2005.
0318113	Penland	Rex D.	2/3/1994	M	W	45	Stokes	9/12/2005	Stokes Superior Court judge John Craig ordered new trial 7/28/2005. Offender moved to safekeeper housing.
0270047	McHone	Steven V.	3/7/1991	M	W	35	Surry	11/11/2005	Executed 11/11/2005
0398002	Syriani	Elias H.	6/13/1991	M	O	67	Mecklenburg	11/18/2005	Executed 11/18/2005
0040519	Boyd	Kenneth L.	7/14/1994	M	W	57	Rockingham	12/2/2005	Executed 12/2/2005
0371096	Simpson	Perrie D.	3/12/1985	M	B	43	Rockingham	1/20/2006	Executed 1/20/2006

The Death Penalty

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ATTACHMENT
VIII

FUTURE POSSIBLE EXECUTIONS IN 2006

(Updated January 23, 2006)

The following is a list of North Carolina death row inmates who have completed, or are in the process of completing state and federal post-conviction proceedings. Depending upon court action, some of these death row inmates will or possibly could face execution dates during 2006. The inmates are listed in probable order of anticipated execution dates, with the understanding that there is uncertainty when the cases will be decided by the respective courts:

CASES PENDING EXECUTION DATES

1. **Moody, Patrick Lane** (Davidson Co.)-Recommendation by United States Magistrate Judge denying relief filed on January 10, 2003; Moody's objections filed on January 25, 2003; on February 21, 2003, Moody filed motion to defer ruling on federal habeas petition pending Hunt decision, and on June 13, 2003 motion to defer ruling was denied; objections to Magistrate Judge's recommendation filed on June 30, 2003. On November 14, 2003, United States District Court Judge Frank W. Bullock, Jr. filed Judgment and Order denying Moody's petition and dismissing it with prejudice. Judge Bullock also denied COA and Moody's Motion to Defer Ruling. On November 28, 2003, Moody filed Rule 59(e) Motion to Alter or Amend Judgment, and on December 2, 2003 State filed response in opposition. Rule 59(e) motion denied by Judge Bullock on June 28, 2004. Notice of appeal filed on July 23, 2004. On September 2, 2004, the Fourth Circuit appointed attorneys Donald Joseph Willey and Charlotte Gail Blake to represent Moody on appeal. On October 18, 2004, Moody filed preliminary brief and Joint Appendix in Fourth Circuit, along with an application for COA. On November 5, 2004, the Fourth Circuit granted a COA as to Moody's ineffective assistance of counsel claim. State's Brief filed in Fourth Circuit on December 2, 2004. Moody's Reply Brief filed in Fourth Circuit on December 16, 2004. Oral argument held in Fourth Circuit on March 17, 2005. On May 12, 2005, the Fourth Circuit filed its decision affirming the District Court's denial of habeas relief. On June 7, 2005, the Fourth Circuit denied Moody's Petition for Rehearing and Suggestion for Rehearing En Banc. Fourth Circuit mandate issued on June 15, 2005. Moody's Petition for Writ of Certiorari (No. 05-7414) filed in United States Supreme Court on November 4, 2005. State's Brief in Opposition filed on November 18, 2005. Distributed for Court Conference of January 6, 2006. On January 9, 2006, the United States Supreme Court denied Moody's petition. On January 23, 2006, notification was forwarded to the Secretary of Correction pursuant to N.C.G.S. § 15-194 to schedule Moody's execution date. [contact: Special Deputy Attorney General Edwin W. Welch]

CASES PENDING IN UNITED STATES SUPREME COURT FOLLOWING FOURTH CIRCUIT DECISION

1. **Conner, Jerry Wayne** (Gates Co.)-On March 12, 2004, Chief United States District Court Judge Terrence W. Boyle filed Judgment and Order denying Conner's petition and dismissing it with prejudice. On March 29, 2004, Conner filed Rule 59(e) Motion to Alter or Amend Judgment. Rule 59(e) motion denied on July 12, 2004. Notice of appeal and application for COA filed on August 12, 2004. On September 14, 2004, Judge Boyle filed Order granting COA on Claim 1 (juror misconduct). Conner's Brief and Joint Appendix filed in Fourth Circuit on November 10, 2004. State's Brief filed in Fourth Circuit on December 22, 2004. Conner's Reply Brief filed in Fourth Circuit on January 7, 2005. Oral argument in Fourth Circuit on February 1, 2005. On May 3, 2005, the Fourth Circuit filed its decision affirming the District Court's denial of habeas relief. On June 1, 2005, the Fourth Circuit denied Conner's Petition for Rehearing and Suggestion for Rehearing En Banc. Conner's Petition for Writ of Certiorari (No. 05-7270) filed in United States Supreme Court on October 31, 2005. State's Brief in Opposition filed on December 8, 2005. Conner's Reply filed on December 19, 2005. On December 29, 2005, the Court requested the record. Decision pending. [contact: Special Deputy Attorney General Steve Arbogast]

2. **Brown, Jr., Willie** (Martin Co.)–On February 25, 2002, United States District Court Judge Malcolm Howard filed an Order and Judgment denying Brown's petition for writ of habeas corpus. On March 11, 2002, Brown filed a Rule 59(d) motion to alter or amend, and on April 17, 2002 Judge Howard denied Brown's Rule 59(e) motion. On May 17, 2002, Brown filed a Notice of Appeal and application for COA, and on June 4, 2002 Judge Howard granted the COA as to the McKoy claim and denied it as to the IAC issue. On appeal, on February 14, 2003 a panel of the United States Court of Appeals for the Fourth Circuit reversed in part, holding that the state post-conviction court's decision barring review of Brown's McKoy unanimity instruction claim was not based on an adequate and independent state law ground, and therefore there was no procedural bar to federal habeas review of the merits of Brown's unanimity claim. Brown v. Lee, 319 F.3d 162, 175 (4th Cir. 2003). The Fourth Circuit panel remanded the case to Judge Howard for consideration of the merits of the unanimity claim. Brown v. Lee, 319 F.3d at 177. On March 13, 2003, the Fourth Circuit denied the State's petition for rehearing and suggestion for rehearing en banc. On November 21, 2003, the State filed in the EDNC a motion to hold proceedings in abeyance pending the decision by the United States Supreme Court in Beard v. Banks, ___ U.S. ___, 72 U.S.L.W. 3234 (Sept. 30, 2003) (No. 02-1603) on the issue of the retroactivity of Mills v. Maryland, 486 U.S. 367 (1988) under Teague v. Lane, 489 U.S. 288 (1989). On January 7, 2004, Judge Howard entered an Order granting the State's motion to hold the proceedings in abeyance pending the

decision in Beard and directing counsel for the State to notify the Court promptly of the decision in Beard. On June 24, 2004, the United States Supreme Court announced its decision in Beard v. Banks, ___ U.S. ___, 124 S. Ct. 2504, 2004 U.S. LEXIS 4572 (Jun. 24, 2004) (No. 02-1603). On June 29, 2004, the State notified Judge Howard of the Beard decision. On August 25, 2004 and August 26, 2004, Judge Howard filed an Order and Judgment, respectively, concluding that under the recent decision by the United States Supreme Court in Beard, Mills and McKoy v. North Carolina, 494 U.S. 433 (1990) announced a new rule of law that does not fall within either of the exceptions to the general rule of non-retroactivity under Teague, and therefore concluded that Brown's case "was final well before the [United States] Supreme Court ruled in Mills in 1988, and "Mills and McKoy may not be applied to his case." On September 9, 2004, Brown filed a Rule 59(e) motion to alter or amend, and on September 21, 2004 the State filed a response in opposition to the Rule 59(e) motion. On October 21, 2004, Judge Howard denied Brown's motion for oral argument and denied Brown's Rule 59(e) motion. On November 19, 2004, Brown filed a Notice of Appeal in the EDNC, along with a motion for a COA. On December 22, 2004, Judge Howard granted a COA as to Brown's Beard retroactivity issue, but denied the COA as to Brown's IAC/appellate counsel claim. On January 11, 2005, the Fourth Circuit appointed attorney J. Donald Cowan as Brown's lead appellate counsel, and on February 1, 2005 appointed attorney Laura M. Loyek as new co-counsel. Following an extension of time, on January 31, 2005 Brown filed his preliminary brief and joint appendix, along with a motion for expansion of the COA to include the IAC/appellate counsel issue in the Fourth Circuit. On February 25, 2005, the Fourth Circuit granted the motion for expansion of the COA, and the State's Brief of Appellee was due and filed on March 28, 2005. Brown's Reply Brief was filed on April 14, 2005. Oral argument held in Fourth Circuit on May 27, 2005. On June 23, 2005, the Fourth Circuit filed its decision affirming the District Court's denial of habeas relief. Brown's Petition for Rehearing and Suggestion for Rehearing En Banc filed in Fourth Circuit on July 7, 2005. Fourth Circuit denied Petition for Rehearing and Suggestion for Rehearing En Banc on July 19, 2005. Petition for Writ of Certiorari (No. 05-8147) filed in United States Supreme Court on December 16, 2005. State's Brief in Opposition due on February 1, 2006. [contact: Assistant Attorney General Sandra Wallace-Smith or Special Deputy Attorney General Barry S. McNeill]

3. **Flippin, Samuel Russell** (Forsyth Co.)-Recommendation by United States Magistrate Judge denying relief filed on March 9, 2004; Flippin's objections filed on April 22, 2004; on June 8, 2004, United States District Court Judge James A. Beaty, Jr. filed Judgment and Order adopting Magistrate's Recommendation and denying Flippin's petition and dismissing it with prejudice. On June 22, 2004, Flippin filed Rule 59 motion to alter or amend. On August 18, 2004, Judge Beaty filed Order denying Rule 59 motion. Notice of appeal filed on September 17, 2004, along with application for COA. State filed response to application for

COA on September 23, 2004. On October 4, 2004, Magistrate Judge recommended denial of COA. Flippin filed objections to Magistrate Judge's recommendation on October 19, 2004. On December 23, 2004, Judge Beaty filed Order adopting Magistrate Judge's recommendation and denying COA. On January 31, 2005, Fourth Circuit appointed attorneys Tom Loflin as lead counsel and Rick Green as second counsel. Briefing schedule withheld for 90 days. On June 13, 2005, Flippin filed his preliminary brief and joint appendix in the Fourth Circuit. On August 4, 2005, Fourth Circuit denied COA and dismissed Flippin's appeal. Flippin's Petition for Rehearing and Suggestion for Rehearing En Banc filed in Fourth Circuit on August 18, 2005. Fourth Circuit denied Petition for Rehearing and Suggestion for Rehearing En Banc on August 30, 2005. Petition for Writ of Certiorari due in United States Supreme Court on January 27, 2006. [contact: Special Deputy Attorney General Valerie Spalding]

CASES PENDING/ARGUED IN FOURTH CIRCUIT

4. **Robinson, Marcus Reymond** (Cumberland Co.)—Order and Judgment by Senior United States District Court Judge James C. Fox filed on September 14, 2004 denying Robinson's federal habeas petition and affirming death sentence. Robinson's Rule 59(e) motion to alter or amend judgment filed on September 28, 2004. On December 14, 2004, Judge Fox entered Order denying Robinson's Rule 59(e) motion. Robinson's Notice of Appeal filed on January 13, 2005, along with application for COA which is pending before Judge Fox. On February 23, 2005, the Fourth Circuit appointed attorneys Geoffrey Hosford as lead counsel and Kevin Bradley as second counsel. On March 4, 2005, the Fourth Circuit extended the time for Robinson to file his preliminary brief and joint appendix until March 30, 2005. Additional extension of time granted to file preliminary brief and joint appendix until April 11, 2005. Following the extension of time, on April 11, 2005, Robinson filed his preliminary brief and joint appendix in the Fourth Circuit (No. 05-1). On May 19, 2005, the State filed its Brief of Appellee. Robinson's Reply Brief was filed on June 6, 2005. Oral argument held in Fourth Circuit on September 22, 2005 (JJ., Williams, King, & Shedd). Pending decision. [contact: Special Deputy Attorney General Valerie Spalding]

2. **Conaway, John Lee** (Richmond Co.)-Recommendation by United States Magistrate Judge denying relief filed on February 8, 2002; Order and Recommendation by Magistrate Judge denying amended habeas petition filed on July 23, 2003; objections to Magistrate Judge's recommendation filed on August 6, 2003, and on January 23, 2004 United States District Court Judge James A. Beaty entered an Order adopting the Magistrate Judge's recommendation, and denying a certificate of appealability. Rule 59(e) motion and application for COA filed on February 9, 2004, and were denied by Judge Beaty on May 14, 2004. Notice of Appeal filed on June 9, 2004, and appeal was docketed in Fourth Circuit on July 13, 2004. On August 2, 2004, the Fourth Circuit appointed attorneys

Burton Craige and Marsh Smith to represent Conaway on appeal. Following suspension of briefing schedule (Conaway's brief and joint appendix originally due on September 13, 2004) and an extension of time, Conaway's Brief, Joint Appendix, and application for COA were filed in Fourth Circuit on February 11, 2005 (No. 04-20). On April 21, 2005, Conaway filed motion to continue oral argument (scheduled for September 2005), and on April 29, 2005 State filed response and motion for extension of time to file Brief of Appellee. State's Brief of Appellee filed in Fourth Circuit on May 2, 2005. Conaway's Reply Brief filed on June 27, 2005. On June 28, 2005, Conaway filed motion for leave to file attachments to Reply Brief, and on June 29, 2005 State filed response. On July 13, 2005, Fourth Circuit allowed motion to file attachments to Reply Brief. Oral argument held in Fourth Circuit on October 25, 2005 (JJ., Widener, King, & Duncan). Pending decision. [contact: Special Deputy Attorney General Valerie Spalding]

3. **Campbell, James Adolph** (Rowan Co.)-Recommendation by United States Magistrate Judge denying relief filed on May 28, 2002; Campbell's objections filed on June 12, 2002; Judgment by United States District Court Judge William L. Osteen filed on January 27, 2003 adopting Magistrate Judge's recommendation and denying federal habeas petition, but issuing COA because of finality of capital punishment; on February 10, 2003, Campbell filed motion to stay proceedings and Rule 59 motion to alter or amend judgment; on August 5, 2003, Magistrate Judge recommended denial of motion to stay proceedings pending Hunt and Rule 59 Motion to alter or amend pending; Campbell filed objections to Magistrate Judge's recommendation on August 21, 2003. On December 3, 2003, Judge Osteen adopted the Magistrate's Recommendation and denied Campbell's Rule 59 motion. Campbell's Notice of Appeal filed on January 2, 2004, and appeal was docketed in Fourth Circuit on January 21, 2004. On April 5, 2004, Fourth Circuit ordered that briefing schedule be withheld for 90 days. On June 30, 2004, Fourth Circuit granted Campbell's motion to withhold setting of briefing schedule for an additional 45 days. On August 2, 2004, State filed in Fourth Circuit a motion to revoke COA and dismiss appeal, and Fourth Circuit directed the filing of a response on or before August 13, 2004. Campbell's response received on August 16, 2004. On September 21, 2004, Fourth Circuit entered Order vacating COA and remanding to District Court for reconsideration of COA. On November 1, 2004, Judge Osteen entered Order denying COA. On November 23, 2004, Campbell filed motion to reconsider denial of COA, the State filed response on December 7, 2004, and Campbell filed reply on December 15, 2004. Campbell afforded until March 23, 2005 to file additional brief in support of motion for reconsideration, and on March 21, 2005 Campbell requested an additional extension of time until April 2, 2005. On April 4, 2005, Campbell filed a memorandum in support of the COA, and on April 18, 2005 the State filed its memorandum in response. On July 6, 2005, Judge Osteen filed an Order denying a COA. Following extension, Campbell's brief and joint appendix

filed in Fourth Circuit on October 18, 2005 (No. 04-2). COA granted on November 7, 2005. State's brief filed on December 2, 2005, and Campbell's reply brief filed on January 11, 2006. Oral argument scheduled for week of March 14-17, 2006. [contact: Special Deputy Attorney General Edwin W. Welch]

4. **Daughtry, Johnny Ray** (Johnston County)–Order and Judgement by Senior United States District Court Judge James C. Fox filed on August 27, 2003 denying Daughtry's federal habeas petition and affirming death sentence; Daughtry's Rule 59(e) motion to alter or amend judgment filed on September 11, 2003. On December 3, 2003, Judge Fox entered Order denying Rule 59(e) motion. Daughtry's Notice of Appeal filed on January 2, 2004, and appeal was docketed in Fourth Circuit on January 5, 2004. On January 2, 2004, Daughtry's counsel filed a Notice of Appeal in federal court, which was signed by both his counsel, Seth Blum and Andrew Whiteman. Mr. Whiteman entered an appearance before the Fourth Circuit on January 8, 2004. Daughtry's docketing statement on appeal was filed in the Fourth Circuit on January 20, 2004, and was signed by Mr. Blum. On February 19, 2004, the Fourth Circuit entered a Preliminary Briefing Order, directing that Daughtry's appellate brief and appendix be filed in the Fourth Circuit on or before March 30, 2004. On February 10, 2004, a PETITION FOR ADJUDICATION OF INCOMPETENCE AND APPLICATION FOR APPOINTMENT OF GUARDIAN [hereinafter "PETITION"], was filed before the Clerk of Wake County Superior Court by Mr. Blum (the Petitioner), by and through his attorney (Ms. Paula K. McGrann), pursuant to N.C.G.S. § 35A-1105 et seq. naming Daughtry as the Respondent. In the PETITION, Mr. Blum, acting as the Petitioner, sought to have Daughtry declared to be incompetent on the basis, among other things, that Daughtry refused to meet with and communicate with his attorneys, and had indicated to Mr. Blum by letter in November of 2003 that "he wants to cancel all appeals." Mr. Blum sought the appointment of a interim guardian because Daughtry "has immediate deadlines to continue his appeals or he may forfeit important rights to post-conviction reviews." On March 2, 2004, the Honorable Janet I. Pueschel, Clerk of Wake County Superior Court, entered a notice scheduling a hearing on Mr. Blum's petition for Friday, March 5, 2004, at 10:15 a.m., at Central Prison, Raleigh, North Carolina, and appointing Ms. Rosilyn Sampson as an interim guardian ad litem to represent Daughtry at the hearing. On March 4, 2004, the State (by and through the Honorable Thomas H. Lock, District Attorney of the Eleventh Prosecutorial District), filed before the Clerk of Wake County Superior Court a MOTION TO INTERVENE and supporting MEMORANDUM, along with exhibits, pursuant to N.C.G.S. § 1A-1, Rule 24(b). Following the filing of the State's MOTION TO INTERVENE, Mr. Blum or his counsel sought to continue the hearing scheduled for Friday, March 5, 2004, and, at their request, the hearing was continued and rescheduled for Wednesday, March 31, 2004. Subsequently, on March 16, 2004, Mr. Blum, by and through his counsel, Ms.

McGrann, filed a NOTICE OF VOLUNTARY DISMISSAL OF PETITION, requesting that the incompetency PETITION be dismissed without prejudice. On March 19, 2004, Mr. Blum and Mr. Whiteman filed the following motions in the Fourth Circuit: (1) MOTION TO HOLD IN ABEYANCE; (2) MOTION TO EXTEND TIME TO FILE BRIEF; and, (3) MOTION TO ALLOW WITHDRAWAL OF COUNSEL. On March 25, 2004, the State filed in Fourth Circuit a Motion to Remand to District Court for Determination Whether Daughtry desired to appeal. On April 21, 2004, Fourth Circuit granted the State's motion to remand to the District Court "for the limited purpose of making factual findings regarding whether Daughtry desires to appeal the denial of habeas relief and any related competency questions. The district court is also directed to make factual findings regarding the motion to withdraw filed by Daughtry's attorneys. The Court defers ruling on the motion to withdraw until the proceedings on remand are complete." On August 4, 2004, the federal district court (Judge Fox) entered an ORDER directing the parties to submit briefs addressing the issues on remand, including (1) whether the Petitioner wishes to appeal this Court's denial of federal habeas relief to the United States Court of Appeals for the Fourth Circuit, and whether the Petitioner is competent to waive his appeal or assist in his appeal; and, (2) the motion to withdraw filed by the Petitioner's counsel in the Fourth Circuit. Following briefing by the parties, on October 4, 2004 Judge Fox entered an ORDER directing that Daughtry be evaluated for the purpose of determining his competency to knowingly withdraw and terminate his appeal to the Fourth Circuit. Pursuant to the ORDER, Judge Fox granted funds to Daughtry's appointed federal habeas counsel to have Daughtry evaluated, and also directed that the State "obtain a separate mental health evaluation of the petitioner by a psychiatric expert of [its] choosing." The ORDER required that the evaluations be performed within 60 days, and that the respective evaluations "be furnished promptly to the court, the Special Deputy Attorney representing the respondent, and the petitioner's counsel." As a result of Judge Fox's ORDER, Dr. Robert S. Brown, Jr., an expert in forensic psychiatry, agreed to perform the evaluation on behalf of the State. Dr. Brown was forwarded and provided the necessary records, and on November 6, 2004 met with Daughtry at Central Prison in Raleigh, North Carolina. On November 18, 2004, Dr. Brown forwarded his report, dated November 16, 2004. On November 29, 2004, Dr. Brown's Report was forwarded to Judge Fox. Meanwhile, the expert hired by Daughtry's federal habeas counsel sought an extension of time to file his report, and on January 3, 2005 Judge Fox extended the filing deadline until January 31, 2005, with the notification that "the petitioner and counsel are put on notice that the petitioner's continued refusal to be evaluated shall force the court to use only the available evaluation to proceed in its determination of his competency." On January 31, 2005, Daughtry's federal habeas counsel filed a notice of "ATTEMPTED PSYCHOLOGICAL EVALUATION," attached to which was a report by Dr. James E. Bellard indicating that although he had met with and evaluated Daughtry in November of 2004, Daughtry had refused Dr. Bellard's

followup attempts to complete the evaluation, and therefore Dr. Bellard could not offer an opinion on Daughtry's competency. On May 9, 2005, Daughtry filed a motion and supporting affidavits in the EDNC requesting that the issues on remand be declared moot because he had informed his attorneys that he desired to continue his appeal and was willing to assist his attorneys in the appellate process. On June 3, 2005, Judge Fox filed an Order denying the motion to declare moot "insofar as it requests the court to rule on motions or requests made in the Fourth Circuit." However, Judge Fox also held that "in light of the court's factual findings in this Order, the requests to withdraw from representation made in this court are dismissed as moot." Judge Fox further directed the Clerk to close the case and return the matter to the Fourth Circuit. On July 7, 2005, the Fourth Circuit ordered that Daughtry's brief and joint appendix be filed on or before August 16, 2005. Daughtry's brief and joint appendix filed on August 23, 2005 (No. 04-1), along with motions to file attachments to brief and to file brief under seal. On December 27, 2005, Fourth Circuit filed Order denying Daughtry's motion to file attachments to brief, but granted motion to file brief under seal. Order also denied COA as to IAC claim, but granted COA as to remaining claims. State's brief due January 26, 2006. [contact: Special Deputy Attorney General Barry S. McNeill]

5. **Buckner, George Cale** (Gaston Co.)–On April 18, 2005, United States District Court Judge Richard L Voorhees filed an Order and Judgment granting the State's motion for summary judgment and denying Buckner's petition for writ of habeas corpus. On April 28, 2005, Buckner filed a Rule 59(e) motion to alter or amend the judgment. On May 31, 2005, Judge Voorhees filed an Order denying Buckner's Rule 59(e) motion. On June 30, 2005, Buckner filed a notice of appeal and application for certificate of appealability (COA) in the WDNC. On July 11, 2005, the Fourth Circuit ordered that Buckner's brief and joint appendix be filed on or before August 22, 2005. Following extension, Buckner's brief and joint appendix filed on September 26, 2005 (No. 05-14). On November 18, 2005, Fourth Circuit expanded COA. On November 15, 2005, Fourth Circuit denied Buckner's motion to remand for hearing on pro se motion for new counsel. State's brief filed on December 7, 2005. Buckner's reply brief filed on December 27, 2005. Scheduled for oral argument on January 31, 2006. [contact: Assistant Attorney General Steve Bryant]

6. **Thomas, James Edward** (Wake Co.)–On March 18, 2004, United States District Court Judge Malcolm Howard filed an Order and Judgment denying Thomas' petition for writ of habeas corpus. On April 1, 2004, Thomas filed a Rule 59(d) motion to alter or amend. On March 8, 2005, Judge Howard denied Thomas' Rule 59(e) motion. Thomas' Notice of Appeal filed on April 14, 2005, and appeal was docketed in Fourth Circuit on April 18, 2005. On motion by Thomas, on June 3, 2005 the Fourth Circuit ordered that briefing schedule be withheld for 90 days after appointment of counsel, and that Ann Groninger was appointed as

one of Thomas' appellate counsel, but that the motion for appointment of Robert Zaytoun was denied. On June 6, 2005, Judge Howard granted Thomas a COA as to Claim IX, but denied the COA as to the remaining claims. On June 20, 2005, Thomas filed a motion for reconsideration of the Order by the Fourth Circuit denying appointment of attorney Zaytoun. Thomas' brief and joint appendix filed on December 14, 2005 (No. 05-7). State's brief due on February 17, 2006. Oral argument tentatively calendared for week of March 14-17, 2006. [contact: Special Deputy Attorney General Jonathan Babb]

7. **Billings, Archie Lee** (Caswell Co.)-Recommendation by United States Magistrate Judge denying federal habeas relief filed on November 22, 2004. Petitioner's objections filed on December 7, 2004. On March 3, 2005, United States District Court Judge Frank Bullock entered a Judgment and Order adopting the Magistrate Judge's recommendation, and affording Billings 30 days to file a motion for a certificate of appealability (COA). On April 4, 2005, Billings filed his notice of appeal and motion for COA, along with supporting brief. On May 9, 2005, Billings filed in Fourth Circuit a motion for appointment of appellate counsel (Kevin Bradley and Cynthia Katkish). On May 11, 2005, State filed response to motion for COA, and on May 17, 2005 filed an amended response to motion for COA. On June 7, 2005, Billings filed motion to modify preliminary briefing order, requesting extension to file brief in Fourth Circuit until decision by MDNC on COA. On June 20, 2005, Magistrate Judge Dixon filed a notice and recommendation that COA be denied, and allowed 10 days for Billings to object. On August 26, 2005, Judge Bullock denied COA and adopted Magistrate Judge's recommendation. Billings' brief and joint appendix filed in Fourth Circuit on October 17, 2005 (No. 05-8). On November 7, 2005, Fourth Circuit granted COA. State's brief filed on December 9, 2005. Billings' reply brief filed on December 27, 2005. Oral argument scheduled for February 3, 2006. [contact: Assistant Attorney General Steve Bryant]

8. **McNeill, John Davis** (Cumberland Co.)–On March 30, 2005, United States District Court Judge Malcolm J. Howard filed an Order and Judgment granting the State's motion for summary judgment and denying McNeill's petition for writ of habeas corpus. On April 12, 2005, McNeill filed a Rule 59(e) motion to alter or amend the judgment and memorandum of law. On May 20, 2005, Judge Howard filed an Order denying McNeill's Rule 59(e) motion. On May 31, 2005, McNeill filed a motion requesting that Robert Hurley be allowed to withdraw as counsel, and that M. Gordon Widenhouse, Jr. be appointed as lead counsel. On June 10, 2005, McNeill filed a notice of appeal in the EDNC. On June 13, 2005, McNeill filed an application for certificate of appealability (COA) and supporting memorandum in the EDNC. On June 21, 2005, the Fourth Circuit delayed the briefing schedule for 90 days. On July 5, 2005, Judge Howard granted COA on three claims. Following extension of time, on December 22, 2005 McNeill filed brief and joint appendix (No. 05-12). On December 27, 2005, McNeill filed

motion for expansion of the COA. On December 29, 2005, Fourth Circuit filed order suspending briefing schedule until adjudication of motion for expansion of COA. [contact: Special Deputy Attorney General Jill Cheek]

9. **Lynch, David Clayton** (Gaston Co.)–On April 14, 2005, United States District Court Judge Richard L Voorhees filed an Order and Judgment granting the State's motion for summary judgment and denying Lynch's petition for writ of habeas corpus. On April 28, 2005, Lynch filed a Rule 59(e) motion to alter or amend the judgment. On May 31, 2005, Judge Voorhees filed an Order denying Lynch's Rule 59(e) motion. On June 28, 2005, Lynch filed a notice of appeal and application for certificate of appealability (COA) in the WDNC. The State filed a response to the application for COA on June 29, 2005. On August 24, 2005, Judge Voorhees granted COA in part. On January 23, 2006, Lynch filed motion to withhold briefing schedule by an additional 30 days Pending briefing in Fourth Circuit (No. 05-13). [contact: Special Deputy Attorney General Valerie Spalding]

10. **Gregory, Warren Robert** (Pitt Co.)—On September 27, 2005, United States District Court Judge Terrence Boyle filed an Order and Judgment granting the State's motion for summary judgment and denying Gregory's petition for writ of habeas corpus. On October 27, 2005, Gregory filed a notice of appeal and application for certificate of appealability (COA) in the EDNC. On November 9, 2005, Fourth Circuit appointed William Gregory Duke as lead counsel and Steven Fisher as co-counsel. On November 16, 2005, Judge Boyle denied COA. Following extension of time, Gregory's preliminary brief and joint appendix filed on January 13, 2006 (No. 05-20). [contact: Special Deputy Attorney General Edwin W. Welch]

11. **LeGrande, Guy Tobias** (Stanly Co.)---Recommendation by United States Magistrate Judge denying federal habeas relief filed on August 5, 2005. Petitioner's objections filed on August 26, 2005. On March 3, 2005, United States District Court Judge Frank W. Bullock, Jr. entered a Judgment and Order adopting the Magistrate Judge's recommendation, and affording LeGrande 30 days to file a notice of appeal and motion for a certificate of appealability (COA). On October 27, 2005, LeGrande filed his notice of appeal and motion for COA. On November 14, 2005, Judge Bullock denied a COA. LeGrande's preliminary brief and joint appendix filed in Fourth Circuit on January 18, 2006 (No. 05-19). [contact: Assistant Attorney General Sandra Wallace-Smith]

CASES NEARING COMPLETION IN FEDERAL DISTRICT COURTS

1. **Stroud, Isaac Jackson** (Durham Co.)-Recommendation by United States Magistrate Judge Wallace W. Dixon denying relief filed on August 19, 2002 (No.

1:01-CV-00582-WLO). Stroud's objections filed on September 3, 2002. Motion to hold proceedings in abeyance pending Hunt filed on January 31, 2003; Order by United States District Judge William L. Osteen filed on March 10, 2003 staying further consideration pending Hunt. On July 17, 2003, Stroud filed motion to continue to hold proceedings in abeyance pending Hunt's petition for writ of certiorari to United States Supreme Court, and on October 16, 2003 United States District Judge Osteen entered Order granting stay pending Hunt decision. On October 21, 2003, Stroud filed compliance with Court's Order and Motion to Continue Stay, and on November 17, 2003, State filed Reply to motion to continue stay. Stay lifted and motion to continue stay denied on April 6, 2004. Petition for writ of habeas corpus denied by Judge Osteen on April 6, 2004. Rule 59(e) filed on May 10, 2004. On April 15, 2005, Magistrate Judge Dixon recommended Rule 59(e) motion be denied as to claims 1, 2, & 3, but be granted as to claim 4. On May 6, 2005, Stroud filed a motion to hold proceedings in abeyance pending decision by the United States Supreme Court on the Petition for Writ of Certiorari in Humphries v. Ozmint. On June 22, 2005, Stroud filed supplemental objections to the Magistrate Judge's recommendation on claim 2 of the Rule 59(e) motion. On August 4, 2005, Judge Osteen denied Stroud's Rule 59(e) motion, and entered an Amended Judgment dismissing Stroud's habeas petition with prejudice. On August 31, 2005, Stroud filed motion for COA. Stroud's notice of appeal filed on September 2, 2005. On October 27, 2005, Magistrate Judge Dixon recommended denial of Stroud's motion for COA. On November 16, 2005, Stroud filed objections to Magistrate Judge Dixon's recommendation that COA be denied. Decision pending. [contact: Special Deputy Attorney General Jonathan Babb]

2. **Kandies, Jeffrey Clayton** (Randolph Co.)-Recommendation by United States Magistrate Judge Russell A. Eliason denying relief filed on December 14, 2000 (No. 1:99-CV-00764-NCT). Kandies' objections filed on December 18, 2000, and supporting brief filed on January 15, 2001. Judgment by United States District Court Judge N. Carlton Tilley, Jr. filed on March 4, 2003 adopting Magistrate Judge's recommendation and denying federal habeas petition. Rule 59 Motion to alter or amend denied on April 21, 2003. Notice of appeal to Fourth Circuit filed on May 19, 2003. On November 19, 2003, Kandies filed motion to delay briefing schedule in Fourth Circuit, and on December 17, 2003 Fourth Circuit entered Order setting January 26, 2004 as deadline for Kandies' Brief and Joint Appendix. On January 12, 2004, Kandies filed motion seeking to extend briefing deadline by 45 days. Kandies brief filed in Fourth Circuit on March 3, 2004, and State's Brief filed on April 19, 2004. Argued in Fourth Circuit on June 2, 2004. On September 24, 2004, the Fourth Circuit filed its decision affirming the District Court's denial of habeas relief. On October 25, 2004, the Fourth Circuit denied Kandies' Petition for Rehearing and Suggestion for Rehearing En Banc. On January 4, 2005, Kandies filed in the United States Supreme Court an application for an extension of time to file his Petition for Writ of Certiorari,

requesting until February 22, 2005 to file his Petition. Kandies filed his Petition for Writ of Certiorari in the United States Supreme Court on February 22, 2005, but was returned for corrective action and refiling within 60 days. Kandies' Petition was refiled, and State filed its Brief in Opposition on May 25, 2005. On June 27, 2005, the United States Supreme Court granted the Petition, vacated the judgment of the Fourth Circuit, and remanded to the Fourth Circuit for further consideration in light of Miller-El v. Dretke, 545 U.S. ____ (2005). On August 8, 2005, Kandies filed motion in Fourth Circuit to remand to MDNC. State filed response on August 18, 2005. On August 31, 2005, Fourth Circuit remanded matter to MDNC. On September 29, 2005, Magistrate Judge Eliason ordered further briefing by parties. On December 14, 2005, Magistrate Judge Eliason stayed briefing pending adjudication of Kandies' motion for discovery. State filed response to motion for discovery on December 22, 2005. Kandies filed reply to State's response on January 9, 2006. Decision pending. [contact: Special Deputy Attorney General Edwin W. Welch]

3. **Peterson, Lawrence Eugene** (Richmond Co.)--Recommendation by United States Magistrate Judge Wallace W. Dixon denying federal habeas relief filed on November 18, 2004 (No. 1:03-CV-00651-NCT). Petitioner's objections filed on December 3, 2004. Decision pending by United States District Court Judge N. Carlton Tilley, Jr. [contact: Special Deputy Attorney General Danielle Marquis]

4. **Wilkinson, Philip Edward** (Cumberland Co.)--On December 8, 2005, United States District Judge Malcolm J. Howard filed an Order and Judgment denying Wilkinson's petition for writ of habeas corpus (No. 5:01-HC-00343-H). Wilkinson filed a Rule 59(e) Motion to Alter or Amend Judgment on December 19, 2005, and the State filed response in opposition on January 9, 2006. Decision pending. [contact: Assistant Attorney General Sandra Wallace-Smith]

CASES WHICH HAVE COMPLETED INITIAL STATE AND FEDERAL REVIEW

1. **Page, George Franklin** (Forsyth Co.)-Recommendation by United States Magistrate Judge March 4, 2002 to deny federal habeas petition; objections filed March 14, 2002; Judgment by federal district court October 9, 2002 adopting Magistrate Judge's recommendation and denying federal habeas petition; notice of appeal filed on October 21, 2002; Page's Fourth Circuit brief filed on December 6, 2002; State's Fourth Circuit brief filed on December 31, 2002; argued in Fourth Circuit on February 27, 2003. Fourth Circuit decision announced on July 28, 2003 affirming death sentence. Page's petition for rehearing and suggestion for rehearing en banc denied on August 26, 2003. Page filed his Petition for Writ of Certiorari in the United States Supreme Court on November 29, 2003, and the State filed its Brief in Opposition on December 1, 2003. United States Supreme Court denied the Petition for Writ of Certiorari on January 12, 2004. On January 2, 2004, Page and fellow plaintiffs Raymond Dayle Rowsey (scheduled for execution on January 9, 2004), Kenneth Bernard Rouse, and Sammy Crystal Perkins filed a civil action in the EDNC pursuant to 42 U.S.C. § 1983 alleging that North Carolina's method of execution constituted cruel and unusual punishment in violation of the Eighth Amendment; Plaintiff Rowsey sought a stay of his impending execution. On January 4, 2004, the State filed a response, and on January 7, 2004 Chief United States District Court Judge Terrence W. Boyle granted a stay of execution as to Plaintiff Rowsey. Rowsey et al. v. Beck et al., No. 5:04-CT-04-BO (Jan. 7, 2004). On January 8, 2004, the United States Court of Appeals for the Fourth Circuit declined to vacate Judge Boyle's January 7, 2004 order staying Rowsey's execution. Rowsey et al. v. Beck et al., ___ F.3d ___, No. 04-6073 (4th Cir., Jan. 8, 2004). However, later on January 8, 2004, the United States Supreme Court vacated the stay of execution entered by Judge Boyle, Beck et al. v. Rowsey et al., 540 U.S. ___, No. 03A576 (Jan. 8, 2004), and Rowsey was executed as scheduled on January 9, 2004. On January 20, 2004, Judge Boyle entered an Order directing the parties to proceed with pleading and briefing. Defendants filed a motion to hold the case in abeyance or, in the alternative, to enlarge the time within which to file an answer or other responsive pleading, and on February 4, 2004 Judge Boyle entered an Order granting the enlargement of time but declining to hold the case in abeyance. Meanwhile, on January 21, 2004, Pages' execution was scheduled for Friday, February 27, 2004. On February 6, 2004, Defendants filed a petition for writ of prohibition or mandamus in the Fourth Circuit, and on February 12, 2004 the Fourth Circuit panel issued an order directing plaintiffs to file a response by February 20, 2004. On February 9, 2004, Page filed emergency petitions for writs of prohibition, mandamus and certiorari, along with a motion for stay of execution in the Supreme Court of North Carolina (alleging violation of ethical rules). On February 10, 2004, the State filed its response. On February 10, 2004, the Supreme Court of North Carolina denied all three petitions and Page's motion for

stay of execution. On February 18, 2004, Defendants filed a motion to dismiss the § 1983 action on the grounds that Judge Boyle lacked subject matter jurisdiction. That same day, Plaintiffs filed a motion for preliminary injunction on behalf of Plaintiff Page. On February 19, 2004, Judge Boyle ordered Defendants to file a response by February 20, 2004. Defendants filed their response and memorandum in opposition to the motion for preliminary injunction on February 20, 2004. On February 25, 2004, at 5:05 p.m., Judge Boyle filed an Order granting Plaintiff Page's motion for preliminary injunction, and directing that Defendant's motion to dismiss be held in abeyance pending the outcome in Nelson v. Alabama, 540 U.S. 1046 (certiorari granted Dec. 1, 2003). On Thursday, February 26, 2004, Attorney General Roy Cooper issued the following statement: "We believe that this sentence should be carried out and that North Carolina's method of execution is constitutional. We agree with Judge Boyle that the factual and legal issues in this case are now directly before the U.S. Supreme Court in an Alabama case. Under the law, we must wait for the outcome of the Alabama case to make certain this execution takes place in a constitutional manner." On February 23, 2004, Page filed a second Motion for Appropriate Relief in Forsyth County Superior Court and emergency motion for stay of execution (based on CT scans allegedly showing brain atrophy and affidavit from Dix psychiatrist). On February 24, 2004, the State filed a response and moved for denial on the pleadings. On February 25, 2004, Judge Eagles entered a stay of Page's scheduled execution. On February 25, 2004, the State filed an emergency motion in the Supreme Court of North Carolina seeking to vacate the stay of execution. On February 26, 2004, the State filed a supplement, and Page filed a response in the Supreme Court of North Carolina. On March 1, 2004, the State moved to withdraw its emergency motion to vacate in the Supreme Court of North Carolina. On March 3, 2004, the District Attorney's Office filed a supplement and amendment to State's February 24, 2004 response in Forsyth County Superior Court. On March 4, 2004, the Supreme Court of North Carolina allowed the State's motion to withdraw its motion to vacate. On May 3, 2004, Page filed a motion for extension of time to pursue testing, and Superior Court Judge Eagles allowed Page's motion on May 3, 2004. On December 8, 2004, Page filed an amendment to 2MAR in Forsyth County (2AMAR). On January 11, 2005, the State filed a motion for hearing on procedural bars to Page's 2AMAR. Judge Eagles asked to be removed from case, and Senior Resident Superior Court Judge DeRamus scheduled the matter for hearing in May of 2005. The hearing on the State's motion to procedurally bar the three remaining claims in Page's 2AMAR was held before Superior Court Judge Ronald Spivey on May 6, 2005. On June 10, 2005, Judge Spivey filed an Order procedurally barring the three remaining claims in Page's 2AMAR, dissolving the stay of execution entered by Judge Eagles, and ordering the North Carolina Secretary of Correction to schedule Page's execution date. On December 1, 2005, the Supreme Court of North Carolina denied Page's Petition for Writ of Certiorari seeking review of Judge Spivey's Order denying relief. At present, decision pending by Judge Boyle on

State's motion for judgment and to lift February 25, 2004 preliminary injunction in lethal injection lawsuit. [contact: Special Deputy Attorney Valerie Spalding; Special Deputy Attorney General Thomas Pitman]

2. **Rouse, Kenneth Bernard** (Randolph Co.)–Judgment by federal district court March 26, 2001 denying federal habeas petition as being filed after one year statute of limitation; Rule 59 Motion to alter or amend denied May 31, 2001; argued in Fourth Circuit on December 3, 2001; reargued in Fourth Circuit on September 24, 2002; Fourth Circuit panel decision announced on January 7, 2003 vacating federal district court's opinion dismissing petition as untimely, and remanding for evidentiary hearing on juror bias claim; State filed petition for rehearing and suggestion for rehearing en banc on January 17, 2003, and on February 13, 2003 the Fourth Circuit granted rehearing en banc; after supplemental briefing, en banc argument heard in Fourth Circuit on April 2, 2003. On August 11, 2003, the en banc Court, by a vote of 7 to 4, affirmed the federal district court's dismissal of Rouse's petition as untimely. Rouse filed his Petition for Writ of Certiorari in the United States Supreme Court on December 15, 2003, and the State filed its Brief in Opposition on February 2, 2004. United States Supreme Court denied the Petition for Writ of Certiorari on March 8, 2004. On January 2, 2004, Rouse and fellow plaintiffs Raymond Dayle Rowsey (scheduled for execution on January 9, 2004), George Franklin Page, and Sammy Crystal Perkins filed a civil action in the EDNC pursuant to 42 U.S.C. § 1983 alleging that North Carolina's method of execution constituted cruel and unusual punishment in violation of the Eighth Amendment (see Page above); on March 29, 2004, received notice setting Rouse's execution for April 16, 2004; execution was stayed by Randolph County Superior Court pending mental retardation hearing, which is pending scheduling by Assistant District Attorney Andy Gregson. [contact: Special Deputy Attorney General Edwin W. Welch]

CASES WHICH HAVE COMPLETED INITIAL STATE AND FEDERAL REVIEW BUT WHICH ARE PENDING MENTAL RETARDATION ISSUES

12. **Williams, Larry Darnell** (Gaston Co.)–Currently, the second longest resident on death row at nearly 21 years; U.S. Supreme Court denied certiorari on February 22, 1999; on March 26, 2001, Secretary Beck rescheduled execution for April 27, 2001; following U.S. Supreme Court's grant of certiorari in McCarver case on March 26, 2001, on March 29, 2001 Williams filed new claim asserting mental retardation and requesting stay pending decision in McCarver; on April 20, 2001, Williams' execution was stayed, and hearing was scheduled to resolve factual dispute whether Williams is mentally retarded; State moved for IQ testing of Williams, and Williams opposed such testing, but on July 2, 2001 Judge Patti agreed that psychological retesting might provide helpful, additional information, and on September 14, 2001 ordered Dr. Nancy Laney to make a recommendation

to the court whether additional IQ testing was appropriate; on April 29, 2002, Dr. Laney submitted a comprehensive report to Judge Patti concluding that Williams does not meet the criteria for mental retardation; Williams requested and received Dr. Laney's raw data for the purpose of having his own psychological expert review Dr. Laney's findings. In March of 2005, Williams was examined by Dr. Timothy Hancock, and Dr. Hancock has prepared a report/affidavit indicating that Williams is mentally retarded. Evidentiary hearing held on Williams' mental retardation claim on August 1-4, 2005 in Gaston County Superior Court. Decision pending. [contact: Special Deputy Attorney General Barry S. McNeill]

13. **McCarver, Ernest Paul** (Cabarrus Co.)-Certiorari granted by the U.S. Supreme Court on March 26, 2001 on mental retardation issue, but on October 11, 2001 the Court dismissed the grant of certiorari as improvidently granted given North Carolina's enactment of state law barring death penalty for mentally retarded; new execution date scheduled for November 9, 2001, but stay granted on October 19, 2001 by Judge Spainhour, affording McCarver until January 31, 2002 to file mental retardation motion pursuant to N.C.G.S. § 15A-2006; McCarver filed a mental retardation motion by the January 31, 2002 deadline, and the hearing tentatively was scheduled for September of 2002; however, on August 21, 2002, McCarver filed a civil action for a declaratory judgment in Wake County Superior Court seeking to have the court declare N.C.G.S. § 15A-2006 unconstitutional because it does not allow a jury to make the mental retardation determination; on October 4, 2002, four other death row inmates filed a complaint seeking class certification; the State has answered and filed procedural motions to McCarver's lawsuit, and the matter was heard by Superior Court Judge Henry W. Hight, Jr. in Wake County Superior Court on January 27, 2003; discovery is now proceeding as to McCarver, but not the intervenors to the lawsuit. If McCarver's declaratory judgment action is denied (and the Supreme Court of North Carolina denies certiorari review), the Secretary of N.C. Department of Correction will be notified to reschedule execution date. [contact: District Attorney Roxann L. Vaneekhoven or Special Deputy Attorney General Dale Talbert]

State Bureau of Investigation

MurVicAgeRacSex04.rep

Aug/31/2005

Murder Victims by Age, Sex and Race - 2004

Victim Age	Victim Sex	Total Victims	White	Black	American Indian/Alaskan Native	Asian/Pacific Islander	Unknown
Infant	Female	1	1				
	Male	6	3	3			
1 to 5	Female	2	1	1			
	Male	10	5	5			
11 to 14	Female	3	2				1
	Male	5	4				1
15	Female	1	1				
	Male	1		1			
16	Male	2	2				
17	Female	1		1			
	Male	5		4	1		
18	Female	1	1				
	Male	5	1	4			
19	Female	4	3	1			
	Male	7	1	5	1		
20 to 24	Female	13	2	11			
	Male	77	23	48	4	2	
25 to 29	Female	13	8	5			
	Male	56	17	36		1	2
30 to 34	Female	11	4	4	2	1	
	Male	40	12	26	1	1	
35 to 39	Female	9	2	7			
	Male	35	13	15	3	3	1
40 to 44	Female	18	10	8			

	Male	28	11	15	2		
45 to 49	Female	8	7	1			
	Male	27	14	12	1		
50 to 54	Female	4	2	2			
	Male	20	10	9		1	
55 to 59	Female	3	2	1			
	Male	19	13	6			
60 to 64	Female	4	1	3			
	Male	6	5	1			
65 to 69	Female	11	9	1	1		
	Male	3		3			
70 to 74	Female	3	2	1			
	Male	4	2	2			
75 & over	Female	4	3	1			
	Male	8	4	4			
Unknown	Female	7	3	4			
	Male	16	9	3	1	1	2
	Unknown	2					2
Total Victims		503	213	254	17	10	9

State Bureau of Investigation

MurRaceAnal04.rep

31/2005

Murder by Race, 2004
Victim and Offender Race Analysis

Total Murder Victims by Race

Race	Murder Victims	Percent Distribution
White	213	42.3 %
Black	254	50.5 %
American Indian/Alaskan Native	17	3.4 %
Asian/Pacific Islander	10	2.0 %
Unknown	9	1.8 %
Total Victims	503	100.0 %

Offenders of White Victims by Offender Race

Race	Offenders of White Victims	Percent Distribution
White	154	55.4 %
Black	80	28.8 %
American Indian/Alaskan Native	2	0.7 %
Asian/Pacific Islander	1	0.4 %
Unknown	41	14.7 %
Offenders of White Victims	278	100.0 %

Offenders of Black Victims by Offender Race

Race	Offenders of Black Victims	Percent Distribution
White	14	4.6 %
Black	211	69.4 %
Unknown	78	25.7 %
Asian/Pacific Islander	1	0.3 %
Offenders of Black Victims	304	100.0 %

State Bureau of Investigation MurOffAgeRacSex04.rep

/31/2005

Murder Offenders by Age, Sex and Race - 2004

Offender Age	Offender Sex	Total Offenders	White	Black	American Indian/Alaskan Native	Asian/Pacific Islander	Unknown
11 to 14	Female	2		2			
	Male	2	2				
15	Female	1	1				
	Male	4		4			
16	Male	7	1	6			
17	Male	14	3	10			1
18	Female	4	2	2			
	Male	15	2	12	1		
19	Female	5	1	4			
	Male	26	4	20	2		
20 to 24	Female	15	8	6	1		
	Male	101	22	76	3		
25 to 29	Female	14	7	7			
	Male	52	16	35		1	
30 to 34	Female	8	2	6			
	Male	47	22	23		2	
35 to 39	Female	7	6	1			
	Male	32	11	20			1
40 to 44	Female	2	2				
	Male	23	9	13		1	
45 to 49	Female	1		1			
	Male	20	12	8			
50 to 54	Female	2		2			

	Male	13	7	5	1		
55 to 59	Female	2	1	1			
	Male	12	9	3			
60 to 64	Male	7	3	4			
65 to 69	Male	5	4	1			
70 to 74	Male	4	3		1		
75 & over	Male	2	1	1			
Unknown	Female	5	3	2			
	Male	43	10	26		2	5
	Unknown	130		2			128
Total		627	174	303	9	6	135

State Bureau of Investigation

MurVicAgeRacSex04.rep

12/31/2005

Murder Victims by Age, Sex and Race - 2004

Victim Age	Victim Sex	Total Victims	White	Black	American Indian/Alaskan Native	Asian/Pacific Islander	Unknown
Infant	Female	1	1				
	Male	6	3	3			
1 to 5	Female	2	1	1			
	Male	10	5	5			
11 to 14	Female	3	2				1
	Male	5	4				1
15	Female	1	1				
	Male	1		1			
16	Male	2	2				
17	Female	1		1			
	Male	5		4	1		
18	Female	1	1				
	Male	5	1	4			
19	Female	4	3	1			
	Male	7	1	5	1		
20 to 24	Female	13	2	11			
	Male	77	23	48	4	2	
25 to 29	Female	13	8	5			
	Male	56	17	36		1	2
30 to 34	Female	11	4	4	2	1	
	Male	40	12	26	1	1	
35 to 39	Female	9	2	7			
	Male	35	13	15	3	3	1
40 to 44	Female	18	10	8			

	Male	28	11	15	2		
45 to 49	Female	8	7	1			
	Male	27	14	12	1		
50 to 54	Female	4	2	2			
	Male	20	10	9		1	
55 to 59	Female	3	2	1			
	Male	19	13	6			
60 to 64	Female	4	1	3			
	Male	6	5	1			
65 to 69	Female	11	9	1	1		
	Male	3		3			
70 to 74	Female	3	2	1			
	Male	4	2	2			
75 & over	Female	4	3	1			
	Male	8	4	4			
Unknown	Female	7	3	4			
	Male	16	9	3	1	1	2
	Unknown	2					2
Total Victims		503	213	254	17	10	9

Murder by Victim Race
Ten Year Trend

Year	White	Black	American Indian/Alaskan Native	Asian/Pacific Islander	Unknown	Total Victims
1995	258	380	17	12	6	673
1996	249	355	10	8	1	623
1997	266	321	17	9	5	618
1998	255	331	13	2	6	607
1999	216	293	22	3	1	535
2000	236	302	18	3	4	563
2001	235	245	12	9	10	511
2002	245	274	18	4	7	548
2003	206	274	9	9	10	508
2004	213	254	17	10	9	503

Murder by Offender Race
Ten Year Trend

This table does not include offenders of justifiable homicides.

Year	White	Black	American Indian/Alaskan Native	Asian/Pacific Islander	Unknown	Total Offenders
1995	206	408	18	8	174	814
1996	211	350	14	3	152	730
1997	248	365	17	7	125	762
1998	238	386	19	2	123	768
1999	190	354	17	2	128	691
2000	182	368	13	8	127	698
2001	176	301	14	2	148	641
2002	208	308	10	2	131	659
2003	182	363	8	9	115	677
2004	174	303	9	6	135	627

House Select Committee on Capital Punishment
Thursday, February 2, 2006

Capital Trials Cost Data and Statistics

Introduction: A capital trial, where a defendant is charged with First Degree Murder and where the District Attorney seeks the death penalty, is generally the most demanding type of case dealt with in North Carolina's criminal justice system. Handling these cases puts tremendous pressure on the prosecutor's office to amass evidence; on defense attorneys, whether retained or court-appointed; on Superior Court time; and on the Justice Department, which becomes responsible for handling the State's interests on the mandatory appeals. These components form the structure of this presentation.

Basic Data: Capital trials individually take a great deal of court resources, but they make up a very small component of the overall caseload in Superior Court.

- The State's 106 Superior Court Judges disposed of 138,955 criminal cases in 2004-05 by trial, plea, or dismissal, holding 2,603 criminal trials.
- AOC can best estimate the number of capital trials by counting the number of "death-qualified juries" empanelled during a year. For 2004-05, there were 16 juries empanelled.
- For the same period, Sentencing Commission data show 85 convictions of First-Degree Murder, of which only four resulted in a death sentence.

Trial Court Cost Components:
A First-Degree Murder charge does not necessarily trigger a capital trial if the District Attorney decides not to seek the death penalty. The Automated Court Information System (ACIS) does not capture whether the prosecutor has articulated his intent to seek the death penalty or to seek life without parole, the only two sentencing options for a Class A felony conviction.

The State Justice Institute funded a comprehensive study on costs of the death penalty in 1993 by the Sanford Institute at Duke. This study, although methodologically sound, became obsolete within a year of its publication. The passage of Structured Sentencing, prescribing life without parole or death penalty, as well as other changes in criminal procedure, rendered many of the study's assumptions out of date.

Some basic assumptions for AOC trial costs include

- The burden on the court is greater with a capital trial than with another murder trial because the capital trial usually takes longer and the jury is involved in the sentencing phase as well as the trial phase, whereas in most criminal cases, the judge decides the sentence. In 2004-05, there were 16 "death-qualified juries" empanelled. This reflects a significant decline over several years. These averaged around 60 until 2001-02, when they began to drop to around 20 annually (table below).

- Prosecutors make the choice to seek the death penalty or not. The decision to seek the death penalty places greater demands on the prosecutor's office for prosecutorial resources.
- A judge hearing a capital case can generally dispense with some other court business during the course of a trial, but will reduce the AOC's ability to schedule that judge throughout the state on rotation. Thus, a capital trial has a ripple effect through the judicial system.

In rare instances, the Department of Justice may prosecute a capital case at the trial level at the request of the District Attorney. Most frequently, this occurs when a conflict exists for the prosecutor, such as if the DA had represented the defendant or a co-defendant while in private practice. The Special Prosecutions Section of the DOJ Criminal Division takes these cases; they estimate that they receive a request of this type about once every two years.

Indigent Defense Cost Components:
When a District Attorney secures an indictment for First-Degree Murder, the Office of Indigent Defense Services deems the case capital, unless the DA indicates he is not seeking the death penalty. Generally, the prosecutor will announce this intention at the pre-trial conference, often well after indictment. AOC evidence based on death-qualified juries indicates that prosecutors are deciding to seek the death penalty much less frequently over recent years.

Year	Number of Death-Qualified Juries
FY 96	60
FY 97	59
FY 98	55
FY 99	64
FY 00	57
FY 01	56
FY 02	42
FY 03	22
FY 04	24
FY 05	16

Until the prosecutor reaches his decision on the death penalty, the Office of Indigent Defense treats any First-Degree Murder case as a capital case. Thus, from the point of initial charge until the pre-trial conference, each murder defendant will be represented by two lawyers. In typical criminal trials, OIDS funds one lawyer to handle the case at $65 per hour.

Most capital defense representation is performed by the IDS Capital Defender's Office. For 2003-04, the Capital Defender's Office expended $1.1 million to represent defendants in capital cases at the trial, appellate, and post-conviction levels. Some capital work is still performed by private assigned counsel, by two lawyers at a rate of $85 per

hour. OIDS expended $10.7 million through the Attorney Fee Fund for capital defense in 2003-04. Costs of expert witnesses are included in this amount.

Appellate Cost Components:
Post-conviction prosecutorial work on capital cases is handled by the Department of Justice, and the Office of Indigent Defense Services continues to provide defense work.

After the entry of a death sentence, the defendant has a direct appeal to the NC Supreme Court. Within the DOJ Criminal Division, there is a team of ten lawyers who, among other duties, handle the State's side on direct appeal. These lawyers also carry the case to the US Supreme Court if the NC Supreme Court finds no error.

Simultaneously with this process, the defendant may file a motion for appropriate relief (MAR) in NC Superior Court to present a variety of new factors that may alter the sentence, such as new evidence, documentation of incompetent counsel, etc. Motions for appropriate relief follow a different appellate route than the basic conviction, passing through the NC Supreme Court, the US District Court, the 4th Circuit US Court of Appeals, and finally the US Supreme Court. The Capital Litigation Section of the Department of Justice handles these post-conviction matters, and is made up of 13 attorneys who are solely focused on post-conviction capital work. The budget for the Capital Litigation Section is $1.5 million.

Because there may be a significant lag between initial sentencing and appeal due to production of a trial transcript, and a lengthy period of time from the beginning of appellate work and an actual execution, the Capital Litigation Section experiences a growing workload even as original death sentences have declined.

House Select Study Committee on Capital Punishment

March 21, 2006

Minutes

The House Select Study Committee on Capital Punishment met on Tuesday, March 21, 2006, at 9:30 a.m. in Room 544 of the Legislative Office Building. Representative Beverly Earle, Co-Chair called the meeting to order and the following members of the Committee were present: Representative Joe Hackney, Co-Chair, Representatives Walter Church, Nelson Cole, Arlie Culp, Pete Cunningham, Rick Eddins, Pricey Harrison, Marvin Lucas, Danny McComas, Mickey Michaux, Earline Parmon, Bonner Stiller, Ronnie Sutton, Joe Tolson, Doug Vinson, Jennifer Weiss, and Winkie Wilkins. Copies of the meeting agenda and the Visitor Registration are attached, (Attachments I and II).

Mr. William Hart, Senior Deputy Attorney General, Criminal Division, North Carolina Department of Justice, was recognized to provide a summary of the current law regarding felony murder. Mr. Hart spoke briefly on the historical perspective of felony murder. That history is outlined in a handout that was distributed to the members of the Committee, (Attachment III).

Mr. Hart discussed details of current law saying that felony murder is defined as a murder which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon. He discussed several cases where the North Carolina Supreme Court said specific things about felony murder:

- The killing need not be intentional.
- By defining felony murder as it has, the General Assembly has, in essence, established a per se rule of accountability for deaths occurring during the commission of felonies,
- Culpable negligence will not support a charge of felony murder,
- There must be an unbroken chain of events such that the homicide is part of a series of events forming one continuous transaction,
- The defense of self-defense is generally not available to a defendant on a charge of felony murder,
- All participants in the underlying felony are guilty of and may be convicted of felony murder.

Mr. Hart stated that under current law, felony murder is punishable by death or imprisonment for life without parole.

Mr. Hart discussed issues that relate to punishment for felony murder. He said that the underlying felony that was a basis for a conviction of felony murder cannot be used as an aggravating circumstance in sentencing. He further said that if one is convicted of felony murder only, the defendant cannot be punished for the felony that served as the basis for the felony murder conviction. Mr. Hart stated that although all participants in a felony that results in death may be convicted of felony murder, not all of those convicted of felony murder are eligible for the death penalty. He said that a defendant guilty of felony murder may only be sentenced to death if that defendant individually fits one of the following categories:

- Killed or attempted to kill the victim,
- Intended that the victim be killed,
- Intended that deadly force would be used in the course of the underlying felony that supported the felony murder conviction,
- Was a major participant in the underlying felony supporting the felony murder conviction and showed a reckless indifference to human life.

Mr. Hart reviewed a few cases in which felonies have been found to properly support convictions of felony murder. Those cases are outlined in his handout.

Representative Sutton referenced the felony murder definition regarding "use of a deadly weapon" and asked Mr. Hart to distinguish between "use" and "possession" if the weapon is not used. Mr. Hart replied that possession and use are determined to be the same and referenced State v. Fields, a case before the Supreme Court of North Carolina in 1985. The Court found that "the simple fact that the felon has a weapon in his possession creates a substantial, foreseeable human risk." Representative Sutton asked if a person who had a pocket knife in his possession, but never used it in any manner and a death resulted from some other cause, would fit under the statute for merely having possession of the weapon. Mr. Hart replied that under the Fields case, the person would fit under the statute.

Referring to the definition of felony murder, Co-Chair Hackney asked if the "use of a deadly weapon" is only necessary to make felony murder for the category "or other felony," and not for arson, rape, sex offense, robbery, kidnapping or burglary." Mr. Hart replied that this was correct. Co-Chair Hackney asked if it is felony murder if a kidnapping occurs without the use or possession of a deadly weapon and a death results. Mr. Hart replied that this correct.

Representative Harrison asked a robbery of a convenience store is committed without the use of a weapon and the store's clerk who has a pre-existing heart condition dies of a heart attack would result in felony murder? Mr. Hart replied that he was not certain, but that conceivably it could be.

Representative Harrison commented that the State of Virginia had dropped felony murder as an aggravating factor in death penalty cases and asked if Mr. Hart could

comment on the trends of other states regarding felony murder. Mr. Hart said that he thought Virginia had reinstated felony murder as an aggravating factor.

Mr. Hal Pell, Committee Counsel, stated that it was his understanding that Virginia has made felony murder a first-degree non-capital offense.

Representative Wilkins asked for clarification regarding the legal definition of possession of a weapon. Mr. Hart replied that if there is a single participant, that person must have the weapon in his actual possession or constructive possession. He said that if there are multiple participants and any one of them has a weapon in their possession, that possession is attributed to all the participants.

Representative Sutton asked if a defendant who had no knowledge of a co-defendants' possession of a weapon would be guilty of possession. Mr. Hart replied that he could not answer that question without further research.

Professor Marshall Dayan, North Carolina Central University School of Law, was recognized. He briefly discussed deterrence as one of the purposes of the felony murder rule in North Carolina. He said that the courts and scholars who worked on the Model Penal Code felt that the felony murder rule did not sufficiently deter unintended homicides or at least homicides that occurred during the course of underlying felonies where injury was not part of the plan, and does not serve the function that the North Carolina Supreme Court has said is the underlying purpose for the felony murder rule.

Professor Dayan offered several examples of the use of the felony murder rule and responded to questions.

Professor Dayan stated that because the application of the death penalty for felony murder situations does not effectuate the deterrence effect that is the purpose behind the felony murder rule according to the North Carolina Supreme Court, it is his recommendation that felony murder not be capital under North Carolina law.

Co-Chair Hackney asked how many states have felony murder and in how many states is it capital.

Mr. Pell indicated that a handout that had been provided to the Committee provided that information, (Attachment IV).

The Honorable Branson Vickory, District Attorney, Eighth Prosecutorial District, and President, North Carolina Conference of District Attorneys, was recognized to speak to the Committee. Mr. Branson stated that the district attorneys fully support the felony murder rule in its present form and feel that it treats as murders those individuals who kill innocent victims during the commission of dangerous or violent felonies. He said that he felt that the legislature, in the past, has determined that these felonies that so inherently risk the lives of innocent victims and anyone else who may be in the way during the perpetration of these felonies should mandate the imposition of a first-degree murder

conviction. Mr. Vickory stated that when one commits a heinous crime in which the life of an innocent person is taken, and that person is given prison for life, there is a specific deterrent effect. He offered examples of situations where a defendant would no longer be subject to first-degree murder if the first degree felony murder rule was eliminated including murder that occurs during the perpetration of a rape, a death that results during the commission of an armed robbery, death resulting from a kidnapping and drive-by shooting situations.

Representative Sutton asked if were Mr. Vickory's recommendation that the law be broadened, tightened or kept it as it currently is. Mr. Vickory replied that he thought the rule should be kept as it currently is.

Representative Eddins thanked Mr. Vickory for his comments from the standpoint of victims.

Mr. Joseph Cheshire, Attorney at Law, and speaking on behalf of the North Carolina Academy of Trial Lawyers, was recognized. Mr. Cheshire stated that he is genuinely concerned about the felony murder rule as it is applied to capital punishment and as it is applied to life without parole. He said that the felony murder rule, as applied in North Carolina is wrong on both the moral and legal level. He added that it was not his opinion that there should not be some type of felony murder rule or felony murder law, but that how it is currently applied is wrong. He discussed the five categories of criminal deaths and the punishment that could be imposed for each. He said that all of the very carefully crafted criminal laws related to the death of other people, civil or criminal, speak about the intent to do an act that directly causes the death of a person except for felony murder. Mr. Cheshire said that in felony murder there is no intent required to convict someone of first-degree murder and imprisonment for the remainder of their life, or to have them executed. He further said that it does not need to be shown that the defendant was the person who committed the act that killed the victim. Mr. Cheshire said that in North Carolina it is possible for a person who did not kill the victim and who never contemplated the death of the victim to get the death penalty, or to receive life without parole. He spoke briefly regarding the cost of incarceration for life sentences for felony murder defendants.

Mr. Cheshire referenced the question that Representative Sutton had raised earlier regarding a defendant who had no knowledge of a co-defendant's possession of a weapon. He said that there is absolutely no question that if the person is in possession of a weapon that person can potentially be convicted of felony murder. He said that it the burden is almost shifted onto the defendant to prove that he did not know the weapon was with the co-defendant.

Mr. Cheshire said that with the current law, there is no middle ground for a jury or judge to determine what the real honest application of the punishment should be as is relates to the felony murder rule. He asked if it makes sense that there are hundreds of people in this state who intended, who thought about, who wanted to, and who went out and actually killed someone who receive second-degree plea offers and are doing periods

of months and years, when someone who did not intend a murder to happen, but intended to commit a felony has to go to prison at least for the rest of his or her life?

Mr. Cheshire said that felony murder should not be a part of capital punishment. He further stated that if one commits an act that results in someone's death, there should be some responsibility for the death, but urged the Committee to carefully study what the punishment options should be as they relates to felony murder.

Representative McComas asked what Mr. Cheshire thought the solution should be. Mr. Cheshire replied that he felt there should be some type of structure for sentencing, and that there should be some way in which either a jury or judge can make a fair application of what an individual did in order to provide for fair application of punishment.

Representative Sutton asked if a district attorney has the option of offering a plea to something less than the felony murder rule. Mr. Cheshire replied that they do have that option.

Representative Glazier stated that under Model Penal Code, the culpability level, based on the intent of the actor is critical. He said that he had less concern over the felony murder rule as a rule, and that there are historic reasons for the rule. He said that he is inclined not to play with the rule to a great extent. He added that he had great concerns regarding how the rule plays into the capital punishment scheme. He said that a major issue for him is the delusional scheme of proportionality, and said that judicial review of proportionality has turned into something that is not what he felt the legislature intended.

Mr. Cheshire replied that there is no better example of the breaking down of proportionality than a person charged with felony murder that gets the death penalty.

Representative Parmon asked if a defendant's ability to pay has any influence on whether they are offered a plea bargain. Mr. Cheshire replied that the Office of Indigent Defense Services has done a good job in getting good lawyers to represent defendants in murder cases, but added that, in reality, plea bargains quite often have a direct relation to who the defendant's lawyer might be.

Representative Michaux asked how the felony murder rule could be structured so as to not be as arbitrary as it currently is. Mr. Cheshire replied that one suggestion would be to give a judge who hears a case or takes a plea some ability to make a decision of where a person should fit within the sentence. He offered to present the staff with additional suggestions at a later time.

Representative Glazier asked Mr. Cheshire to also give thought to changes that should be made in the proportionality provision of the death penalty statute addressing what types of cases should be included in the proportionality pool that currently are not.

Representative Stiller commented that the Committee might look into the level of culpability of the associates when more than one person is involved in a crime. He requested that Mr. Cheshire give thought as to whether this would be something decided by jurors after hearing the case, or by the judge because of the level of training that may be required to discern through the facts.

A handout that was distributed to the members by Mr. Cheshire is included in the attachments to the minutes, (Attachment V).

Mr. George Brown, North Carolina Citizens for Felony Murder Rule Change, was recognized to address the Committee. Mr. Brown stated that his organization supports repeal of the felony murder rule. He noted that a person who has committed a murder could still be charged with second-degree murder, manslaughter or first-degree murder, if warranted. He said that the difference would be that the district attorney will have to prove it, which is a situation that does not exist under the current felony murder rule. Mr. Brown stated that the penalties are "all over the road" where murder is concerned, but not with the felony murder rule. He discussed several cases and the penalties associated with each. The cases are summarized in a handout that was distributed to the Committee members is attached, (Attachment VI).

Ms. Ramona Stafford, North Carolina Victim's Assistance Network, was recognized to address the Committee. Ms. Stafford shared the personal experience of the murder of her husband in 1993 and spoke in support of victim's rights. Ms. Stafford stated that victims do not deserve to have their lives violently taken and murders should not be permanent guests in our prisons. She said that the death penalty is the way for society to validate the ultimate value of human life. Ms. Stafford said that the North Carolina Victim's Assistance Network supports the felony murder rule in its current form and recommends that no changes be made.

Mr. Pell was recognized and called the members' attention to the handout that was distributed earlier in the meeting, (Attachment IV). He referenced page 4 regarding the ways the felony murder rule is treated in other jurisdictions. He noted that some states treat felony murder as second-degree murder, some as manslaughter. He pointed out a chart showing the states that treat felony murder as first-degree murder. Mr. Pell also stated that the State of Virginia does treat the felony murder rule as first-degree murder, but in Virginia, first-degree murder is not a capital offense. He noted that it had been suggested by a speaker in an earlier meeting that the Virginia statute might serve as a guide if the Committee decides to make changes in, or narrow the application of, the felony murder rule. Mr. Pell said that Virginia makes thirteen specific offenses, each requiring pre-meditation and deliberation, as capital murder. He said that the felony murder rule is first-degree murder and their statute makes it a Class II penalty. Mr. Pell stated that in Virginia, a conviction of first-degree murder under the felony murder rule would subject the defendant to a term of twenty years minimum sentence and life without parole as a maximum sentence.

Representative Sutton asked if judges in Virginia have a sentencing chart or is sentencing totally at the discretion of the judge. Mr. Pell replied that he thought that sentencing was judge discretionary.

The meeting was adjourned at 12:00.

Representative Beverly Earle
Co-Chair

Representative Joe Hackney
Presiding Co-Chair

Emily Reynolds Freeman
Commission Clerk

ATTACHMENTS:

Attachment I	Agenda
Attachment II	Visitor Registration
Attachment III	William Hart handout – Historical Perspective and Current Law
Attachment IV	Hal Pell handout – The Felony Murder Rule
Attachment V	Joe Cheshire handout
Attachment VI	George Brown handout

HOUSE SELECT COMMITTEE ON CAPITAL PUNISHMENT

Legislative Office Building, Room 544
Raleigh, NC

MARCH 21, 2006

AGENDA

9:30 – 9:40 AM	**INTRODUCTION AND OPENING REMARKS**
	Rep. Joe Hackney, Co-Chair Rep. Beverly Earle, Co-Chair
	THE FELONY MURDER RULE
9:40 – 10:00 AM	Senior Deputy Attorney General William Hart North Carolina Department of Justice
10:00 – 10:20 AM	Prof. Marshall Dayan NC Central University School of Law
10:20 – 10:40 AM	The Honorable Branson Vickory, District Attorney President, NC Conference of District Attorneys
10:40 – 11:00 AM	Joseph Cheshire, Attorney at Law NC Academy of Trial Lawyers
11:00 – 11:15 AM	George Brown NC Citizens For Felony Murder Rule Change
11:15 – 11:30 AM	Ms. Ramona Stafford NC Victim's Assistance Network
11:30 AM -- 12:00 PM	**COMMITTEE DISCUSSION**
	ADJOURNMENT

VISITOR REGISTRATION SHEET

House Select Committee on Capital Punishment — March 21, 2006

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
GEORGE BROWN	NC CITIZENS FOR FELONY MURDER RULE CHANGE P.O. BOX 1354 JAMESTOWN, NC 27282
Lan Rubbert	CJPC
Holly Bryan	NCATL
Charmaine Fuller	CJPC
Elaine M. Gordon	CDPL - 201 West Main Street, Suite 800, Durham NC 27701
Gerda Stein	CDPL
Cas Shuman	citizen
John Stange	PFADP
Brian Elderbroom	Common Sense Foundation
Jane Hunt Jim Hunt	120 Pineland Circle, Raleigh 27606
JuleShanklin	3457 Redbud Ln 27607

VISITOR REGISTRATION SHEET

House Select Committee on Capital Punishment — March 21, 2006

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Becki Gray	Civitas Institute
Charlie Reece	NC Conf. of DA's Raleigh, NC
Peg Dowr	NC Conference of D.A.'s
Virginia Hebert	Senate Minority Leader

Felony Murder in North Carolina

William P. Hart
Senior Deputy Attorney General
Criminal Division
North Carolina Department of Justice
March 21, 2006

I. Historical Perspective of Felony Murder

The felony murder rule, which originated in England as early as 1256, punished anyone who committed or attempted to commit any felony that resulted in a death by the crime of murder. 2 W. LaFave & A. Scott, Substantive Criminal Law § 14.5, at 445 (2003); M. C. Bassiouni, Substantive Criminal Law, at 247 (1978). By 1700, the rule was more limited and imputed only to those who would commit a felony of a violent nature the malice aforethought and intent to kill otherwise necessary for a conviction of murder. LaFave & Scott, at 445; Bassiouni, at 247. The basis for the imputation was that anyone who engages in the commission of such a violent crime creates circumstances of danger which, according to plain and common experience, are likely to result in death or are at least foreseeable. Basiouni, at 247- 49.

As noted by the Supreme Court of North Carolina, "[t]he felony murder rule was promulgated to deter even accidental killings from occurring during the commission of or attempted commission of a dangerous felony." State v. Richardson, 341 N.C. 658, 666, 462 S.E.2d 492, 498 (1995). As the Court also noted, "the rationale of the felony murder rule is that one who commits a felony is a bad person with a bad state of mind, and he has caused a bad result, so that we should not worry too much about the fact that the fatal result he accomplished was quite different and a good deal worse than the bad result he intended." Id.

By statute enacted in 1798, the Legislature declared the common law to be in force in North

Carolina. See N.C.G.S. § 4-1. Thus, felony murder was one of the common law crimes that existed in North Carolina.

In 1893, the General Assembly divided murder into two degrees for purposes of punishment. State v. Watkins, 283 N.C. 17, 28-29, 194 S.E.2d 800, 808-09, cert. denied, 414 U.S. 1000, 38 L. Ed. 2d 235 (1973); State v. Dalton, 178 N.C. 779, 783, 101 S.E. 548, 550 (1919). In enacting N.C.G.S. § 14-17, the General Assembly did not define murder or set forth the elements of the various theories of murder, or otherwise replace the common law definition of murder. See State v. Streeton, 231 N.C. 301, 304, 56 S.E.2d 649, 652 (1949) (holding that at common law murder is not divided into degrees and that the common law definition has not been replaced by statute); Dalton, 178 N.C. at 783, 101 S.E. at 550 (holding that "the statute does not, and does not intend, to give any new definition of murder"); State v. Banks, 143 N.C. 652, 656, 57 S.E. 174, 176 (1907) (holding that "[t]he statute does not undertake to give any new definition of murder, but classifies the different kinds of murder as they existed at common law, and which were, before the statute, all included in one and the same degree"). Thus, felony murder continued to be a crime in North Carolina. And, it was designated to be one type of first degree murder. At that time, felony murder was limited to "killings occurring during certain specified felonies 'or other felony.'" State v. Davis, 305 N.C. 400, 423, 290 S.E.2d 574, 588 (1982).

In 1949, the Supreme Court of North Carolina issued an opinion in which it discussed the malice element implied in felony murder and questioned but did not decide whether the "other felony" language in N.C.G.S. § 14-17 was limited to felonies that were "inherently dangerous to life." Streeton, 231 N.C. at 305, 56 S.E.2d at 652.

In 1972, the Supreme Court of North Carolina, without finding that the breaking or entering

and larceny crimes committed by a defendant were inherently dangerous to life, found that they were "committed under . . . circumstances" that "created substantial foreseeable human risks" and thus fell within the "other felony" definition in N.C.G.S. § 14-17 allowing a conviction for felony murder. State v. Thompson, 280 N.C. 202, 212-13, 185 S.E.2d 666, 673 (1972). The Court went on to hold that felonies that were either inherently or foreseeably dangerous to human life supported the crime of felony murder because the turpitude of such an act was deemed to supply the elements of malice, deliberation, and design to effect death. Id.

In 1977, the General Assembly amended the felony murder portion of N.C.G.S. § 14-17 so that it applies to any killing "committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon." N.C.G.S. § 14-17.

In 1985, the Supreme Court of North Carolina interpreted the new statutory language "use of a deadly weapon" to apply not to effectuation of the intended felony but to possession of a deadly weapon at the time of commission of or attempt to commit a felony. State v. Fields, 315 N.C. 191, 199, 337 S.E.2d 518, 523 (1985). The Court reasoned that "the simple fact that the felon has a weapon in his possession creates a substantial, foreseeable human risk." Id. The Court stated that "[i]f the defendant has brought the weapon along, he has at least a psychological use for it: it may bolster his confidence, steel his nerve, allay fears of his apprehension" and "[e]ven under circumstances where the weapons is never used, it functions as a backup, an inanimate accomplice that can cover for the defendant if he is interrupted." Id.

II. Current State of the Law on Felony Murder

The full text of the murder statute with relevant felony murder portions highlighted is set forth below:

§ 14-17. Murder in the first and second degree defined; punishment

A murder which shall be perpetrated by means of a nuclear, biological, or chemical weapon of mass destruction as defined in G.S. 14-288.21, poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be **committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree, a Class A felony, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life without parole as the court shall determine pursuant to G.S. 15A-2000**, except that any such person who was under 17 years of age at the time of the murder shall be punished with imprisonment in the State's prison for life without parole. Provided, however, any person under the age of 17 who commits murder in the first degree while serving a prison sentence imposed for a prior murder or while on escape from a prison sentence imposed for a prior murder shall be punished with death or imprisonment in the State's prison for life without parole as the court shall determine pursuant to G.S. 15A-2000. All other kinds of murder, including that which shall be proximately caused by the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium, or cocaine or other substance described in G.S. 90-90(1)d., or methamphetamine, when the ingestion of such substance causes the death of the user, shall be deemed murder in the second degree, and any person who commits such murder shall be punished as a Class B2 felon.

Felony Murder is:

> [a] murder which shall be . . . committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon.

State v. Richardson, 341 N.C. 658, 666, 462 S.E.2d 492, 498 (1995) (citing N.C.G.S. § 14-17).

Premeditation and deliberation are not elements of felony murder. State v. Thomas, 332 N.C. 544, 564, 423 S.E.2d 75, 86 (1992); State v. Wall, 304 N.C. 609, 613, 286 S.E.2d 68, 71 (1982).

The killing need not be intentional, as the turpitude of a felonious act that is inherently or foreseeably dangerous is deemed to supply the elements of malice, deliberation and design to effect death. State v. Thompson, 280 N.C. 202, 212-13, 185 S.E.2d 666, 674 (1972).

By defining felony murder as it has, the General Assembly "has, in essence, established a *per se* rule of accountability for deaths occurring during the commission of felonies." State v. Bell, 338 N.C. 363, 386, 450 S.E.2d 710, 723 (1994), cert. denied, 515 U.S. 1163, 132 L. Ed. 2d 861 (1995).

Culpable negligence will not support a charge of felony murder, because it does not satisfy the requirement of an actual intent to commit an act which is a felony and that resulted in death that underlies the felony murder theory. State v. Jones, 353 N.C. 159, 538 S.E.2d 917 (2000).

There must be an unbroken chain of events leading from the felony or attempted felony to the act causing death, so that the homicide is part of a series of events forming one continuous transaction. State v. Gibbs, 335 N.C. 1, 51-52, 436 S.E.2d 321, 350 (1993), cert. denied, 512 U.S. 1246, 129 L. Ed. 2d 881 (1994); State v. Shrader, 290 N.C. 253, 261, 225 S.E.2d 522, 528 (1976).

The defense of self-defense is generally not available to a defendant on a charge of felony murder because he is considered to be the aggressor in a dangerous situation that he created. State v. Bell, 338 N.C. 363, 385-87, 450 S.E.2d 710, 723 (1994), cert. denied, 515 U.S. 1163, 132 L. Ed. 2d

861 (1995).

All participants in the underlying felony are guilty of and may be convicted of felony murder. State v. Carey, 288 N.C. 254, 218 S.E.2d 387 (1975).

Felony murder is currently punishable by death or imprisonment in the State's prison for life without parole as the court shall determine pursuant to G.S. 15A-2000. N.C.G.S. § 14-17.

III. Death Penalty Issues in Felony Murder Cases

Punishment by death for felony murder has been held not to constitute cruel and unusual punishment. State v. Williams, 305 N.C. 656, 292 S.E.2d 243, cert. denied, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982).

When a defendant is convicted of first degree murder solely on the theory of felony murder, the underlying felony that was the basis of that conviction cannot be used as an aggravating circumstance in sentencing. State v. Gregory, 340 N.C. 365, 459 S.E.2d 638 (1995), cert. denied, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996). However, other violent felonies committed during the commission of the murder may be found by the jury as aggravating circumstances. State v. Barlowe, 337 N.C. 371, 446 S.E.2d 352 (1994).

If convicted of felony murder only, a defendant cannot also be punished for the felony that served as the basis for the felony murder conviction. State v. Weeks, 322 N.C. 152, 176, 367 S.E.2d 895, 909 (1988). However, a defendant may be punished for other crimes committed during the commission of the murder by being sentenced for other violent felony convictions that were not the basis of the felony murder conviction. State v. Barlowe, 337 N.C. 371, 446 S.E.2d 352 (1994).

* Although all participants in the felony that resulted in death may be convicted of felony murder; not all of those convicted of felony murder are eligible for the death penalty. A defendant

guilty only of felony murder may only be sentenced to death if he individually:

1. killed or attempted to kill the victim,

2. intended that the victim be killed,

3. intended that deadly force would be used in the course of the underlying felony that supported the felony murder conviction, or

4. was a major participant in the underlying felony supporting the felony murder conviction and showed a reckless indifference to human life.

Enmund v. Florida, 458 U.S. 782, 73 L. Ed. 2d 1140 (1982); Tison v. Arizona, 481 U.S. 137, 95 L. Ed. 2d 127 (1987); State v. Hunt, 323 N.C. 407, 373 S.E.2d 400 (1988); State v. Howell, 335 N.C. 457, 439 S.E.2d 116 (1994).

IV. Felonies that have been found to properly support convictions of felony murder

1. Murder

State v. Weeks, 322 N.C. 152, 367 S.E.2d 895 (1988) (defendant was found guilty of second degree murder of his father and first degree murder of his mother, but the jury failed to make a finding as to premeditation and deliberation; both victims were shot multiple times and the house was set on fire; defendant claimed insanity).

2. Rape

State v. Garcia, 358 N.C. 382, 597 S.E.2d 724 (2004)(defendant forced female victim into ladies room at gunpoint, attempted to rape her in bathroom stall, and beat her to death with handgun as she crawled to door of bathroom to escape), cert. denied, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005).

3. Arson

State v. McLaughlin, 286 N.C. 597, 213 S.E.2d 238 (1975)(defendant, who claimed to have been drunk, had a confrontation with a woman, threatened to burn down her house, and left and did so, resulting in the death of five small children).

4. Burglary

State v. Simmons, 286 N.C. 681, 213 S.E.2d 280 (1975)(defendant, who had been drinking,

and another planned to break into a woman's house at night, obtained a shotgun because she had a dog, broke into the house, and killed the woman during the burglary).

State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994)(defendant entered woman's apartment at night through window he broke with rock, repeatedly stabbed her and raped her while her children screamed for help; defendant claimed to have been on crack cocaine).

5. Robbery

State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983)(defendant robbed, shot, and killed a man who had stopped to help defendant and his two companions who pretended to have a broken-down truck and asked for a ride; defendant had been drinking).

State v. Squire, 292 N.C. 494, 234 S.E.2d 563(three defendants robbed a bank; they were stopped by a trooper while fleeing in a car; one defendant shot and killed the trooper from the back seat when the trooper approached; all three defendants were convicted of felony murder), cert. denied, 434 U.S. 998, 54 L. Ed. 2d 493 (1977).

6. Kidnapping

State v. Shrader, 290 N.C. 253, 225 S.E.2d 522 (1976)(defendant compelled woman at gunpoint to drive him to bank where he took money from tellers at gunpoint, then compelled woman to drive him back to another location, then shot woman in head after he got out of her car, claiming later that he did not intend to kill woman).

State v. Roseborough, 344 N.C. 121, 472 S.E.2d 763 (1996)(during the kidnapping and pistol-whipping of one man, defendant shot under a bridge where he believed two other men were, hitting and killing one of the men).

7. Sale of Cocaine (with use of gun)

State v. Squires, 357 N.C. 529, 591 S.E.2d 837 (2003)(defendant was engaged in a drug deal with man who defendant claimed owed him money and shot him in the back of the head; defendant then shot another man who was with first victim;), cert. denied, 541 U.S. 1088, 159 L. Ed. 2d 252 (2004).

8. Discharge Firearm into Occupied Property

State v. Richardson, 341 N.C. 658, 462 S.E.2d 492 (1995)(defendant got out of his car at a red light and fired a rifle at the windshield of the car behind him, killing the driver and injuring the passenger).

9. Felonious Escape

State v. Lee, 277 N.C. 205, 176 S.E.2d 765 (1970)(two prison inmates, defendant with a knife and another inmate with a gun, tried to overpower two guards in an escape attempt; during the scuffle, the other inmate shot and killed one of the guards).

10. Felonious Breaking or Entering or Larceny (with use of gun)

State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972)(defendant, armed with a pistol, and others broke into an apartment in the afternoon hours; after taking items, defendant shot and killed a teenage boy who was upstairs in the apartment).

State v. Fields, 315 N.C. 191, 337 S.E.2d 518 (1985)(defendant shot homeowner when homeowner confronted defendant during defendant's larceny from outside shed).

11. Felonious Child Abuse

State v. Pierce, 346 N.C. 471, 488 S.E.2d 576 (1997)(defendant's two and one-half year old niece died from injuries inflicted by defendant and his girlfriend over a three or four week visitation period as punishment for wetting her pants, refusing to eat, etc.).

12. Assault with a Deadly Weapon with Intent to Kill

State v. Terry, 337 N.C. 615, 447 S.E.2d 720 (1994)(defendant became involved in an altercation among several men in a store parking lot, got a pistol, and shot three men; felony murder was based on one of the assaults with a gun).

State v. Jones, 353 N.C. 159, 538 S.E.2d 917 (2000)(assault with a deadly weapon, an automobile, based only on culpable negligence and not on an intent to commit the underlying felony of assault, will not serve as a basis for felony murder unless the General Assembly specifically states that it does).

13. Attempted Burning of a Building Used for Trade

State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985)(defendant attempted to burn buildings at IBM with firebombs and shot and killed someone during the transaction).

NORTH CAROLINA GENERAL ASSEMBLY
Legislative Services Office
George R. Hall, Legislative Services Officer

Research Division
300 N. Salisbury Street, Suite 545
Raleigh, NC 27603-5925
Tel. 919-733-2578 Fax 919-715-5460

Terrence D. Sullivan
Director

To: House Select Study Committee on Capital Punishment
From: Hal Pell, Staff Attorney, Research Division

Date: March 21, 2006

The Felony Murder Rule[1]

I. Background and Origins

It is a commonly held belief among legal commentators that current felony murder rules were carried over from the common-law of England to the Colonies. However, during the pre-Revolutionary years, England did not impose absolute liability for deaths that occurred during the course of a felony. English law conditioned felony murder rule liability on causing death through an act of violence or an act manifestly dangerous to human life, in the perpetration of a felony. It was never a rule that felons were strictly liable for accidental deaths in the course of a felony.

Beginning in the 1790's, many American legislatures reduced the penalty for most murders to terms of imprisonment. Capital punishment was reserved for premeditated killings or murders committed in the attempt of a few dangerous felonies. The early felony murder rules did not punish for any death occurring during a felony. There was some form of "fault" involved, whether it was negligence or recklessness that caused the death.

In 1794, Pennsylvania adopted a murder statute that reads similarly to North Carolina's current statute:

"All murder, which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder in the first degree; and all other kinds of murder shall be deemed murder in the second degree . . . ."

[1] An article published in the Stanford Law Review, October 2004, by Prof. Guyora Binder: "The Origins of American Felony Murder Rules," was used in preparing Section I.

There was nothing in the Pennsylvania statute to suggest that the mere causing of death in the course of a felony was always a murder. The language was compatible with a requirement that all murder required some intent to kill, or some other culpable mental state, such as gross recklessness.

The first felony murder rules were enacted in nineteenth-century America, and were patterned after the Pennsylvania statute. The first "actual" felony murder statute was enacted in Illinois in 1827. Offenses committed with felonious intent that resulted in death were deemed murder. New Jersey, in 1829, passed a law that included murder as a killing committed in the course of certain felonies where the probable consequence may be "bloodshed." In the same year, New York, passed a statute that murder included killing "without any design to effect death" by a person committing a felony. By 1900, nineteen states had adopted a statutory felony murder rule.

In 1893, North Carolina passed a statute that made murder committed during any felony a first degree murder. The death penalty was the punishment for first degree murder, and few changes were made in the next 85 years. In 1977, in response to the United States Supreme Court's ruling in *Woodson v. North Carolina* (mandatory death penalty unconstitutional), the North Carolina legislature rewrote the State's capital punishment and sentencing laws.

The legislature amended the first-degree murder statute to provide that a sentence would be imposed pursuant to the new sentencing statute, G.S. 15A-2000. The statute was also amended to provide that commission of "any felony" no longer qualified as the underlying felony for the felony murder rule; only those listed felonies, or a felony committed with a dangerous weapon, would qualify. Consequently, North Carolina's current murder statute, absent the underlined additions below, is consistent with the early Pennsylvania statute, quoted above:
North Carolina General Statute 14-17:

A murder which shall be perpetrated by means of <u>a nuclear, biological, or chemical weapon of mass destruction as defined in G.S. 14-288.21,</u> poison, lying in wait, <u>imprisonment, starving, torture,</u> or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or <u>a sex offense,</u> robbery, <u>kidnapping,</u> burglary, <u>or other felony committed or attempted with the use of a deadly weapon</u> shall be deemed to be murder in the first degree, . . .

Significantly, until 1986, premeditation and deliberation were elements of first-degree murder charges based upon poison, lying in wait, imprisonment, starving, and torture. The North

Carolina Supreme Court had held that premeditation and deliberation were presumed, due to the nature of the murder. However, the Court reversed itself in a 1986 case, *State v. Johnson*, and placed these types of murder on a par with the "felony murder rule." As with the felony murder rule, it is not necessary for the State to prove any "intent" element to pursue a first-degree murder charge for using a nuclear, biological, or chemical weapon of mass destruction, poison, lying in wait, imprisonment, starving, or torture.

II. Application of the Felony Murder Rule in NC Death Penalty Cases

The North Carolina Administrative Office of the Courts does not keep records detailing whether a First Degree Murder conviction is based upon premeditated murder or felony murder. In many cases, the defendant is convicted on both theories. Although the North Carolina Attorney General's Office does not keep historical records, upon request it has surveyed cases and provided the names of four death penalty cases where the defendant was convicted solely on the felony murder rule. The Attorney general's Office has acknowledged that the following cases may not constitute a complete list. The factual recitations were obtained from the North Carolina Supreme Court decision that affirmed the findings and death sentence in each case:

(1) Robbie James Lyons -- Executed 12/05/03

Lyons shot the victim, Stephen Wilson Stafford, a store clerk, several times. One of the shots entered Mr. Stafford's back. Lyons had two prior felonies, one for armed robbery, and one for common law robbery. Robbery with a dangerous weapon was the underlying felony for application of the FMR.

(2) Frank Ray Chandler -- Executed 11/12/04

Chandler broke into the home of the victim, Ms. Doris Poore, a 90 year-old widow. Ms. Poore was found partially nude in her bed, with a massive skull fracture. The jury acquitted the defendant of attempted rape or first degree sexual offense. First degree burglary was the underlying felony for application of the FMR.

(3) William Dillard Powell -- Executed 3/11/05

Powell killed the victim, Ms. Mary Gladden, a store clerk, with a tire iron. Ms. Gladden died from blows to her head. Robbery with a dangerous weapon was the underlying felony for application of the FMR.

(4) Fernando Louis Garcia, III -- Motion for Appropriate Relief pending.

Garcia took the victim, Ms. Juliann Bolt, at gunpoint into the ladies restroom at the clubhouse of an apartment complex in Raleigh. Ms. Bolt was found on the floor with a massive skull fracture, caused by blows from the gun. Attempted rape was the underlying felony for application of the FMR.

III. Felony Murder as First Degree Murder – United States Jurisdictions

Almost all states have a felony murder rule. The felony murder doctrine generally imputes the malice element necessary for murder from the underlying felony. Four states have effectively "abolished" the felony murder rule by requiring (by statute or case law) that the State specifically prove the element of "malice" relating to the homicidal act. (Delaware, Hawaii, Kentucky, and Michigan).

Some states contain language that prevents application of the doctrine when a non-participant in the felony causes a death. Others have prevented application when the defendant's co-felon is killed. Six states classify felony murder as second-degree murder, and four as manslaughter. The states in the chart below classify felony murder as first-degree murder or murder, if not classified into degrees.

FELONY MURDER/FIRST DEGREE MURDER JURISDICTIONS

Alabama	Illinois	Nevada	Tennessee
Arizona	Indiana	New Jersey	Texas
Arkansas	Iowa*	New Mexico	Vermont*
California	Kansas+	North Carolina	Virginia**
Colorado	Maine*	North Dakota	Washington
Connecticut	Maryland	Oklahoma	West Virginia*
Dist. of Columbia*	Massachusetts	Oregon	Wyoming
Florida	Mississippi	Rhode Island*	US (fed./military)
Georgia	Montana	South Carolina	
Idaho	Nebraska	South Dakota	

* Jurisdiction does not have the death penalty.
**Statutory maximum is twenty (20) years to life.
+Death penalty held unconstitutional by State Supreme Court (2004).

IV. The Virginia Felony Murder Law

At a prior committee meeting, a speaker suggested that a review of Virginia's capital murder statute would be helpful if narrowing the application of the death penalty was a committee consideration. As noted in the above chart, Virginia treats felony murder as First-Degree murder. Virginia, however, has adopted a "Capital Murder" statute that does not include felony murder. Virginia makes 13 specified offenses subject to the death penalty—all murders occurring during with designated factual circumstances, and all of which require a showing of that the killing was willful, deliberate, and premeditated.[2] The First Degree murder statute provides that:

> Murder, other than capital murder, by poison, lying in wait, imprisonment, starving, or by any willful, deliberate, and premeditated killing, or in the commission of, or attempt to commit, arson, rape, forcible sodomy, inanimate or animate object sexual penetration, robbery burglary or abduction, except as provided in § 18.2-31 [the capital murder statute], is murder of the first degree, punishable as a Class 2 felony.

Consequently, Virginia makes non-capital the offenses that do not require proof of intent under North Carolina law: killings by poison, lying in wait, imprisonment, and starving. It also makes non-capital the offenses that do not require proof of intent under North Carolina's felony murder rule: killings in the commission of arson, rape, forcible sodomy, inanimate or animate object sexual penetration, robbery, burglary or abduction. In addition, Virginia also makes non-capital any willful, deliberate, and premeditated killings that do not fall into one of the 13 specific circumstances of the capital murder statute. The penalty for First Degree murder, under Virginia law, is twenty (20) years to life without parole.

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[2] Abduction with intent to extort; by another for hire; by a prisoner; during a robbery; commission or rape or sodomy; killing a law enforcement officer; killing more than one person, same act; killing more than one person within a 3 yr. period; involving drug distribution; by another as part of a criminal enterprise; killing a pregnant woman with intent to terminate pregnancy; killing a child (under 14) by a person age 21 or over; killing by another during commission or attempt to commit an act of terrorism.

Handouts distributed by Joe Cheshire speaking on behalf of NC Academy of Trial Lawyers

No. 05-___

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2004

****

WILLIAM DILLARD POWELL,

Petitioner,

v.

STATE OF NORTH CAROLINA

Respondent.

****

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

****

DEATH PENALTY CASE

James R. Glover
Glover & Petersen, P.A.
1506 E. Franklin Street, Suite 100
Chapel Hill, NC 27514

David R. Teddy
Teddy & Meekins, P.L.L.C.
1219 Fallston Road
Shelby, NC 28150

William F. Massengale
Massengale & Ozer
211 N. Columbia St.
Chapel Hill, N.C. 27514

*Counsel of Record

CAPITAL CASE

QUESTIONS PRESENTED

I. Whether the execution of an offender for unintentional felony murder without additional aggravating circumstances is a violation of the Eighth Amendment prohibition of cruel and unusual punishment because there is a national consensus against such a practice.

II. Whether North Carolina's statutory capital sentencing scheme, which allows "double counting" of the underlying felony at both the guilt and sentencing phase, unconstitutionally fails to narrow the class of death-eligible murderers.

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No. 05-___

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2004

****

WILLIAM DILLARD POWELL,

Petitioner,

v.

STATE OF NORTH CAROLINA

Respondent.

****

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

****

Petitioner William Dillard Powell respectfully prays that this Court issue a Writ of Certiorari to review the issue presented in the application for writ of habeas corpus which was denied by the North Carolina Supreme Court.

OPINION BELOW

The opinion of the North Carolina Supreme Court denying Mr. Powell's Petition for Writ of Habeas Corpus and Emergency Application for Stay of Execution is attached as Exhibit A.

JURISDICTION

Mr. Powell's petition for writ of habeas corpus was denied by the North Carolina Supreme Court on March 9, 2005. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(9) (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. VIII: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

U.S. Const., amend. XIV: No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner is presently scheduled to be executed at 2:00 a.m. on March 11, 2005. Petitioner requests that this Court review the constitutionality of North Carolina's capital sentencing scheme as applied to Mr. Powell.

Mr. Powell was convicted and sentenced to death during the April 1993 Criminal Session of the Cleveland County Superior Court. Petitioner's conviction and death sentence were affirmed on direct appeal. *State v. Powell,* 340 N.C. 674, 459 S.E.2d 219 (1995), *cert. denied,* 516 U.S. 1060 (1996). Petitioner sought and was denied relief in state post-conviction proceedings. *State v. Powell*, 356 N.C. 621, 575 S.E.2d 520 (2002).

On December 23, 2002, Petitioner filed in the Western District of North Carolina a Petition for a Writ of Habeas Corpus seeking relief from his conviction and death sentence. On September 11, 2003, District Court Judge Lacy H. Thornburg filed a Memorandum Opinion and Order and a Judgment granting the Respondents' motion for summary judgment, denying relief on all of Petitioner's habeas. *Powell v. Lee*, 282 F. Supp.2d 355 (W.D.N.C. 2003). Petitioner's timely filed motion to alter or amend the judgment was denied by an order filed by Judge Thornburg on October 23, 2003.

Petitioner filed notice of appeal to the United State Court of Appeals for the Fourth Circuit on November 21, 2003. Upon review of Petitioner's Brief, on May 21, 2004, the Fourth Circuit issued an order, without written opinion, denying a certificate of appealability. On July 21, 2004, the Fourth Circuit issued an order denying rehearing.

On January 10, 2005, the Supreme Court of United States denied Petitioner's petition for a writ of certiorari. *Powell v. Polk*, ___ U.S. ___, 125 S.Ct. 920, 160 S.E.2d 813 (2005). On January 24, 2005, the Secretary of the North Carolina Department of Correction issued an order setting March 11, 2005 as the date for Mr. Powell's execution.

On February 16, 2005 Mr. Powell filed a new MAR in the Superior Court of Cleveland County raising a claim that the trial court had erroneously instructed the sentencing jury because the instructions required the jury to find the pecuniary gain aggravating factor if they found that he took money as the result of a robbery at the time of the killing, without requiring the jury to find that pecuniary gain was the motive for the killing, as required by the North Carolina Supreme Court's decision in *State v. Maske*, 358 N.C. 40, 54-57, 591 S.E.2d 521, 530-532 (2004). During the hearing on this MAR on February 25, 2005, Mr. Powell filed an amendment to this MAR raising a claim based on information first learned by defendant's counsel that morning that State failed to reveal to the defendant's counsel that a reward had been offered by the State to a key witness, Lori Yelton, in exchange for her testimony. The presiding judge denied relief and dismissed both claims raised in the new MAR. On March 7, 2005, Mr. Powell filed a Petition for Writ of Certiorari with the North Carolina Supreme Court seeking review of the dismissal of those claims. The North Carolina Supreme Court declined to issue the writ on March 9.

On March 7, 2005, Mr. Powell applied to the North Carolina Supreme Court for a writ of habeas corpus, challenging the constitutionality of his sentence of death. This Petition for Writ of Certiorari arises from the denial of that application on March 9.

STATEMENT OF THE FACTS

The facts of what occurred in the Pantry Pride in Shelby in the early morning hours of October 31, 1991 will probably never be known with certainty or precision. There were no eyewitnesses to the robbery gone tragically awry. But every fact known or believed about what happened there supports one indisputable truth: Mr. Powell entered the Pantry Pride, unarmed, with no intent to hurt Mary Gladden.[1]

Mr. Powell went to the Pantry Pride after he and Lori Yelton had been binging on drugs for several days. During that time, Mr. Powell had been injecting large quantities of cocaine and abusing Xanax, a drug prescribed to relieve anxiety. The cocaine was gone, Mr. Powell's girlfriend needed more and they had no cash with which to buy it. Mr. Powell left in a pickup belonging to a friend with whom he and his girlfriend were staying and headed out, first to get some money and then to buy drugs.

Entering the Pantry Pride, Mr. Powell went behind the counter to take money from the cash register. After he removed the money from the cash register, Mrs. Gladden, the only employee in the store at the time, resisted, first hitting him and then grabbing hold of his arm and refusing to let go. Mr. Powell, in a highly agitated state attributable to both the cocaine binge and a brain dysfunction caused by years of chronic alcohol and drug abuse, panicked. He picked up a tire iron from behind the counter, and

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[1] The Defendant told police that the victim slapped him, and that he panicked and he just wanted to get out of there and he did not intend to hurt the lady." (TT, Vol. 4, p. 1135).

killed Mrs. Gladden in the struggle. She died almost immediately. He fled, leaving scattered on the floor virtually all of the money that had been in the cash register.

At the close of the State's case and at the close of the evidence, the trial judge ruled that the State had not produced evidence sufficient to permit a jury to find that Mr. Powell had the intent to kill formed after premeditation and deliberation and ruled that the charge of first degree murder would be submitted only on the theory of felony murder with armed robbery of Mary Gladden as the underlying felony. (TTpp. 1492-1498, 1500, 1641-1643)

In the first phase of the trial, the jury was instructed as follows:

> So, with regards to this first degree murder offense, I charge that if you find from the evidence and beyond a reasonable doubt that on or about the alleged date the defendant had in his possession a dangerous weapon and took and carried away property from the person or in the presence of a person without his voluntary consent with the use of a dangerous weapon, the defendant knowing he was not entitled to take the property and intending to deprive that person of its use permanently or that the defendant took and carried away property from the person or presence of a person without his voluntary consent by violence or putting that person in fear, the defendant knowing he was not entitled to take it and intending at that time to deprive the person of its use permanently and that while committing robbery, that is to say either robbery with a dangerous weapon or common law robbery, the defendant killed the victim and that the defendant's act was a proximate cause of the victim's death, it would be your duty to return a verdict of guilty of first degree murder under the felony murder rule.

TTpp. 1697-1698.

The jury found Mr. Powell guilty of first degree felony murder, a killing in the course of the armed robbery of money from Mary Gladden. (TTpp. 1721-1733). At the sentencing phase of the trial, Mr. Powell's trial counsel objected to the submission of the aggravating circumstance that the murder was committed for pecuniary gain on the ground that it could not be the basis for a sentence of death because it was predicated solely on evidence required to prove an element of felony murder. The trial judge overruled this

objection. (Tpp. 1736-1741) The trial judge reviewed all of the other statutory aggravating circumstances and held that none of them were supported by the evidence. The District Attorney agreed that the pecuniary gain aggravating circumstance was the only one that could be submitted to the jury. (TTpp. 1737-1744) The trial judge submitted the pecuniary gain aggravating circumstance to the sentencing jury, instructing that:

> a murder is committed for pecuniary gain if the defendant, when he commits it, has obtained or intends or expects to obtain money or some other thing which can be valued in money, either as compensation for committing the murder or as a result of the death of the victim. If you find from the evidence beyond a reasonable doubt that when the defendant killed the victim, the defendant obtained money by reason of a robbery, you would find this aggravating circumstance and would so indicate by having your foreman write "yes" in the space after the aggravating circumstance on the issues and recommendation form.

(TTp. 1887) The jury was instructed that this was the only aggravating circumstance that they could consider. (TTpp. 1885-1889) In their verdict, the jury found this aggravating circumstance to be proven. The jury found the sole aggravating circumstance of pecuniary gain to be sufficiently substantial to call for the imposition of the death penalty and recommended that Mr. Powell be sentenced to death.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Mr. Powell raised these issues in a Petition for Writ of Habeas Corpus to the North Carolina Supreme Court. That court denied his petition on March 9, 2005.

REASONS FOR GRANTING THE WRIT

I. The execution of an offender for unintentional felony murder without additional aggravating circumstances constitutes cruel and unusual punishment because there is a national consensus against such a practice.

This Court applies the "evolving standards of decency" test when analyzing the "cruel and unusual" clause of the Eighth Amendment to the United States Constitution. *Trop v. Dulles*, 356 U.S. 86 (1958); *Weems v. United States*, 217 U.S. 349 (1910). The Court looks "to objective evidence of how our society views a particular punishment today." *Penry v. Lynaugh*, 492 U.S. 302 (1989). "The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Id.*

This Court's recent decision in the case *Roper v. Simmons*, 543 U.S. __ (2005), once again applies the "evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be "cruel and unusual." In *Roper*, the Court held that the execution of juvenile offenders is prohibited by the Eighth and Fourteenth Amendments, basing its decision in substantial part upon the fact that thirty states do not permit the execution of juveniles. In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court held that the execution of mentally retarded persons is barred by the Eighth and Fourteenth Amendments, because at the time of its decision thirty states did not engage in that practice. Likewise, evolving standards of decency should preclude the execution of William Dillard Powell. At least thirty-nine states would not execute an offender convicted of Mr. Powell's crime.

The trial judge found that Mr. Powell did not act with intent to kill, and instructed the jury only on felony murder. The judge's ruling on this issue acquitted Mr. Powell of

the offense of intentional murder. See *Smith v. Massachusetts*, 543 U.S. __ (2005) (judge's mid-trial ruling dismissal of charge for insufficiency of evidence equivalent of acquittal such that Double Jeopardy Clause of Fifth Amendment prevented reexamination of that ruling). The judge, with the concurrence of the District Attorney, submitted "pecuniary gain" as the only aggravating circumstance. The jury was instructed that it was required to find pecuniary gain if it found that, "when [Mr. Powell] killed the victim, [he] obtained money by reason of a robbery." The jury was required to, and had already found, that Mr. Powell took money during a robbery to find him guilty of the robbery which was the basis for guilt of felony murder. Thus, Mr. Powell became eligible for a death sentence – and a death sentence was imposed – based solely on his commission of an unintentional killing, with no other fact about him or the crime making it aggravated.

There is presently a national consensus against the execution of an offender whose crime was not intentional and was aggravated only by the felony underlying the death sentence – the robbery. At least twenty-six states would not impose a death penalty under these circumstances. Another thirteen states do not impose the death penalty. Therefore, in at least thirty-nine states, Mr. Powell would not be on death row, but would be serving a term of years or life in prison.

Seven death penalty states – Montana, New Jersey, Ohio, Pennsylvania, Washington, Missouri and South Carolina - do not recognize felony murder as a capital offense.[2] These states require a finding of mens rea - intent, premeditation and deliberation, or "malice aforethought" – in order for a murder to be eligible for the death

[2] Mont. Code Ann. § 26-18-303 (2004); N.J. Stat. Ann. §§ 2C:11-3a(a), (c); Ohio Rev. Code §§ 2903.01,2929.02, and 2929.04; 18 Pa. Cons. Stat. § 2502(a) (2004); Wash. Rev. Code 9A.32.030(1)(a); Mo. Rev. Stat. § 565.020 Mo. Rev. Stat. (requires deliberation for conviction for first-degree murder); S.C. Code Ann. § 16-3-10 (requires finding of malice for killing or underlying felony).

penalty. Ten others – Alabama, Kansas, Louisiana, New Hampshire, Utah, Virginia, Texas, Oregon, Indiana and Illinois – have effectively abolished simple felony murder as an offense punishable by death by requiring a finding of specific intent to kill; the felony simply serves to aggravate the murder charge to a capital offense.[3] Connecticut's capital felony statute limits the death penalty to felony murder that occurs during the course of a kidnapping or sexual assault.[4]

Three other states – Tennessee, Wyoming and Nevada – have felony murder statutes on their books, but their appellate courts have decided that duplicate consideration of the underlying felony at both the guilt and sentencing phases does not adequately narrow the class of death-eligible murderers such that the death penalty would be reserved for the "worst" murderers. See *Engberg v. Wyoming*, 820 P.2d 70 (Wyo. 1991); *State v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992); *McConnell v. Nevada*, 102 P.3d 606 (Nev. 2004). That is precisely the factual situation presented in Mr. Powell's case. As the Middlebrooks court noted:

> A simple felony murder unaccompanied by any other aggravating factor is not worse than a simple, premeditated and deliberate murder. If anything, the latter, which by definition involves a killing in cold blood, involves more culpability.

Id. at 345.

At least five states that allow imposition of the death penalty for felony murder appear to limit their pecuniary gain aggravator to a "murder for hire" scenario. Such is

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[3] Ala. Code §§ 13A-6-2(a), 13A-5-40(b); Kan. Stat. Ann. § 21-3439; La. Rev. Stat. Ann. § 14:30; N.H. Rev. Stat. Ann. § 630:1; Utah Code Ann. § 76-5-202; Va. Code Ann. § 18.2-31; Tex. Penal Code Ann. § 19.03; Ind. Code § 35-50-2-9; Ore. Rev. Stat. §§ 163.095(d), 163.115(1)(b) (1985); 720 § ILCS 5/9-1(b)(6). New York's death penalty statute, struck last year by that state's highest court, also fell into this category. N.Y. Penal Law § 125.27.

[4] Conn. Gen. Stat. § 53a-54b.

the case in Nebraska, New Mexico, Oklahoma, Arizona, and Mississippi.[5] In these states, if an offender were sentenced to death with pecuniary gain as the sole aggravating factor, the jury would have made a finding that the offender's *mens rea* intended the death of the victim. Such is not the case in North Carolina, where pecuniary gain is broadly interpreted to include any killing for the purpose of getting money or something of value," including robbery. *State v. Gardner,* 311 N.C. 489, 513, 319 S.E.2d 591, 606 (1984). Therefore, in at least thirty-nine states, Mr. Powell would be ineligible for the death penalty and would be serving a life sentence for his crime.

This Court has long recognized the relevance of international norms in determining "the acceptability of a particular punishment." *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982) (*quoting Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977)). International norms are persuasive authority in interpreting the Eighth Amendment's ban on cruel and unusual punishment. *Roper v. Simmons*, 543 U.S. at __ (opinion of Kennedy, Stevens, Souter, Ginsber, and Breyer, J.J.) and *id.* at ___ (opinion of O'Connor, J. dissenting). The United States is "virtually the only western country still recognizing a rule which makes it possible 'that the most serious sanctions known to law might be imposed for accidental homicide.'" Roth and Sundby, *The Felony Murder Rule: A Doctrine at Constitutional Crossroads*, 70 Cornell L. Rev. 446, 447-48 (1985). England, where the doctrine originated, abolished the felony-murder rule in 1957. The Homicide Act, 5& 6 Eliz. 2, ch. 11 Section 1. The rule apparently never existed in France or Germany. *Id.*, note 12 citing Fletcher, *Reflections on Felony Murder*, 12 SW. U.L. REV. 413, 415, note 11 (1981).

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[5] See R.R.S. Neb. § 29-2523; N.M. Stat. Ann. § 31-20A-5; 21 Okl. St. § 701.12; Ariz.R.S. § 13-703 (F); *Ladner v. State*, 584 So.2d 873 (Miss. 1991).

As the *Roper* majority notes, the death penalty must be limited to those offenders who commit "a narrow category of the most serious crimes" and "whose extreme culpability makes them the most deserving of execution." (slip op. at p. 14). Like mentally retarded people and children, persons who commit unaggravated, unplanned murders do not fall into this category. The *Roper* and *Atkins* courts recognize that lesser mental states lessen the *mens rea* of the offender, and that the Constitution requires that the death penalty be reserved for the offenders with the greatest moral culpability. Similarly, the vast majority of states recognize that an offender such as Mr. Powell, whose crime was found by the trial court to be unintentional and unaggravated by any fact other than the robbery underlying his felony murder conviction, lacks the requisite *mens rea* to be deserving of society's harshest punishment.

In *Tison v. Arizona,* 481 U.S. 137 (1987), this Court also recognized the "critical" importance of the mental state with which the defendant commits the crime in the individualized determination of culpability required in capital cases:

> Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished. The ancient concept of malice aforethought was early attempt to focus on mental state in order to distinguish those who deserved death from those who through "Benefit of . . . Clergy" would be spared. . . . Over time, malice aforethought came to be inferred from the mere act of killing in a variety of circumstances; in reaction, Pennsylvania became the first American jurisdiction to distinguish between degrees of murder, reserving capital punishment to "willful, deliberate and premeditated" killings and felony murders. . . . More recently, in *Lockett v. Ohio*, 438 U.S. 586 (1978), the plurality opinion made clear that the defendant's mental state was critical to weighing a defendant's culpability under a system of guided discretion, vacating a death sentence imposed under an Ohio statute that did not permit the sentencing authority to take into account 'the absence of direct proof that the defendant intended to cause the death of the victim.' *Id.* at 608 (opinion of Burger, C.J.); see also *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (adopting position of *Lockett* plurality) In *Enmund v. Florida*, the

> Court recognized again the importance of mental state, explicity permitting the death penalty in at least those cases where the felony murderer intended to kill and forbidding it in the case of a minor actor not shown to have had any culpable mental state.

481 U.S. at 156. This Court held that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." *Id.*, 481 U.S. at 157. The *Tison* Court did not address a case such as Powell's, where the defendant actually killed the victim, but was not shown to have had any culpable mental state.

Both the *Atkins* and the *Roper* courts noted that even in states where the practice of executing the mentally retarded or juveniles had not been abolished, it had become rare. So too has the practice of executing persons guilty of felony murder without an additional finding either of intent to kill or of the culpable mental state of reckless indifference to human life. This Court has recognized that "killing only rarely occurred during the course of robberies, and such killing as did occur even more rarely resulted in death sentences if the evidence did not support an inference that the defendant intended to kill." *Tison v. Arizona, supra,* 481 U.S. at 148-49, *citing Enmund v. Florida*, 458 U.S. 782, 798-99 (1982). This is also the case in North Carolina with crimes such as that of Mr. Powell. "Juries in this state almost always recommend life imprisonment when Defendant's conviction in a robbery murder case rests solely on a felony murder." *State v. Stokes*, 319 N.C. 1, 27, 352 S.E.2d 653 (1987) (finding Stokes' sentence of death to be disproportionate). Mr. Powell's is one of only two cases of persons sentenced to death in North Carolina on the basis of felony murder alone and whose crime had no aggravating factor other than the underlying felony – in his case, a robbery. *See also State v. Chandler,* 342 N.C. 742, 467 S.E.2d 636 (1996).

Finally, when analyzing evolving standards of decency in relation to imposing a death sentence for an unaggravated and unintentional felony murder, it is worth noting that a number of states that might have imposed a death penalty on persons similarly situated as Mr. Powell at the time of *Tison v. Arizona* in 1987 have since changed their law. The court decisions in Wyoming, Tennessee and Nevada took place in 1991, 1992 and 2004, respectively.

Applying the evolving standards of decency test, there can be no doubt but that it is the established consensus that it is wrong to impose and carry out the death sentence in Mr. Powell's case.

II. Because the North Carolina statutory scheme allows "double counting" of the underlying felony at both the guilt and sentencing phase, it unconstitutionally fails to narrow the class of death-eligible murderers.

Recognizing that the penalty of death is unique because of its total irrevocability, the United States Supreme Court has required the most rigorous and scrupulous procedures before considering the imposition of death. *Furman v. Georgia*, 408 U.S. 238 (1972). "[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that *discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.*" *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (emphasis added).

To pass constitutional muster, a capital sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared with others found guilty

of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983). Under the capital sentencing schemes of most states, including North Carolina, the sentencing authority is required to find at least one aggravating circumstance before it may impose death. *See Gregg*, 428 U.S. at 162-167 (reviewing Georgia sentencing scheme); *Profitt v. Florida*, 428 U.S. 242, 247-51 (1976) (reviewing Florida sentencing scheme). By doing so, the sentencing authority narrows the class of persons eligible for the death penalty according to an objective legislative definition. *See Zant*, 462 U.S. at 878-79. The legislature must provide "clear and objective standards," so that the sentencing authority is given "specific and detailed guidance," and the process of imposing the death penalty is "rationally reviewable" on appeal. *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (holding that an aggravating circumstance in the Georgia death penalty statute was unconstitutionally vague).

The only aggravating factor submitted to Mr. Powell's jury was pecuniary gain based on the robbery that was the underlying felony for his felony murder conviction. This is unconstitutional because it merely duplicates the elements of the felony murder conviction.

In *Engberg v. Meyer*, 820 P.2d 70 (Wyo. 1991), the defendant was convicted of first-degree felony murder under a statutory definition similar to that of North Carolina. *Id.* at 87. The jury found five aggravating circumstances, including: (1) that the murder was committed while the defendant was engaged in the commission of a robbery, and (2) that the murder was committed for "pecuniary gain." Id. at 88-89. The Supreme Court of Wyoming concluded:

> This statute provided no requirements beyond the crime of felony murder itself to narrow and appropriately select those to be sentenced to death and

> therefore, on its face, permitted arbitrary imposition of the death penalty. . . . *All* felony murders involving robbery, by definition, contain at least the two aggravating circumstances detailed above. This places the felony murder defendant in a worse position than the defendant convicted of premeditated murder, simply because his crime was committed in conjunction with another felony.

Id.

Finally, the court concluded that another "compelling" reason for reversing Engberg's death sentence was that the Wyoming legislature had subsequently amended its death penalty statute. *Id.* The amended statute corrected the constitutional problems previously found by the court. While North Carolina has not amended its death penalty statute, the reality is that *no other defendant* of the one hundred and eighty-three presently on North Carolina's death row are there on the sole finding of pecuniary gain in a robbery murder case.

In *State v. Middlebrooks*, 840 S.W.2d 317 (1992, *cert. granted,Tennessee v. Middlebrooks,* __ U.S. __, *cert. dismissed as improvidently granted*, 510 U.S. 124 (1993), the Supreme Court of Tennessee also reviewed a capital sentencing scheme that duplicated the elements of felony murder at both the guilt and sentencing phases. Id. at 341-47. When a defendant has been convicted of first-degree murder solely on the basis of felony murder, the court concluded that the use of felony murder as an aggravating factor is unconstitutional under both the Eighth Amendment and the Tennessee state constitution. *Id.* at 346.

As in *Engberg*, the Tennessee court held that the felony murder rule did not adequately narrow the class of death-eligible defendants at either the guilt or the sentencing phase of the trial. Citing *Gregg*, 428 U.S. 153, the court concluded that a "proper" narrowing device must ensure that those who receive the death penalty will be

"among the worst murderers -- those whose crimes are particularly serious, or for which the death penalty is peculiarly appropriate." 840 S.W.2d at 343. Applying that principle to the issue presented here, the court explained:

> The only defendants who are eliminated by the felony murder narrowing device are those who kill with premeditation and deliberation -- i.e., in cold blood -- but not during the course of a felony. A simple felony murder unaccompanied by any other aggravating factor is not worse than a simple, premeditated, and deliberate murder. If anything, the latter, which by definition involves a killing in cold blood, involves more culpability.

The court also held, however, that the imposition of death for a felony murder conviction was not unconstitutional *per se*, so long as some aggravating circumstance other than the underlying felony was found. *Id.* at 340-42.

In *McConnell v. Nevada*, 102 P.2d 606 (Nev. 2004), the court deemed it impermissible under the United States and Nevada constitutions to base an aggravating circumstance in a capital prosecution on the felony upon which a felony murder is predicated. *Id.* at 624. Like the *Engberg* and *Middlebrooks* courts, the Nevada court agreed with defendant's argument that an aggravating factor based on burglary failed to perform its constitutional function of narrowing death eligibility because the burglary also served as an element of felony murder. *Id.* at 620.

The Tennessee, Wyoming and Nevada courts all distinguished the United States Supreme Court case of *Lowenfield v. Phelps,* 484 U.S. 231 (1988). In *Lowenfield*, the defendant was convicted under a Louisiana statute which narrowly defined five categories of first-degree murder. *Id.* at 241-42. The petitioner was found guilty under a provision of the statute which provided that first-degree murder includes "the killing of a human being . . . when the offender has a specific intent to kill or to inflict great bodily harm upon more than one person." *Id.* (citing *La. Rev. Stat. Ann.* § 14:30.A(3)(West

1986)). The sole aggravating circumstance found by the jury was that "the offender knowingly created a risk of death or great bodily harm to more than one person." *Id.* at 243(citing *La. Code. Crim. Proc. Ann., Art.* 905.4(d). The Supreme Court observed:

> The use of "aggravating circumstances" is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. We see no reason why this function may not be performed by jury findings *at either the sentencing phase of the trial or the guilt phase.*

Id. at 244. (emphasis added). Because Louisiana's statutory definition of first-degree murder adequately narrowed the class of death-eligible persons at the guilt phase of the proceedings, the Court held that the sentencing scheme was constitutionally valid, despite the fact that certain aggravating circumstances duplicated the elements of first-degree murder.

The difference between the constitutionally acceptable scheme in Louisiana, and the unconstitutional sentencing schemes in Wyoming, Tennessee, Nevada, and North Carolina, is that the Louisiana statute narrowed the class of felony murderers eligible for the death penalty to those who had a specific intent to kill or inflict bodily harm. The North Carolina scheme, like that in Tennessee, Wyoming and Nevada, is unconstitutional because it allows all those convicted of felony murder to be executed insofar as it permits execution where the sole aggravating factor is the felony underlying the murder conviction.

The unconstitutional failure to properly narrow the class of death-eligible murderers, as required by *Zant v. Stephens*, has in this case demonstrably resulted in an arbitrary and disproportionate result.

In early 1997, faculty at the University of North Carolina issued a study of proportionality review as conducted between 1978 and 1995 by the Supreme Court of North Carolina. Professor Peter Bearman and his colleague, Katherine Stovel, analyzed each capital case considered by the North Carolina Supreme Court and each case cited in the proportionality review undertaken in connection with that case. They developed a "map" whereby the characteristics of each case reviewed and cited could be arrayed, with similar cases closest to each other and the distance between cases growing as the cases became less similar. A copy of this report, "The State of the Proportionality Review of Capital Sentences in North Carolina 1978-1995" is attached as Exhibit B.

Several aspects of the study and its authors are noteworthy. First, Professors Stovel and Bearman had no association with Mr. Powell's case and had never met or spoken with anyone involved in representing him. Second, it relied entirely upon a methodology generally recognized and accepted by researchers in social sciences. Third, it was conducted by distinguished scholars with no agenda other than to advance scholarship in the field: Professor Bearman is now Chair of the Department of Sociology at Columbia University and Director of its Institute for Social and Economic Research and Policy and Katherine Stovel is now Associate Professor at the University of Washington; neither has any personal or professional interest in opposing capital punishment. Fourth, the study was undertaken to assess the efficacy of proportionality review in North Carolina, not to undermine the administration of the death penalty in the state, and, consistent with that objective, it noted numerous cases in which the proportionality review had succeeded in identifying similar cases and ensuring a proportional result.

The last point above is especially significant in light of the study's conclusion. According to Professor Bearman:

> This study discovered that generally the Court's proportionality review was outstanding in its adherence to the spirit and intent of the legislation that inspired it. Such reviews were good reviews because they compared the case at hand to cases that were similar. Many of those reviews — in fact the majority – concluded that the sentence of death was proportional to sentences returned for similar crimes. Our study therefore did not try to show, nor did it show, that proportionality review was always poorly executed. . . . But one review in our report is singled out as egregious in its departure from the intent of the Supreme Court of the United States and the North Carolina Legislature. That review was the review of William Powell.

Letter of Professor Bearman to Governor Easley is attached as Exhibit C.

In other words, after studying over 100 capital cases which had resulted in a death sentence, Professors Bearman and Stovel concluded that Mr. Powell's case represented the single greatest failure of proportionality review. According to their study, if an appropriate review had been conducted "the Court would have recognized that the jury that heard Mr. Powell's case made a decision that was very different from decisions other juries in North Carolina had made in similar cases." Rather, "in Powell's case, the characteristics of the crime are not similar to the other death cases. They are similar to the life cases."

This study scientifically establishes what the *Zant* court recognized – that a capital sentencing scheme must provide a mechanism for narrowing the class of death eligible murderers. Absent that, the death penalty will be applied arbitrarily and disproportionately, as has happened in Mr. Powell's case.

WHEREFORE, Mr. Powell respectfully prays that grant a Writ of C*ertiorari* and reverse the decision of the Supreme Court of North Carolina.

This the 9th day of March, 2005.

James R. Glover
Glover & Petersen, P.A.
1506 E. Franklin Street, Suite 100
Chapel Hill, NC 27514

David R. Teddy
Teddy & Meekins, P.L.L.C.
1219 Fallston Road
Shelby, NC 28150

William F. Massengale
Massengale & Ozer
211 N. Columbia St.
Chapel Hill, N.C. 27514

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Petition for Writ of Certiorari was served facsimile and via United States Mail on:

Valerie B. Spalding
Steven M. Arbogast
North Carolina Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629

This the 9th day of March, 2005.

James R. Glover

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Sunday

SPORTS



Justin Leonard turns a one-shot deficit into a surprising three-shot lead after the third round of the PGA Championship. **C1**

GREENSBORO

Danahey plea questioned

Some say fire sentence is too harsh

By Stan Swofford
Staff Writer

GREENSBORO – Was justice served?

The question lingers in the Janet Danahey-Campus Walk fire case — almost as troubling to some as the charred, skeletal remains of the apartment complex where four young adults died Feb. 15.

Danahey, 23, pleaded guilty in Guilford Superior Court last month to four counts of first-degree murder and arson. Wracked with guilt and believing, perhaps erroneously, that she was about to be tried for her life, Danahey accepted a sentence of life without parole.

Many people believe she got what she deserves and that she's lucky not to be on death row.

Others, including criminal trial lawyers, law professors and people with no connection to the courts, Danahey or her crime, say Danahey's punishment is too harsh. A sentence of life without parole should be reserved for criminals who intended to kill, they say, and Danahey did not. They say she committed involuntary manslaughter or, at most, second-degree murder.

Some are critical of Guilford District Attorney Stuart Albright for charging Danahey with first-degree murder and demanding a punishment of at least life without parole — even though prosecutors themselves acknowledge that

See Fire, Page A6

MORE: Lawyers question fairness of felony murder rule. A6



At her sentencing July 29, 23-year-old Janet Louise Danahey turned to the families of the four fire victims and said she would spend the rest of her life atoning for her crime and trying to be a part of them.

TOM COPELAND
News & Record

Fire: 'This will be on her mind always'

WHAT THEY'RE SAYING



"We looked at this case from the victims' point of view. I can rest well, doing what I did."

Stuart Albright,
Guilford district attorney



"There is always a risk in a capital case that a jury will return a verdict of death. You can't roll the dice if your client doesn't want to."

Jim Kimel,
lawyer who led
Janet Danahey's defense

Continued from page A1

Danahey did not intend to kill anyone or even to burn the building in which the four victims and about 30 others slept.

Some also are critical of her defense — led by Greensboro lawyer and former District Attorney Jim Kimel — for not taking the case to trial. Some experienced trial lawyers say they were baffled by the decision to plead her guilty as charged before the state announced officially that it intended to seek the death penalty.

Although they agree that a defense lawyer can never be certain what a jury will do, especially in a death case, they say it was highly unlikely Danahey would have received a death sentence for what amounted to a prank that went horribly awry.

Kimel and the rest of Danahey's defense team, lawyers Bob Scott and Joseph Coltrane said it was Danahey's decision, and Danahey's alone, to plead guilty "after several months of consultation with her lawyers, prayer, and meetings with her parents and

From the beginning, they told the families they would accept no punishment less than life without the possibility of parole.

Prosecutors say some, but not all, family members wanted the death penalty, although they declined to say who. Jim Bek, the father of Ryan Bek, said he and his wife, Ginny, believe "justice has been carried out." He said he didn't know how other parents felt but sensed some were "not interested in pushing for the death penalty."



Jim Bek

Robert Harris, Beth Harris' father, said he told Albright and Neumann that Danahey should receive "the harshest punishment the law allows." Later, after she had been sentenced to life without parole, he said he would have been satisfied if she had been punished much less severely.

James and Carolyn Llewellyn, parents of Donna and Rachel Llewellyn, could

Felony murder rule spurs fairness debate

Defense attorneys say felony murder should not carry the death penalty.

BY STAN SWOFFORD
Staff Writer

Death penalty lawyers despise it. Prosecutors love it.

It's called the felony murder rule, a concept rooted in English common law that dates at least to the 16th century. It allows the state to charge a person with murder even if that person had no intention of killing anyone.

In 12 of the 38 states that have capital punishment, including North Carolina, a defendant can be sentenced to death for felony murder. All that's required is that a death occur while certain felonies — arson, rape, sex offense, robbery, burglary, and kidnapping — are being committed, or any other felony in which a deadly weapon is used.

Prosecutors like the law because it makes their job easier, they don't have to prove intent, an element that would otherwise be required for a first-degree murder conviction. Prosecutors must prove only that the defendant intended to commit the underlying felony. Even if the death was accidental — such as someone dying of a heart attack during a burglary — the defendant can be convicted of first-degree murder.

Defense lawyers hate the law because it's so difficult to combat. One local attorney told how he defended a woman who shot her husband.

"We beat everything, the premeditation, the intent, everything — except the felony murder rule," he said. The woman shot into an occupied car, which is a felony, and was convicted of first-degree murder. If her husband had been standing outside the car, she would have been found not guilty of first-degree murder, he said.

But lawyers and others dislike the felony murder rule because of its basic unfairness, they say.

"I have a basic problem with it," said attorney David Lloyd. The Janet Danahey case is illustrative of that unfairness, he said. "More than anything else, the Danahey case points to the failure of the law to deal with the situation."

The rule has been used — some would say abused — in controversial ways. In the late 1990s, prosecutors in Winston-Salem, Greensboro, Durham and elsewhere used the felony murder rule to go for the death penalty against defendants who had accidentally killed while driving drunk. Juries did not return a death sentence, but three defendants received life in prison without parole.

Jim Kimel, who defended Danahey, was Guilford County district attorney when his office indicted Donald Edgar Bass on a charge of first-degree murder for killing a pedestrian while driving drunk. "I think the public holds drunk drivers in such low esteem that there's almost nothing you can do to them that's bad enough," Kimel said, defending the decision to seek the death penalty in the case.

Bass decided not to risk the death penalty and agreed to plead guilty to second-degree murder. The N.C. Supreme Court in late 2000 ruled that the felony murder rule could not be used in drunk-driving cases.

Ken Rose, head of the N.C. Center for Death Penalty Litigation, said the rule should not be used in cases like Danahey's either. Rose said he can sympathize with Kimel and other defense lawyers whose clients have been charged with first-degree murder under the rule.

The N.C. Bar Association passed a resolution last year calling on the General Assembly to remove the death penalty for felony murder cases. The legislation died in committee.

Ironically, the ancient English law concept is no longer a part of English law. Parliament abolished the felony murder rule in 1957, declaring it unfair.

Contact Stan Swofford at 373-7351 or sswofford@news-record.com

trict attorney's office. Harris said that before he talked with her, he told Albright that Danahey should "face death" and that "she won't change my mind."

Sobbing and trembling, and with only Kimel and Harris in the room, Danahey told Harris how she, Hooks and Montanni had searched the Campus Walk parking lot and elsewhere for the car belonging to her ex-boyfriend, Thaddeus Johnston, so she could pour foul-smelling clam juice over the radiator. She told how, after failing to find the car, she squirted charcoal lighter over the sofa outside Johnston's apartment and ignited it.

Harris said that as Danahey recounted her story, she began to tremble so violently that he held her in his arms and wiped the tears from her face. He said she held out her hands, which were still cuffed, and said, "It's hard to live knowing these hands are responsible for four deaths."

"I told her the law would allow her to be put to death," Harris said. "She said she would readily accept that. She also said she was ready to spend the rest of her life in prison."

Harris said he thought Danahey told the truth and was extremely remorseful, and that "after talking with her, I believe this was an accident that got out of hand." During an interview about a week after Danahey received life without parole, Harris said he would have been satisfied with a sentence of 20 years.

Nevertheless, immediately after meeting with Danahey, Harris told Albright he still believed she should get death "if the law called for it."

Danahey's confession to Harris considerably strengthened the state's case, Neumann said. "It's not every day that someone confesses in the DA's office," he said.

Some trial lawyers said they were astonished that Danahey's attorneys allowed her to talk with Harris. "In a

capital case that a jury will return a verdict of death," he said. "You can't roll the dice if your client doesn't want to."

Nevertheless, local trial lawyers and others say her sentence is unfair. "Justice was not served," said David Lloyd, president of the Greensboro Criminal Defense Lawyers Association, who emphasized he was not speaking for the association.

Some who are troubled by the case's outcome are reluctant to talk publicly. They fear they'll sound as if they are trivializing the loss suffered by families and friends of the victims.

"I don't want to sound insensitive," said Gordon Price of Greensboro. However, Price, a 51-year-old former deputy sheriff, says it's "sickening" to him that Danahey will spend the rest of her life in prison while murderers who intended to kill walk free.

"Janet Danahey is not a threat," said Price. "This thing just didn't play out right."

Danahey — a UNCG graduate, former Olympic torch bearer and Gold Award Girl Scout — was arrested Feb. 17, two days after fire roared through the Campus Walk apartment complex at 904 Howard St., killing sisters Rachel Llewellyn, 21, and Donna Llewellyn, 24; Elizabeth Harris, 20; and Ryan Bek, 25.

Not since Nov. 3, 1979, when five Communist Workers Party sympathizers died during a confrontation with the Ku Klux Klan and American Nazi Party, had there been a criminal case in Guilford County with such a large loss of life. Chief Assistant District Attorney Howard Neumann said that "from the beginning" he and District Attorney Albright "looked at this as a first-degree murder case."

Albright said a big part of his job is being an advocate for the victims.

"We looked at this case from the victims' point of view," Albright said. "I can rest well, doing what I did."

Neumann said he and Albright involved themselves in the case to a degree they "don't ordinarily do" and allowed the victims' families an unusual amount of input.

Nicole Montanni, who were with her the night of the fire, said they saw Danahey running from the burning apartment building. They told police Danahey said she burned a sofa outside the Campus Walk apartment of an ex-boyfriend. They also said she asked them to get rid of clothes she wore and charcoal lighter used to burn the sofa. They gave the items to police.

Albright and Neumann's most powerful tool was a concept of law known as the felony murder rule. Under this rule, as it is applied in North Carolina, a person can be found guilty of first-degree murder and subject to the death penalty if the victim died during the commission or attempted commission of the specified felonies of arson, rape, sex offense, robbery, burglary and kidnapping, or any felony in which a deadly weapon is used. Legally, it didn't matter that Danahey didn't intend to kill anybody. If Danahey was guilty of arson, she was guilty of murder.

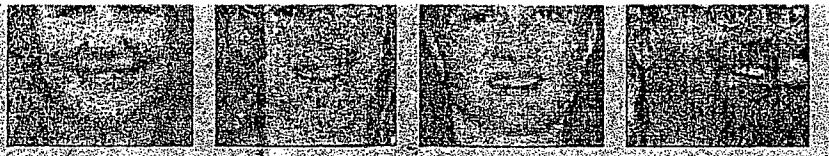
"Four people died," Albright said. "They're as dead as in any other murder case."

The prosecutors believed they could convince the jury that Danahey committed first-degree arson — the willful burning of a building with someone in it — when she set fire to the sofa. But if that failed, they believed they had another trump card. Simply burning the sofa was a felony, Neumann said.

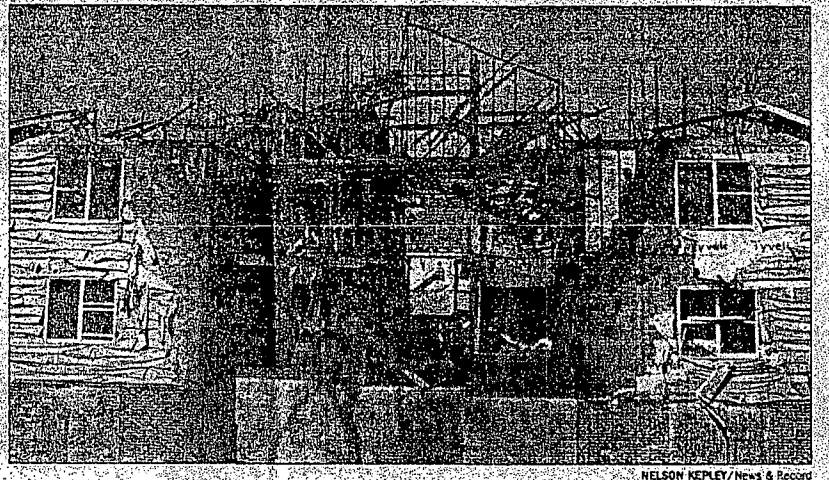
Lloyd said prosecutors would have to prove that the Bic lighter Danahey used was a deadly weapon. "I'd argue it wasn't," said Lloyd. "Not any more than a Bic pen was a deadly weapon if somebody forged a check with it and the victim died of a heart attack."

However, Superior Court Judge Peter McHugh, who sentenced Danahey, also believed the state had a strong case. He said it was likely that a jury would have convicted Danahey under the state's felony murder rule. He told Kimel at the sentencing that the advice he gave Danahey was "unimpeachable."

But Lloyd and other lawyers say they would have gone to trial. They said the key was to dissuade the judge to instruct jurors they could consider lesser charges, such as second-degree murder or manslaughter.



The Feb. 15 fire at the Campus Walk apartment complex killed sisters Rachel Llewellyn (from left), 21, and Donna Llewellyn, 24; Elizabeth Harris, 20; and Ryan Bek, 25.



NELSON KEPLEY/News & Record

Jim Coleman, Duke University Law School professor, said he believes a judge would be bound to instruct the jury on lesser charges if the defense presented evidence Danahey intended only to burn the sofa and not the building.

"The evidence appears inconsistent with an intention to commit arson," he said. "It was a vindictive act that got out of control and killed four people. That's involuntary manslaughter. It's odd she would plead guilty to first-degree murder."

Kimel said the defense team's research showed it was unlikely that at a trial the judge would have allowed the jury to consider verdicts of second-degree murder or involuntary manslaughter.

Danahey was "ensnared" by the felony murder rule, said her mother, Mary Belle Danahey. The family didn't see any way around the rule, she said.

What you do is argue negligence as forcefully as possible, said criminal defense lawyer Doug Henderson of Greensboro. "You argue that life in prison without parole should be reserved for the worst criminals. The jury might well have tried to help her."

You emphasize the unfairness, said Lloyd. As tragic as the Campus Walk fire was, the tragedy and the crime that caused it at the Imperial Foods chicken plant in Hamlet almost 11 years ago, was worse, he said. That fire, the state's worst industrial accident, killed 25 workers. They died because the plant's owner, Emmett Roe, had locked them in the building to prevent theft. Roe was convicted of 25 counts of involuntary manslaughter and sentenced to 20 years in prison. He was paroled, a broken and devastated man, after four years.

Janet Danahey is "saddened and devastated beyond comprehension," her mother said.

Robert Harris, Beth Harris' father, saw her sadness during an extraordinary meeting at the district attorney's office about two months ago when Danahey tearfully confessed to him. Until then, police and prosecutors had only the information that Danahey's girlfriends had told them, and also the clothes and charcoal lighter the two women said Danahey had given them to discard.



Janet Danahey confessed to Robert Harris, the father of victim Elizabeth Harris.

There was no laboratory evidence of an accelerant, only a computer model indicating one had been present.

Harris said he had felt a "burning need" to talk with Danahey. In May, Kimel notified prosecutors that Danahey would talk to parents. Harris was the only parent to meet with her.

Danahey also had a tremendous need to talk with families of the victims, Kimel said. "She wanted the families to know that their children did not die from a malicious act on her part, and how remorseful and sorry she was."

Danahey, accompanied by Kimel, was brought to the district attorney's office about two months ago when Danahey tearfully confessed to him. Until then, police and prosecutors had only the information that Danahey's girlfriends had told them, and also the clothes and charcoal lighter the two women said Danahey had given them to discard

washingtonpost.com

Backfire

Four Lives Snuffed Out, and One Shattered: Can Janet Danahey Find Redemption Among the Ruins?

By Tamara Jones
Washington Post Staff Writer
Sunday, May 1, 2005; D01

MATTHEWS, N.C.

It all comes back in slow-motion replay now, looping through a mother's unsparing memory. First the ringing phone, piercing the silence of that winter night three years ago, jolting Mary Belle Danahey awake on the couch. Then the sheriff's voice, calm and authoritative:

"There are some officers coming to your house. Please open the door."

Mary Belle could see flashlight beams weaving slowly across the lawn. The light swept up the face of the house and back down again. A prowler, she thought groggily. Someone must have reported a prowler.

"Do not hang up," the voice on the phone instructed. "Lay the phone down and open the door."

Two deputies stood on the doorstep.

Where's Janet? they asked.

Mary Belle remembered that her 23-year-old daughter had come up from Greensboro -- a rare weekend together for the four Danaheys. Her husband, Dave, lumbered down the stairs now, bewildered, demanding to know what this was about. The deputies wouldn't say.

We need to see her, they insisted.

Mary Belle led the way, past the living room where a replica of the Olympic torch Janet had carried through her home town as a Girl Scout was proudly displayed. Midway up the stairs, the deputy following Mary Belle turned and called down to his partner: "Keep an eye on the father." Dave froze.

In the guest room, Janet's light was on. The paperback she had been reading when she nodded off was cradled across her chest, and the faded pink bedspread was pulled up over her clothes. Janet's dusky blue eyes blinked open as her mother called her name.

She rose, face ashen, and held out her arms. One of the deputies snapped on the handcuffs.

What is this? What's going on? Her mother's frantic questions went unanswered. Her father remained mute. Janet cast them a beseeching look. One of the deputies spoke up again.

Janet Danahey, you are being arrested for murder.

Advertisement



The prosecution would call it a Valentine's Day act of revenge by a scorned lover; the defense would insist it was an accident, just a stupid college prank gone tragically awry. What both sides agreed on was this: Janet Danahey never meant to harm anyone, much less commit murder, when she set a fire that burned out of control at the Campus Walk apartment complex in Greensboro. She had never met the man and three women who perished on the top floor.

Debate raged over the fate of the young arsonist facing life in prison or execution. Ultimately, the most perplexing questions raised by the case would prove to be not legal but ethical. The fire in many ways, it seems, never really went out, burning still through the lives of everyone it touched in unexpected ways.

Valentine's Day

In a state admired for the lyric beauty of its coastline on one side and its mountains on the other, Greensboro is sandwiched in the unremarkable middle, a college town where plenty of students cling to the campus neighborhoods after graduation day. A year after earning her degree in business administration from the University of North Carolina, Danahey was temping as a $12-an-hour gofer.

Things were no better on the personal front. Thad Johnston, her boyfriend of six months, had just dumped her. She described the split as amicable, but Johnston remembers her hysterical and in tears the last time he saw her, the day before the fire.

On that Feb. 14, Danahey invited two girlfriends over for pasta. They shared a couple of bottles of wine and sometime after midnight, decided to play a prank on Danahey's ex. Statements given to authorities and Danahey's own account provide matching versions of what happened next:

After abandoning an initial plan to pour fish oil into Johnston's radiator, Danahey suggested setting something on fire instead. Johnston and his pals had set a neighbor's welcome mat ablaze, and Johnston's roommate, Victor Medina, once jumped his skateboard over a flaming beanbag chair in the parking lot. Grabbing the can of lighter fluid beneath Danahey's sink, the girlfriends headed to Campus Walk a block away. Danahey ventured alone to the rear of the darkened apartment complex and climbed stairs to the breezeway on the second floor.

"I heard laughter from the apartment and saw lights on and that Victor was home," Danahey said later in an interview. She recalled glimpsing Medina through the sliding glass door, though Medina insists he was asleep in bed, that the apartment was dark.

Danahey quietly leaned over the balcony to squirt lighter fluid on a small box of Christmas decorations, then flicked a cigarette lighter. The tinsel inside simply melted in a puff of chemical fumes. She doused an old futon that, Johnston later recalled, had been the scene of romantic encounters. She flicked the lighter again. Just a low, blue flame, Danahey insists. She giggled and ran.

Campus Walk was a relatively new complex, 12 apartments on three floors, full of college kids or recent grads, most of them asleep at that hour.

The calls came across the 911 switchboard in a frantic burst around 2:30 a.m.

One began with a prolonged scream. Another with someone coughing and gasping between words. Pleas for help were interrupted by shouted warnings and the crackling of flames in the background.

And then came a single, harrowing cry.

We can't get out!

The wind had kicked up, and flames were devouring the wooden breezeways and outside staircases of Campus Walk, sealing off escape. Embers fell like fiery rain. People jumped from balconies and windows.

Near dawn, searchers digging by hand found ashes in a shape barely human, buried in a four-foot mountain of debris in the back breezeway. Over the next three hours, three more bodies were uncovered.

Trapped

The complex was still smoldering when Bob Harris arrived around 11 a.m. He realized that authorities wouldn't have summoned him if his 20-year-old daughter were okay. News of the deadly fire was dominating local TV and radio by then. Beth was a responsible girl who kept in close touch with her divorced parents. A music major, she had spent Valentine's Day delivering singing telegrams. She would have called to let them know she was all right.

Now Harris was directed to the fire department's command post. Assistant Fire Battalion Chief Dave Douglas met him there. Four victims had been found but not identified. The university had confirmed that Beth had never made it to class.

Harris walked back to the Campus Walk parking lot, weaving past the emergency vehicles, past the news crews and onlookers, past cars twisted and melted by the fierce heat. He came upon a 1994 red Ford Taurus. Beth's.

It was locked. He longed to sit inside, to be where Beth had been. He began pounding on the car, pounding and pounding, until a firefighter came and held him while he sobbed.

Back at the trailer, Douglas was meeting with another family.

Beth shared her apartment with nursing student Rachel Llewellyn, 21, and her sister Donna, 24, who worked in the financial aid office of another nearby college. Nobody had seen them.

"We know four bodies have been found," he told Carolyn and James Llewellyn. "There are three people we can't account for, and two are likely your daughters."

The Llewellyns absorbed the devastating news that their only children were dead.

"Was Ryan with them?" they wanted to know. Ryan Bek was Donna's boyfriend, a 25-year-old computer tech. Douglas took down the name. Soon he was notifying a parent for the third time that morning that his child was dead.

Anger demands answers, and anguish craves them. Dave Douglas told the families what he could:

Campus Walk was built to code and had passed inspection the month before. The units had working smoke detectors and fire extinguishers. The fire burned straight up the wall and the wind carried it, like a horizontal chimney. The building did what it was supposed to do, keeping the fire on the outside. Most of the residents did exactly what they should have, keeping doors closed and waiting near a window for help.

But those trapped in Apartment K decided to make a run for it. Overcome by smoke, all four died on the blistering-hot breezeway, which later collapsed. Whether it was quick, whether it was painless, whether

they knew they would die -- these were the questions no investigator could answer.

Decisions

The prosecutor's decision to invoke the Felony Murder Rule touched a nerve in North Carolina. The law requires no proof of intent, motive or even direct involvement if a death occurs during the commission of another felony, in this case arson. Danahey was charged with first-degree murder.

"If it truly was a prank, a joke, as innocent as she'd have you believe, then why didn't she go back?" demanded the county's district attorney, Stuart Albright.

"She did not stab her boyfriend 73 times or commit a drive-by shooting," one woman wrote the Greensboro News & Record. Countered another: "She may, eventually, receive God's forgiveness. She will never receive mine."

Locked up, fed meals through a slot, Danahey dwelled on the hurt she had caused. She asked to meet with the devastated parents. "I wanted them to get mad, to show their anger. I would rather see everyone's pain because that helps me get over my pain. It would scare me. It's like correcting the wrong in a way," she explains.

Her own family was struggling to comprehend what had happened. It was six weeks before Dave Danahey could swallow his fury enough to face his daughter. Hiring a lawyer meant plundering funds for his approaching retirement. Fighting a death penalty if Janet were convicted could bankrupt the Danaheys. Janet's only sibling, Emily, tried to regard the crisis philosophically, intellect playing emotion's vigilante. On the verge of entering divinity school, 25-year-old Emily spent hours talking to Janet about faith, honesty and moral accountability.

"I didn't mean to do this," she remembers Janet sobbing. "There has to be some way this can be fixed. I can't believe this is real."

The district attorney was offering life without parole in exchange for a guilty plea. Danahey's two girlfriends had taken police to the dumpster where Janet's lighter fluid and smoky clothes had been tossed. They were willing to testify against her. Though the felony murder rule could hold them equally responsible, prosecutors chose not to charge them.

Pleading guilty would spare everyone more pain, Emily told her sister.

Janet's mind reeled. Her choice was still unmade when the district attorney sent another message.

Beth Harris's father wanted to meet her.

It had been barely three months since his only daughter's funeral. An insurance executive, Harris is a religious man with a mind he describes as analytical. He needed to know exactly what happened, and why.

"Something wouldn't rest in me until I heard from Janet herself."

She was shackled to an eye bolt on the floor when Harris walked into the district attorney's conference room. Janet looked up and held out her arms.

"These hands are the ones responsible for your daughter's death," she began.

Again and again, Janet apologized, through heaving sobs, with her body trembling so violently that Harris couldn't help but hold and comfort her, a father's instinct.

Janet told him what she had refused to tell police, how she had seen the flames from her back porch that night, but couldn't find her cell phone to call for help. How she heard sirens, and people screaming, but thought everything was under control.

She told Harris she learned of the deaths on the evening news, then spent the night praying and sobbing and sleeping. The next morning, she drove three hours to her parents' house.

Bob Harris listened. He consoled his daughter's killer. Janet asked for his forgiveness, and he granted it. Faith demanded that of him.

"What is forgiveness?" he wonders even now in an interview. "There's an understanding in my mind that she really didn't intend for anyone to be hurt or even be put out of their apartments."

Still, Harris felt Janet had a debt to pay.

Before leaving that day, he told her that he was a firm believer in capital punishment. Was Janet ready to accept death for what she had done?

"Yes," he remembers her saying. "I'd rather die right now than live the rest of my life with this."

Shortly after, Danahey decided to take the plea bargain, live out her life behind bars. There was a chance, she felt, for redemption, "of giving back in a positive way to the world what you took away."

At her formal sentencing, the courtroom was filled with survivors, police officers, firefighters and the families and friends of Campus Walk victims. Danahey's side took up a single bench.

Danahey rose. She says she no longer recalls the rambling apology that left some spectators disgusted, others confused, still others moved. Newspaper accounts quote her vowing to spend the rest of her days trying to fulfill the promise of those lives she took.

"I can make their dreams go on," she promised the grieving parents.

"I am your family now."

A Father's Crusade

Watching the drama unfold on the evening news, a 60-year-old graphic designer named George Brown felt his heart ache at the sight of Danahey's tear-stained face. Stunned when she was locked away for life, Brown found himself calling the district attorney and Danahey's lawyer to demand answers about what had happened to this stranger who so moved him. No one called back.

Brown knew well what damage impulse could wreak. One summer afternoon when he was around 11, he discovered a pack of matches in his pocket. Walking home across a field of broom sage, he lit a clump.

"It was like it had been sprayed with gasoline," he recalls. There was a loud whooof and the whole field was ablaze. The only thing that saved his family's home was a road that formed a natural firebreak. George never did confess.

Like Danahey, he sought meaning from tragedy. Changing the felony murder rule would prove that "I

did something at least once that would be meaningful to this generation and generations to come."

Danahey reminded Brown of his only child. He could easily imagine his free-spirited son trapped in a similar situation, another victim of impulse.

And so Brown launched a grass-roots campaign to change the state's felony murder rule. But first, he wrote a letter to Inmate 0774159 at the North Carolina Correctional Institution for Women in Raleigh. He sent Danahey a picture of his old marmalade cat named Harry, and told her his own synopsized life story. Divorced, recently unemployed in a dot-com downsizing, he was feeling bleak about the prospects for a man his age. He never asked Danahey about the fire, nor did she volunteer. She wrote instead about a spiritual awakening. Brown found Danahey inspiring.

Brown designed a Web site and rallied volunteers to write legislators and speak out against the felony murder rule -- at churches or community centers, to legal organizations and volunteer groups. After an impassioned talk to an influential civic group Brown finally got a call back from the district attorney.

Months had passed since Stuart Albright had put Janet Danahey away for life, and public criticism that he had done so to enhance a tough-on-crime image for his reelection campaign was rankling. He invited his nemesis over for a chat.

Brown remembers a tense but polite discussion, and the moment when Albright pulled a stack of 8-by-10 photographs from a manila envelope and tossed them down on his polished conference table. Look what Janet Danahey did. The grisly photos showed the charred remains of Beth Harris, Ryan Bek and the two Llewellyn sisters. After the prosecutor was done trying to shock him, after he declared that Brown could not know what those parents must have gone through, George Brown remembers softly saying yes, he did know.

Brown's only son was just two months shy of 25 when he died on June 3, 1998. He had just quarreled with his fiancee, and George can only assume that this is what sent his bipolar child into a depressive tailspin. The railroad he was walking along that night marked a shortcut to his father's place. George wonders still if he had been on his way over to talk, deciding, instead, to lie down on the tracks .

Finding Meaning

Danahey's only brush with trouble before had been in high school, when she was caught vandalizing a boy's car with syrup and kitty litter. Now she was a lifer.

Behind prison walls, Danahey began to find what she never quite had outside: a sense of purpose, an identity. Letters filled the dull hours yawning across the prison yard. She wrote to her family, to a woman in a retirement home who corresponded out of loneliness or compassion or maybe both. She exchanged letters with George Brown. A Llewellyn cousin, and the sister of Rachel's best friend. And with Bob Harris.

She yearned to know more about Beth. About all of her victims. She read any newspaper clip she could find and studied the poem Ryan Bek's parents inserted in his published obituary.

"To know people you killed, their families, their favorites . . ." she says excitedly during a prison interview. "What their favorite song is, everything. I don't know, get to know them better in this world so you can fully get to know who you are mourning. I think it'll actually help the pain lift."

She stops, as if dismayed by her own insight.

"Gosh, if you've never killed anybody, you never go through that."

She learned that Ryan Bek had volunteered on behalf of battered women. That Beth Harris had the voice of an angel and planned to become a music teacher. She was outraged when prison authorities denied her request to start a battered-women's support group among inmates to honor Ryan. When she was told there were already too many prison choirs to launch one in Beth's memory. Bob Harris found Janet's urgent interest sincere.

"There is something there I haven't really been able to define," he says. "I do feel sorry for her both in being faced with dying in prison and admitting something that caused four deaths. She's beating herself to death."

And now this strange current keeps carrying him back to his daughter's killer. It is a connection he puzzles over, one that has cost him the comfort of the other Campus Walk families, causing them to shun him at their candlelight vigils and memorial tree-plantings. He says he is not offended, but the hurt is plain in his eyes.

"Beth can never be replaced, but part of the sensitivity of Beth, I see in Janet," he explains. "The warmth Beth had -- I see that in Janet. I don't think it's disrespecting Beth in any way."

In some ways, he goes on, "it's almost like she replaced Beth as my daughter. In a lot of ways, I have protective feelings for her. I want to help her, see whatever she does in life is good and successful.

"It's almost a warped relationship."

Collateral Damage

Mary Belle Danahey tells new acquaintances that her youngest daughter lives in Raleigh and works for the state. She dwells on what has happened to her family over a boxful of newspaper clippings and notes of support spread across the kitchen table. She gets up now and then to refill her tumbler with bourbon and water.

"Janet was ensnared by the law," she says. "Other people have done worse and got away with it. If the wind hadn't been strong that night . . ."

Her denial collides now and then with her husband's disgust, or with her older daughter's reproach. The small family hasn't yet memorized the steps of this complicated choreography. Over dinner one evening at a sports bar, they go round again.

"I feel anger at those four people," Mary Belle blurts out. "Why couldn't you get out?"

"I cannot believe that," Emily says. "You looked at those families." At the sentencing, Mary Belle had glared. "I gave them a look," Mary Belle acknowledges ruefully. "I know that. It's awful."

Emily believes Janet never learned responsibility because "Mama and Daddy always made things right."

"This time we can't, right?" Dave replies sharply.

The Danaheys held a yard sale and got rid of most of Janet's belongings to pay for her legal costs. There wasn't much. A microwave, her clothes, the brand-new set of dishes Mary Belle had bought Janet that Christmas, which she never got a chance to use.

They try to visit her once a month, write letters, talk occasionally on the phone, but the collect calls are prohibitively expensive. Janet's grandfather died. Emily gave birth to her first child, and she and her husband are expecting their second any day.

George Brown persuaded a legislator to sponsor his bill to repeal the felony murder rule, only to ask that it be withdrawn. There weren't enough votes. Maybe this year, or next, the time will be right to move forward.

Campus Walk was razed, and the lot fenced off. Construction crews showed up this spring and new apartments are starting to go up, but for the longest time all that remained in that scarred and empty space was a foundation.

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The wrong penalty

One must start with recognition that the family of Mary Gladden, a convenience store clerk in the foothills town of Shelby, has every emotional reason to want William Powell to die for killing her on Halloween of 1991. The instinct for revenge is strong, and understandable.

But the law is not about taking revenge, and there's the serious rub in the William Powell case. Here's a man who had never before committed a violent act. The only aggravating factor in the slaying (aggravating factors being those circumstances that can lead to death sentences) was that Powell was robbing the store where Gladden worked and thus had financial gain as a motive. He wasn't even carrying a gun.

Gladden was beaten to death. Powell did it. But prosecutors from Cleveland County apparently were taking no chances: They made a deal with Powell's girlfriend to testify against him, for which she says she was to receive some kind of financial reward. Lawyers for Powell say prosecutors didn't share that information with his defenders. Meanwhile, a clemency petition for Governor Easley notes that if the jury in Powell's case could have sentenced him to life without parole, they would have done it.

Powell obviously should pay a steep price for his crime. But here, in sum, are the reasons why he should not be on Death Row, much less at the top of the dance card: There was no premeditation, one of the common grounds prosecutors use to justify a death case; Powell, unarmed when he entered the store, clearly hadn't intended to hurt anybody and killed Gladden with some kind of tool he grabbed in desperation. Prosecutors, it seems, didn't share information they should have. When one factors in Powell's drug problems and the fact that he had never committed a violent act, the case for death becomes more and more shaky. Indeed, a study of the consistency of death penalty sentencing found that Powell's case clearly didn't fit the mold.

With the execution scheduled for tomorrow, Governor Easley, a former prosecutor, should grant Powell's request for clemency if last-minute efforts in the court system fail. If, that is, the governor wants a fair system instead of one that panders to simplistic instincts.

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Condemned Inmate's Jury Never Heard State's Star Witness Rewarded for His Testimony; Defense Attorneys Had Conflict of Interest

Frank Ray Chandler is scheduled to be executed on November 12. He was sentenced to death in 1993 for the murder of Doris Poore in Surry County.

The murder of Ms. Poore was an accidental killing, committed during the course of a break-in. Chandler mistakenly believed there was marijuana in the home, but the house actually belonged to Ms. Poore, an elderly woman. She awoke to find him there and screamed when she saw him. Startled, Chandler swung his arm, hit her head, and tragically caused her death. The jury found that Chandler did not premeditate the killing.

The jury that sentenced Chandler to death did so largely on the testimony of the State's star witness, a jailhouse snitch. Among other things, the snitch told the jury about inflammatory statements Chandler allegedly made about Ms. Poore.

What the jury did not know, because the District Attorney's office did not share the information with Chandler, was that the snitch had an incentive to help them obtain a death sentence for Chandler. When first questioned by the authorities, the snitch asked, "What's in it for me?" He was paid $2,500 in reward money for his testimony against Chandler, and a few weeks after Chandler's trial was allowed to enter a plea agreement concerning his pending charges. As a result he received no additional jail time for those charges.

One of Chandler's trial attorneys had social interactions with the star witness on more than one occasion prior to Chandler's trial. There was an unquestionable conflict of interest since the attorney did not question the witness about his drug use, which would have undermined his credibility with the jury. The attorney's former secretary reports that the attorney regularly neglected his capital murder clients. The lawyer was later disbarred and convicted of common law forgery. In April of this year, the lawyer was convicted of possession of firearms by a convicted felon and of domestic violence charges.

Both of Chandler's trial lawyers had previously represented the State's star witness, creating a significant conflict of interest. Chandler's lawyers kept quiet about their prior representation. As a result, Chandler was never given the opportunity to have conflict-free counsel represent him in the trial for his life.

The District Attorney in the case, who withheld from Chandler the evidence of the snitch's deal, was later removed from office because of financial improprieties.

Former North Carolina Supreme Court Justice Robert Orr, who reviewed the case on appeal, is among those who say Chandler should have been sentenced to life in prison instead of death. Chandler lost that appeal, but Justice Orr wrote in his dissent, "Because I believe that, in this case, the sole aggravating circumstance was improperly submitted and that the sentence imposed is disproportionate, the defendant should be resentenced and a life sentence imposed."

CLEMENCY PETITION

SUBMITTED TO GOVERNOR MIKE EASLEY

ON BEHALF OF

FRANK RAY CHANDLER

October 29, 2004

The Honorable Michael F. Easley
Governor
116 West Jones Street
State of North Carolina
Raleigh, N.C.

Re: Clemency Petition for Frank R. Chandler

Dear Governor Easley:

On behalf of Mr. Frank Chandler, we respectfully request that his death sentence be commuted to a sentence of life imprisonment. Mr. Chandler is scheduled to be executed on November 12, 2004, for the tragic, but accidental, death of Mrs. Doris Poore on December 12, 1992.

Mr. Chandler's death sentence should be commuted to a sentence of life imprisonment for the following compelling reasons:

- This was an accidental murder committed during the course of a felony, a break-in. The 1993 jury rejected the prosecution's theory of premeditation and deliberation.

- There was only one aggravating factor submitted to and found by the jury, and this factor – that the murder was committed for "pecuniary gain" – does not apply to this case.

- The death verdict is not proportionate in light of other felony murder cases in which a death sentenced was not imposed.

- The death sentence would not have been possible under the 2004 "Open Discovery" law because substantial evidence impeaching the State's star witness would have been disclosed to the defense and utilized at trial.

- Now disbarred defense attorney Terry Collins – who has since been convicted of felonies involving a scheme to obtain drivers licenses for clients convicted of drunk driving – should never have been involved in the defense of Frank Chandler because Collins had used illegal drugs with the State's star witness in the late 1980s and early 1990s.

- Mr. James Gillespie, co-counsel for Frank Chandler, operated under a "conflict of interest" because he represented the State's star witness in an earlier proceeding, and did not obtain his client's consent to proceed despite the conflict.

- Two years after Mr. Chandler's trial, the elected District Attorney was removed from office by the Superior Court for improprieties in office.

- There was a grossly inadequate mitigation investigation of Mr. Chandler's background. Family members were never interviewed in their homes. The trial defense lawyers failed to discover and present to the jury significant positive mitigation evidence about Frank Chandler, including numerous photographs of family outings during his childhood. The investigation of mitigating evidence was unacceptable under the Supreme Court's 2003 ruling in Wiggins.

A Tragic, But Accidental, Felony Murder

On December 12, 1992, twenty-year old Frank Chandler broke into a home in Mt. Airy, North Carolina. Mr. Chandler testified at trial that he mistakenly believed that there was marijuana in the home. Actually, the home belonged to someone else, an elderly woman, Mrs. Doris Poore. The victim woke up and walked around her house in the dark to see what was happening. Mrs. Poore walked up in the dark near Mr. Chandler and screamed when she saw him. Startled, he instinctively swung his arm, hit her head and tragically caused her immediate death. Mr. Chandler testified that he then carried Mrs. Poore to her bedroom and placed her on the bed.

A forensic pathologist testified that Mrs. Poore died of a single "massive blow" to the head, which caused extensive brain damage. The pathologist admitted on cross-examination that a blow with a fist could cause a skull fracture and persons the age of Mrs. Poore have softer skulls and skin that is easier to tear than younger people. Despite charges – of which Mr. Chandler was acquitted -- there was no evidence of any sexual activity. An SBI agent testified that a palm print from the back door of the house matched the palm print of Mr. Chandler.

At the July 1993 trial, the jury convicted Mr. Chandler of felony murder, but rejected a theory of guilt based upon premeditation and deliberation. The jury also convicted Mr. Chandler of burglary and attempted larceny, but acquitted him of attempted rape and attempted sexual offense. Following a capital sentencing proceeding, the jury found the one aggravating factor which was submitted, that the murder was committed for "pecuniary gain," and sentenced Mr. Chandler to death.

Justice Orr's Dissent: Death Sentence Improper

This is a case unique in modern North Carolina capital jurisprudence because it does not have the elements of premeditation and deliberation, or the types of aggravating factors that normally cause juries in North Carolina to impose death.

Former North Carolina Supreme Court Justice Robert Orr eloquently discussed the inequities of the death sentence here in his dissent to the Court's denial of Mr. Chandler's direct appeal. A copy of Justice Orr's dissent is attached and offers compelling reasons for exercising your power of commutation. Justice Orr concluded:

> Where the majority opinion now leaves the state of the law is that as long as there is some pecuniary gain motive present in the attendant circumstances surrounding a capital felony, a defendant, even one convicted of felony murder but not first-degree murder based on premeditation and deliberation, will be subject to the imposition of the death penalty. This extension of the application of the (e)(6) aggravating circumstance also directly relates to my disagreement with the majority's finding of proportionality in this case. **The following capital felony decisions rendered by this Court in 1995 alone include defendants who were found guilty of first-degree murder based on premeditation and deliberation -- many based on premeditation and deliberation *and* felony murder or involving murderous acts far more egregious than those found in the instant case -- and yet were either:**
>
> **(1) not tried capitally** [citations omitted]; or
>
> **(2) a jury declined to impose the death penalty**, [citations omitted] **or**
>
> **(3) a jury was unable to decide on the death penalty, thus requiring the imposition of a mandatory life sentence by the trial court**, [citations omitted].
>
> **I also note that of the seven other cases decided in 1995 in which the defendants were convicted of felony murder but not first-degree murder based on premeditation and deliberation, six of the defendants were sentenced to a life sentence despite findings of several aggravating circumstances.** [citations omitted]
>
> With the exception of the last six cases involving felony murder, all of the cases noted involve defendants who were convicted of first-degree murder based, at least in part, on premeditation and deliberation. As indicated, none of these defendants will suffer the death penalty. Defendant, in this case, now faces execution as opposed to a life sentence solely because of the tenuous evidence involving "pecuniary gain."
>
> Mrs. Poore's death is a tragedy, and the circumstances surrounding it are egregious and disturbing. However, in a capital punishment system that is supposed to be proportional and designed to "minimize the risk of wholly arbitrary and capricious action" in imposing the death penalty, *Gregg*, 428 U.S. at 189, 49 L. Ed. 2d at 883, *quoted in Johnson*, 298 N.C. at 59, 257 S.E.2d at 607, I believe that the majority's decision in this case moves us perilously close to a constitutionally infirm application of the (e)(6) aggravating circumstance, and is also in error as to proportionality.

Because I believe that, in this case, the sole aggravating circumstance was improperly submitted and that the sentence imposed is disproportionate, the defendant should be resentenced and a life sentence imposed.

State v. Chandler, 342 N.C. 742, 768-71, 467 S.E.2d 636, 651-53, cert. denied, 519 U.S. 875 (1996) (emphasis added). Justice Orr went on to cite a myriad of cases with similar factual and legal issues to those raised by Mr. Chandler's that resulted in a life sentence

Since reinstatement of the death penalty, the Supreme Court of North Carolina has reviewed nearly 400 death penalty cases. Of these, the Court has affirmed the death sentence in only six cases in which the death sentence rested entirely on pecuniary gain as the only aggravating factor. Even among this tiny fraction of capital cases, Frank Chandler's stands alone, raising profound questions about the propriety of this imminent execution.

The following chart summarizes why Mr. Chandler's case stands alone, and calls for the setting aside of the death penalty:

Defendant	Jury Found that Defendant did not Premeditate and Deliberate?	N.C. Supreme Court Justice Concluded that Evidence Murder was Committed for Pecuniary Gain was Insufficient?	N.C. Supreme Court Justice Concluded the Death Sentence was Disproportionate?	Defendant's Lawyer was Later Disbarred?
Chandler	**Yes**	**Yes**	**Yes**	**Yes**
Basden	No	No	No	No
Ward	No	No	No	No
Powell	No	No	No	No
LeGrande	No	No	No	No
Bacon	No	No	Yes	No

Dispassionate analysis of the chart thus clearly illustrates that Frank Chandler's death sentence stands far out of the mainstream, another factor which we ask you to consider when weighing the exercise of your clemency power.

Prosecutors Suppressed Material Impeachment Evidence Which Would Have Destroyed the Credibility of Their Star Witness, Jeffrey Kyle Wilson

This case was transformed from an accidental death during the course of a botched break-in into a remorseless and even perverted murder by the testimony of the State's informant, Mr. Jeffrey Kyle Wilson, a former cellmate of Mr. Chandler. Mr.

Wilson testified that he was in the Surry County Jail with Mr. Chandler and that he confessed the break-in and murder to him. When he took the stand, Mr. Chandler admitted that he broke in the house and that he accidentally killed Mrs. Poore. However, Mr. Wilson added significant details – strongly denied by Mr. Chandler – that Mr. Chandler told him that he looked at the private parts of the elderly victim because he "ain't never seen no old p---y."

Mr. Wilson also made it appear that Mr. Chandler was cold and remorseless about Mrs. Poore's death. Mr. Wilson testified that he had "no hope" to benefit from his testimony, that he had never discussed or brought up his pending charges with officers, and that he was testifying "for the lady that died" and so that no one else would be harmed by Mr. Chandler. Mr. Wilson also said that Mr. Chandler told him he was going to play "crazy." These details from Mr. Wilson transformed this case into a death penalty case when it should have routinely been a felony murder case resulting in a life sentence.

As a result of the 1996 post-conviction discovery provisions for death penalty cases, post-conviction counsel learned for the first time about significant impeachment evidence that directly contradicted Mr. Wilson's trial testimony. For example, Mt. Airy police investigator Shelton revealed, for the first time, that the first words out of the informant Wilson's mouth were, "What's in it for me?" Detailed police and SBI reports also contradicted Mr. Wilson's testimony that he "never brung up my charges." Within weeks of the conclusion of Mr. Chandler's trial, the prosecutors entered into a plea bargain with Mr. Wilson, under which he received substantial sentencing concessions and recommended that a reward be paid to Mr. Wilson. The SBI delivered a check to Mr. Wilson in the amount of $2,500.00.

At the conclusion of the state post-conviction hearing, the state superior court judge (also the trial judge) found and concluded that Mr. Wilson "was a material witness, both as to guilt and sentencing issues." (Order of Judge Freeman) Three important details demonstrate the significance of Mr. Wilson's testimony for the State in securing the death penalty:

First, Mr. Wilson testified that, while he and Mr. Chandler were cellmates, Chandler told Wilson that he was going to "play crazy" and that he made "laughing" comments about the death. This was used by the State to show not only a consciousness of guilt but also a lack of remorse. The jury agreed with the State and rejected Mr. Chandler's proposed mitigating factor that he was remorseful.

Second, the testimony of Mr. Wilson supported the sole aggravating factor found by the jury – the murder was committed for pecuniary gain. Mr. Wilson testified that Mr. Chandler told him that he looked for Mrs. Poore's pocketbook before he left her house -- a far cry from Chandler's testimony of a botched attempt to find marijuana because he thought this was a different house.

Third, Jeffrey Kyle Wilson provided the disgusting allegation about Mr. Chandler bragging about looking at Mrs. Poore's private parts. Mr. Wilson testified that Mr.

Chandler told him that he had lifted Ms. Poore's dress and pulled her panties down because he had "never seen no old p---y."

Mr. Wilson's testimony was so important that the District Attorney, within days of the trial, wrote a letter to the Governor seeking payment of a monetary reward to Wilson. In that letter, the District Attorney stated that Mr. Wilson "was an extremely valuable witness, and most likely lead [sic] Chandler to be found guilty." After the trial, the State paid Mr. Wilson a reward of $2,500.00 as a result of this letter. Even though the state court found that "no agreement of any kind, including a monetary reward and/or sentencing concession, express or implied, was offered or made between any agent of the State...and Jeffrey Kyle Wilson," Wilson received a sentence concession a few weeks after Chandler's trial. As his court-appointed attorney verified, Wilson entered into a plea agreement by which his pending charges were consolidated for judgment; the judge then ordered that the new sentence run concurrently with his prior sentence. It is simply not credible to argue that Wilson's testimony was anything but vital to the Prosecution's death penalty case.

Material Impeachment Evidence Suppressed by Prosecutors In Violation of Brady and Other Supreme Court Cases

However, the jury was not allowed to fully evaluate the credibility of Mr. Wilson, an informant and the State's star witness, the person who attributed the disgusting comment to Mr. Chandler – and who arguably made up the alleged comment in order to secure a better deal. The jury did not have the opportunity to fully evaluate Mr. Wilson because the prosecution failed to reveal that Wilson's in-court declarations of altruism were totally false, and that his actual motive for testifying was selfish self-interest. The prosecutors failed to disclose that the first words out of Mr. Wilson's mouth, when he sent for law enforcement officers to speak with him at the Surry County jail, were, "What's in it for me?" This telling question asked by Mr. Wilson was not revealed until after the direct appeal was over and after post-conviction "open file" discovery was required by statute.

The prosecutors also failed to disclose, among other matters, that police reports which revealed that Mr. Wilson had detailed discussions with officers about his "pending charges," despite his in-court lies that he NEVER "brought up" or "discussed" his pending charges with officers. Despite having significant and material impeachment evidence in its files, the prosecution improperly argued to the jury that Mr. Wilson's motives were altruistic, leaving the jury with no reason to suspect that Mr. Wilson was embellishing his testimony for personal gain. The prosecution was well aware that Wilson's cooperation was based on personal interest rather than any high-minded civic concerns, yet they chose to present a totally-misleading picture of their "snitch" witness to the jury which decided that Mr. Chandler should die.

Prosecutors at the trial did not have an "open file" policy. The trial prosecutors testified at the state court hearing that their only obligation was to reveal to the defense attorneys whether any promises, deals or concessions had been made to any witnesses.

This, of course, is completely contradictory to the Supreme Court Brady line of cases. Consequently, the defense attorneys were not aware of several items of exculpatory and impeaching information.

In Banks v. Dretke, a case decided this year, the U. S. Supreme Court overturned a death sentence because the prosecution failed to disclose that a penalty-phase witness was actually a paid informant. In Mr. Chandler's case, we believe that you should commute the death sentence because the courts in this case essentially approved of the "hide and seek" tactics rejected in Banks. The prosecution in this case suppressed evidence in its possession or control that the informant, Mr. Wilson, was motivated for personal gain, such as a reward and sentencing concessions.

In Banks, the State of Texas argued that the defendant should have been able to discover that the witness was a paid informant through a diligent investigation. Texas made this argument even though its prosecutors concealed this information from the defense, despite professing an "open file" policy. In the present case, the Fourth Circuit incorrectly concluded that Mr. Chandler's defense should have been able to discover the Governor's reward proclamation, which motivated Mr. Wilson and through which Mr. Wilson received a reward of $2,500.00. The Supreme Court strongly rejected this same argument in Banks:

The State here nevertheless urges, in effect, that "the prosecution can lie and conceal and the prisoner still has the burden to . . . discover the evidence," so long as the "potential existence" of a prosecutorial misconduct claim might have been detected. A rule thus declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendants due process. "Ordinarily, we presume that public officials have properly discharged their official duties." We have several times underscored the "special role played by the American prosecutor in the search for truth in criminal trials." Courts, litigants, and juries properly anticipate that "obligations [to refrain from improper methods to secure a conviction] . . . plainly resting upon the prosecuting attorney, will be faithfully observed." Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation.

In Mr. Chandler's case, as in Banks, impeachment evidence regarding a material witness in the sentencing phase of a death penalty was not disclosed.

Mr. Chandler Did Not Have the Benefit Of the State's New "Open Discovery" Bill

Ironically, as Chandler's appeals concerning these Brady violations resulting from "closed prosecutor files" proceeded, a new "open discovery" bill, effective October 1, 2004, passed the North Carolina State Legislature. This new law came in response to recent exonerations of two men previously convicted of first degree murder, the fact that six death penalty verdicts have been overturned by superior court judges in North Carolina in recent years due to Brady discovery violations, and calls from you and the Attorney General of North Carolina upon prosecutors in this state to adopt "open file"

policies in all capital cases.[1] The Brady violations in Mr. Chandler's case were brought to light by the 1996 statute allowing post-conviction discovery of all law enforcement and prosecution files in death penalty cases. This same statute, N.C.G.S. 15A-1415(f), allowing for "open file" discovery once the trial and direct appeals are over, is the same statute which allowed Mr. Chandler's post-conviction attorneys to finally learn about the undisclosed Brady evidence in this case.

The only explanation for the death sentence in this case is that the jury ruled emotionally after being angered and disgusted by the testimony of the cellmate, Jeffrey Kyle Wilson. For it was Mr. Wilson, the ineffectively impeached informant, who attributed the crude comment about the victim to Mr. Chandler and other alleged comments by Mr. Chandler which ostensibly showed a lack of remorse. This ineffective impeachment was caused by prosecutorial misconduct – the failure to reveal the true motives of Mr. Wilson to embellish his testimony in return for sentencing concessions or a reward, both of which he ultimately received, and allowing the witness to testify falsely about his motives.. The record is clear that the No one should be executed based on this type of hidden evidence. Mr. Chandler death sentence must be vacated by commuting the sentence to life in prison.

Defense Attorney Collins Was Involved In Illegal Activities With the State's Star Witness and Informant Kyle Wilson

Now disbarred defense attorney Terry Collins should never have been involved in the defense of Frank Chandler because, according to information provided to counsel for Mr. Chandler recently, Mr. Collins had used illegal drugs with the State's star witness, Jeffrey Kyle Wilson, in the late 1980s and early 1990s. See Attached Affidavit of J. Clark Fischer. The information was not available at the time the undersigned prepared Mr. Chandler's MAR petition in 1997-98, and thus has never been addressed. This information contradicts the testimony of Mr. Collins, at the post-conviction hearing when he was cross-examined by the Special Deputy Attorney General:

Q. Now, you weren't representing Mr. Wilson at the time of Mr. Chandler's trial, were you?

A. No.

Q. And you didn't have any social interactivity or other personal dealings with Mr. Wilson at the time of Mr. Chandler's trial?

A. I had heard his name called in the courtroom, but I wouldn't have known him when he walked through the door this morning and I don't think I knew him in 1993 by his appearance.

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[1] *See Winston-Salem Journal*, March 17, 2004, "Easley says prosecutors' files should be shared," and *Raleigh News and Observer*, March 2, 2004, "N.C.'s top prosecutor calls for opening files." *See* Rabil, S. Mark, "True Open File Discovery: The Remedy for Discovery Violations in Capital Cases," *North Carolina State Bar Journal*, Winter 2003, pp 22-26 (for discussion of first five cases set aside)

Mr. Wilson's new statements to undersigned counsel contradict Mr. Collins' testimony. Thus, there was unquestionably a conflict of interest for Mr. Collins, who, during cross-examination of Mr. Wilson, never asked about Mr. Wilson's drug use. Of course, Mr. Collins was in a unique position to question Mr. Wilson about these illicit activities because of his personal knowledge of and relationship with Wilson. No greater conflict can exist for an attorney, especially in a capital trial. It would have been devastating for the jury to learn of Wilson's drug habits, yet the conflicted Collins obviously made sure not to bring illegal activity in which he participated to the jury's attention.

The illicit activities alleged by Mr. Wilson as to Mr. Collins are corroborated by Mr. Collins subsequent behavior. As the attached records from the Wake County Clerk of Court show, in June 1998, Mr. Collins pled guilty to various felony charges, including conspiracy to commit false pretenses. Along with others, Mr. Collins devised a scheme to extract large amounts of cash from people who either did not have licenses (e.g. illegal aliens) or had lost their licenses due to drunk driving convictions. As part of the plea bargain, Mr. Collins surrendered his law license and was disbarred. He has not been reinstated.

The Wake County indictments against Mr. Collins were not made public until after Mr. Chandler's April 1998 MAR hearing concluded, and thus counsel were not able to address these matters in the prior proceedings. See attached article from Mt. Airy Times.

Mr. Collins' behavior has not improved since 1998. See the attached records from the Surry County Clerk of Court from April, 2004, showing convictions for possession of firearms by a convicted felon and domestic violence charges.

The subsequent convictions and behavior of Mr. Collins – after Mr. Chandler's 1993 trial – is significant because the latter misconduct did not start suddenly, and arose gradually from the late 1980s and early 1990s. That is, the criminal activities of Mr. Collins in the mid-1990s, must have arisen from a need to generate large amounts of cash so that Mr. Collins and those with whom he was involved could maintain their habits and lifestyles.

These habits and lifestyles obviously had their effect on Mr. Collins' performance in the courtroom. Mr. Collins' secretary from July 1993 until early June, 1997, Ms. Debbie Collins, has recently informed undersigned counsel that Mr. Collins regularly neglected his capital murder clients. For example, he did not honestly tell the courts about the correct number of hours spent preparing for cases. Ms. Collins told about how Mr. Collins would send her, an untrained secretary, to conduct initial and subsequent interviews of capital defendants. Also, Mr. Collins used the same closing argument for all of his capital trials. She remembers typing the closing argument for Frank Chandler from a template. Counsel has reviewed transcripts from the closing arguments of several other death penalty cases to verify this.

Undersigned note that we tried to contact Mr. Collins by phone messages and by leaving a note on the door of his home, but he has not responded.

Defense Attorney Gillespie Previously Represented The State's Star Witness and Informant Kyle Wilson

Mr. James Gillespie, co-counsel for Frank Chandler, operated under a "conflict of interest" at the trial because he represented the State's star witness in an earlier proceeding, and did not obtain his client's consent to proceed despite the conflict. This conflict was not brought to the attention of the trial court nor was Mr. Chandler given the opportunity to waive any conflict. The problem arose because the prosecutors did not disclose the names of witnesses until the first day of trial. Although this issue was rejected by the courts, it still hangs as a cloud over the appearance of fairness in this case.

District Attorney Removed From Office In 1995

Less than two years after Mr. Chandler's trial, the elected District Attorney, Mr. James Dellinger, was removed from office by the Superior Court due to improprieties in office. When combined with the serious Brady violations concerning the failure to disclose material impeachment evidence about Mr. Wilson, this subsequent removal from office strengthens the claim that Mr. Chandler's conviction resulted from prosecutorial misconduct.

Grossly Inadequate Mitigation Investigation

There was a grossly inadequate mitigation investigation. The July 1993 trial took place only six months after the arrest of Mr. Chandler. This did not provide adequate time for responsible counsel to prepare for both guilt and sentencing phases of a capital trial. Unfortunately, defense counsel did not use the time allotted to conduct anything close to an adequate mitigation investigation. Undersigned counsel, who together have represented dozens of capital defendants, can verify the inadequacy of the investigation.

The few family members and friends who testified at the sentencing phase were not properly or extensively interviewed and prepared for their testimony. Many of the family members were never called or interviewed. For example, defense attorneys never interviewed Frank Chandler's half-brother, William Parish, with whom Frank lived every weekend for three years during his teen years. No defense lawyer, paralegal or investigator ever went to Frank Chandler's home to investigate, talk to his family, look at photographs or find out about the story of Frank Chandler. The trial defense lawyers failed to discover and present to the jury significant positive mitigation evidence about Frank Chandler, including numerous photographs of family outings during his childhood. Copies of these are attached.

The investigation of mitigating evidence was unacceptable under the Supreme Court's 2003 ruling in Wiggins. Given that most of the mitigating factors were rejected by the jury, the prejudice is obvious. The jury was left with the impression that Frank

was a cold and remorseless killer. The jury never heard any significant details about Frank's childhood or teenage years prior to the incident.

Conclusion

The Governor has the constitutional power to grant a commutation of a death sentence to a sentence of life in prison. The power should be used in the interest of justice, and, in this case, we believe that you should tender justice with mercy. The death penalty does not exist in this State to punish non-premeditated, accidental felony murders based upon only one tenuous aggravating factor. The death penalty is reserved for the "worst of the worst" in this State, and, despite the tragic death of Mrs. Poore, this is not one of the worst cases.

We strongly believe that you should exercise your constitutional power in this case, and commute Frank Chandler's death sentence to life, a severe yet just punishment for the crime he committed.

Respectfully Submitted,

/S/

S. Mark Rabil
Assistant Capital Defender

/S/

J. Clark Fischer
Attorney At Law

cc: Hon. Robert Orr
Mr. Frank Chandler

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Felony murder rule protested

By Andrew Martel
Staff writer

CARTHAGE - A few hours after Sherry Williams and 11 other jurors sentenced William Little Jr. to life in prison, she e-mailed his lawyer.

"I felt like I owed that boy an apology, an explanation," she said.

"We know he has to take responsibility for everything that happened ... but I think they should take away that whole felony murder rule."

The felony murder rule required the jury to convict Little of three counts of first-degree murder even though Williams believes he never intended to kill anyone during a drug deal in June 2002.

Wording of the law

Under the felony murder rule, any death that occurs during another crime, such as arson, rape or robbery, is considered first-degree murder even if it is unintentional.

In Little's case, the jury found that he robbed his victims when he left the scene with drugs and money.

Williams and at least one other juror from the trial, Shanikqua Stubbs, disagree with the felony murder rule, saying it forced them to send a 25-year-old man to prison for life.

"I think it's awful," Stubbs said. "We had no other choice than to find this man guilty of first-degree murder, even when he didn't kill anyone."

Prosecutors in Little's trial agree that he did not fire any shots that killed anyone.

Emedel Hernandez, 23; Jose Luis Zapatero, 38; and Elmer Adan Carbajal, 25, were killed June 3, 2002, during a drug deal in a mobile home near Robbins. A fourth man was injured.

During the trial, defense lawyers said Little's accused accomplice, Kevin Brower, fired the fatal shots. Brower, who is 24 and from Eagle Springs, is scheduled to stand trial this summer.

North Carolina law allows accomplices to be guilty of any crime in a criminal act, even if they are not directly responsible for it.

North Carolina Appellate Defender Staples Hughes said he does not know how many times the felony murder rule has been used. But prosecutors almost always take advantage of the rule when they can, he said.

"Any time, if you pick up a paper and read about a robbery in which someone's killed, that's going to be charged as a felony murder," Hughes said.

Other Moore trials

Jurors in other felony murder trials in Moore County have also disagreed with the felony murder rule.

In August, some jurors in the trial of Robert A. Verbal questioned the felony murder rule, which they followed to convict Verbal of the murder of another man during a drug deal.

The jurors in the Verbal trial said they felt the shooting was an accident, the result of a drug deal gone bad, according to Verbal's lawyers and court affidavits.

Williams' and Stubbs' protests will probably not win Little an appeal, but they can support any claim he might make that his sentence is cruel or unusual, said Bruce Cunningham, a lawyer in Moore County who represents Brower.

Williams knew nothing about the felony murder rule before the trial. But since the trial ended Feb. 24, she and Stubbs have researched the issue. They also have signed a petition to change it. Williams has agreed to go to Raleigh and tell state lawmakers her story.

"They're going to have to hold my hand," Williams said. "I don't know anything about going to the legislature."

The felony murder rule has existed since the 19th century, but as long as North Carolina had parole, the law was not particularly rigid, Cunningham said. In 1994, North Carolina abolished parole.

"I think people are realizing that's the case, and they are sort of intuitively believing that the punishment should fit the crime," Cunningham said.

The movement to change the felony murder rule was launched in 2002 by George Brown, a graphic designer from Guilford County. Brown saw a 23-year-old woman receive a life sentence after being convicted under the rule. Janet Danahey had set some old Christmas decorations on fire outside her boyfriend's door. The flames quickly spread throughout the apartment building, killing four people.

About 40 states have a felony murder rule, Cunningham said. But several states allow for second-degree murder, or they give judges discretion during sentencing.

Cunningham hopes North Carolina lawmakers would look to some of those states for ideas on changing the rule.

"We're hoping discretion will be restored for judges to make the punishment fit the crime," he said.

Not every juror in the trial shares Williams' and Stubbs' opinion about the felony murder rule.

"The law's the law. That's what we were charged to apply it to," said Dave Southon, a retired banker

who was the jury foreman.

Appropriate sentence

Another juror, Bruce Dyer, said he felt the life sentence was appropriate for Little. Even if he did not kill anyone, he fired his gun and wounded a fourth man, Dyer said.

"I'm not so sure he should have gotten a different sentence because he was a bad shot," he said.

But even if Little had not fired any shots, he still could have been charged under the felony murder rule. Under those circumstances, Dyer said he would disagree with it.

Stubbs and Williams say they could have found Little guilty of second-degree murder, which means he did not plan it.

"He should have served some time, if nothing else than assault with a deadly weapon," Stubbs said.

"But for him to spend the rest of his life in prison because someone he was with killed someone else, to me, is totally unfair."

Staff writer Andrew Martel can be reached at martela@fayettevillenc.com or at 323-4848, ext. 372.

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State Nears End Of Case in Trial

BY JOHN CHAPPELL: Staff Writer

The triple-murder trial of Kevin Nicholas Brower will reach a turning point Monday in Moore County Superior Court.

Brower could be sentence to die if the jury finds him guilty of any of three first-degree murder charges and one assault charge resulting from the shooting deaths of three men and serious wounding of a third.

Emedel Rosas Hernandez of Robbins, Elmer Adan Carbajal of Candor and Jose Luis Zapatero of Robbins died from gunshot wounds June 3, 2002. Detectives found their bodies on the living room floor of Zapatero's trailer at Sunset Mobile Home Park near Robbins.

Last February, a different jury convicted a second man, William Garfield Little, on the same charges and sentenced him to three consecutive life sentences with no possibility of parole.

Assistant District Attorney Warren McSweeney is expected to finish putting on prosecution evidence against Brower sometime Monday. At that time, Brower's court-appointed attorneys, James R. Van Camp and Bruce Cunningham, will have to decide whether or not to put on evidence. Brower is presumed innocent, and does not have to prove anything.

The trial could immediately proceed to final arguments. Senior Resident Superior Court James M. Webb would then charge the jury and it would retire to deliberate.

The final part of the state case will be testimony from an SBI expert on ballistics. Such testimony was crucial in the Little trial and is likely to be a significant issue here as well, depending on how the jury finds on a key argument of the prosecution.

The state says Little and Brower planned an armed robbery, intending to steal some two pounds of brick cocaine. Things went wrong, and three men died as the two blazed away, McSweeney contends. If convicted, both could automatically be guilty of first-degree murder whether they intended to kill anybody or not.

A provision of law known as the felony-murder rule says any death during commission or attempt to commit certain felonies (arson, rape or other sexual offenses, burglary, robbery or kidnapping) is first-degree murder. For instance, even if a death occurs from a heart attack during the commission of such an underlying felony, it is still first-degree murder.

The felony-murder rule is controversial. It originated in England as part of the common law, but England abolished it in 1957. States such as Hawaii and Kentucky have done away with it, but it is still the law in North Carolina,

If the state succeeds in proving Brower part of an armed robbery plot, then he would automatically be guilty of first-degree murder in the deaths of Carbajal, Zapatero, and Hernandez even if he had not fired a single shot, or if every shot he did fire missed.

At Little's trial, his attorneys argued that there was no planned robbery, only a cocaine deal gone bad. All fatal bullets came from Brower, they contended, based on their interpretation of evidence at that trial about the positions of each shooter and ballistic evidence.

This time, Van Camp and Cunningham may contend otherwise.

Last week, Detective Lt. Richard Talbert marked floor plans showing body positions and where he'd collected casings, bullets, and bullet fragments. Jurors examined color photographs of bloody bodies taken at the crime scene. Whether those bodies were moved by relatives and others who rushed in after hearing gunfire is something defense lawyers consider a significant issue in Brower's trial. What jurors decide on such facts could determine how they rule on which bullets came from Brower's gun and which came from Little's gun. That could be important if they are unconvinced Brower and Little intended armed robbery. Brower could be convicted on some lesser charge if jurors decide the evidence does not support first- degree murder, even under the felony murder rule.

Van Camp has questioned every witness closely about who stood where that day. Repeatedly, he has asked every witness about how many other people were in that trailer, how many were outside, and how long it could have been from the time of the first shot until somebody phoned 911 — how much time could have passed before Capt. Greg Maness got a radio call even though he reached the scene two minutes later.

The wounded survivor, Juan Guerrero Romero, testified that two cousins of his rushed in to help him and stop his bleeding. He told of other victims being lifted and moved by people trying to help them. Romero marked a map as to where he stood, where he moved, where he was when Little shot him, and where he fell.

Former Detective Greg Beard introduced a statement Romero gave from his hospital bed the day after the shooting and again the question of positions and movements came up.

Zapatero's widow, Luz Maria Zapatero Ronquillo, who returned from Mexico to testify in both trials, was asked about body positions as well. She said she'd put a sofa cushion beneath the head of her husband as he lay dying.

Both Romero and Ronquillo testified in Spanish with the aid of a certified interpreter as the court ruled neither is fluent enough to testify in English.

When Talbert introduced crime scene photos, he also faced questions about body position and who'd been there before police arrived to seal the trailer.

In his statement, Brower said both he and Little were carrying .45-caliber guns. He admitted turning to join in the shooting after hearing Little's gun go off behind him but said he did not know who shot who in the commotion.

No guns were recovered. Testimony indicated both were discarded in a trash container that was emptied before investigators could get to it. Who fired the fatal shots may not matter if the jury finds Brower was engaged with Little in armed robbery.

Another defense tactic might focus on self-defense if Brower's lawyers are able to introduce testimony tending to show Hernandez or the others were also likely to have been armed as well. Such testimony could come this week unless the defense also rests.

John Chappell can be reached at 783-5841 or by e-mail at jchappell@thepilot.com.



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Jury Gets Case in Brower Triple-Murder Trial

BY JOHN CHAPPELL: Staff Writer

In a surprise move, the defense in Kevin Nicholas Brower's triple-murder trial rested Monday afternoon without calling any witnesses.

James R. Van Camp and Bruce Cunningham are court-appointed attorneys for Brower, who could be sentenced to die. He faces first-degree murder charges in the shooting deaths of Emedel Rosas Hernandez, Elmer Adan Carbajal and Jose Luis Zapatero in June 2002.

Their bodies were found sprawled about Zapatero's blood-spattered living room floor at Sunset Mobile Home Park near Robbins. A fourth man, Juan Guerrero Romero, survived a gunshot. He testified against Brower and another man, William Garfield Little, who was convicted on the same charges last February and sentenced to life in prison without parole.

Assistant District Attorney Warren McSweeney rested the state's case following testimony Monday by SBI ballistics expert Scott Jones.

In closing arguments, Van Camp asked the jury to consider some questions.

"I ask you to think about those questions as you listen to the prosecutor," he said. "What in the world happened at the crime scene? We don't know what happened. The first policeman who got there never was called to testify. Why in heaven's name didn't they talk to (Romero's) cousins? They were outside. They were inside. No one ever said a word to them. Where are the cousins? "

Van Camp asked why nobody tested bodies for gunshot residue.

"You have deceased people," he said. "They are there. Their hands are there. No test. Why didn't they? If Juan Romero got wounded the way he said he got wounded, why wasn't there some soot, some residue in his wound? Maybe he didn't get wounded that way. Why didn't they test clothing, bodies, to determine how close somebody who shot them was? You are left wondering. And you sit in judgment of the fate of a young man, under a law you took an oath to abide by and to use. ... You call upon the prosecution to provide you with evidence so you can do that. They haven't done it."

Filling in missing pieces is not the job of the jury, Van Camp said.

"They want you to fill in the pieces of the puzzle," he said. "That is not what you said you would do."

Describing Romero as "a man who can't get his story straight," Van Camp said Romero told four different stories.

"Can you believe him?" Van Camp asked. "Can anybody believe him when he says, 'I've never done that before.' He just happened to know somebody to call to buy a kilo of cocaine. Unbelievable. We are supposed to take that as credible evidence, to be fully satisfied by the state's case?"

Van Camp said the crime happened in a rough neighborhood and people were breaking the law. He asked jurors to put themselves in Brower's place.

"We are talking about four Mexican fellows speaking Spanish to each other, and you don't

know three of them," he said. "Romero's cousins are outside. The cocaine is short. Juan Romero says when he hears the drugs are short, he's leaving. Kevin says he turns to leave, 'Done deal, everybody straight.' Done deal.

"He turns to leave. He hears a shot. When he turns. He pulls his gun and starts shooting, too. I went over that a little slower than it took. He hears a shot, and he doesn't know what in the world is going on. As he said in his statement, it was do — or die."

McSweeney had a bailiff set up scene diagrams and a ballistic evidence chart.

"Three senseless killings and one senseless assault," McSween-ey said in his closing argument. "The state is not trying to paint a pretty picture. It would have been nice to have choirboys come in and testify. That is not the way the world is. On June 3, 2002, there were some bad people involved.

"Yes, Mr. Romero was involved in a drug deal. Yes, Mr. Brower and Mr. Little were involved in a drug deal. That is what was supposed to happen. But the defendant had other plans about what was supposed to happen."

No evidence shows more than two guns, he told the jury.

"Mr. Jones put it very bluntly: 'The evidence is what it is,'" he said. "It leads only to one conclusion: The defendant is guilty of three counts of first-degree murder and one of assault. I contend it all started at Charles' and Julie's house. What is sitting on the table? Rolls of money. Charles said it was approximately 12 rolls of $1's and $5's. The defendant asks for some $20's. Charles gives four or five to the defendant.

"They were wrapping them around the money. Think about that: just a fake, a Trojan horse if you will, just to get in the door. When two or more people join in a common purpose, a common scheme, and one person does something, they are both guilty, both equally guilty."

McSweeney cited Brower's statement in which he said: "We were both shooting."

At the chart and the map, he connected bullets to projectiles and locations.

"The state will contend these four shots were the ones fired by Mr. Brower," he said. "The other shell casings, ejected from Mr. Little's handgun, fell to the floor (indicating on map). These projectiles, all those were pulled from the bodies. Agent Jones' possible combinations match Mr. Rom-ero's testimony. You also heard Miss Miller say she heard Kevin say, 'I know I got one behind the left ear.' The entry wound on Mr. Zapatero is right behind the left ear. You saw the pictures of Mr. Carbajal where the wounds were close together."

Those were the fatal shots, McSweeney contends.

"'The evidence is what it is,'" McSweeney repeated again and again. "We are not asking you to excuse Juan, to excuse Mr. Zapatero for dealing in drugs. You may not like what they were doing. You might not agree with what they were doing. That does not give anybody the right, in the state of North Carolina, to shoot and kill."

Van Camp got the final word with the jury.

"The evidence is not what it isn't," Van Camp said. "Where is any evidence Kevin and William entered into any scheme to assault Juan Romero or to rob anyone? Where is the common thread? Kevin took the money they took there. Kevin didn't take anything from anybody. The only way to tie him to anything Little did is this rule: common purpose. But where is there any evidence? Fake rolls? Where do we have anybody saying that was not $23,500? You can't say there is evidence of it. None. And 'the evidence is what it is.'"

Romero changed his story as to where people were, Van Camp contended.

"The medical examiner says the shots, most of them, were from left to right," he said. "It just happens Kevin and Mr. Little are all on the wrong side according to where the bullets went. We know bullets go in straight lines. Romero said he was looking out a nonexistent window. There is no window there. The physical facts don't match. You have no evidence of

what bullet, or what gun, shot what person."

He asked the jury to read Brower's next-day statement carefully, remembering that he cooperated with the investigation. He asked the jury to imagine a friend asking about the trial.

"You tell them, 'Interesting case, the prosecution submitted witnesses who had been given deals — one, Juan Romero, had inconsistent stories,'" he said. "There was evidence there were other people there, but prosecutors made no effort to find them, to talk to them, and the medical examiner testified that the bullets came from directions where the eyewitness couldn't have been. A ballistics expert says there 'could have been more than two guns.' Your friend looks at you and asks, What did you do?'"

Senior Resident Superior Court Judge James M. Webb will instruct the jury this morning, and then deliberations will begin.



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(NO) felony murder!

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Jury Opts For Lesser Conviction

BY JOHN CHAPPELL: Staff Writer

Shortly after noon Thursday, a Moore County jury found Kevin Nicholas Brower guilty of murder in the second degree in the deaths of two men on June 3, 2002.

They returned "not guilty" verdicts on all other charges against him, including the death of a third man and felonious assault on a fourth.

Senior Resident Superior Court Judge James M. Webb sentenced Brower to 220 to 273 months in prison for murdering Emedel Rosas Hernandez. He sentenced Brower to a second term of the same length for murdering Elmer Adan Carbajal. He ordered that the second term run at the conclusion of the first, which will keep Brower in prison until 2038 at a minimum, with credit for time served. Brower, 25, will be nearly 60 years old at the earliest when he gets out of prison.

He had faced a possible death sentence if he'd been convicted on any of three first-degree murder charges. Hernandez, Carbajal, and a third man, Jose Luis Zapatero, all died in a hail of bullets in Zapatero's trailer at Sunset Mobile Home Park near Robbins.

A fourth man, Juan Guerrero Romero, survived a gunshot to the neck. He testified against Brower and a second shooter, William Garfield Little.

A different jury in a separate trial last February convicted Little on three counts of first-degree murder on much the same evidence. Little is currently serving three consecutive sentences of life without the possibility of parole.

At the heart of first-degree murder charges in these trials is something called the "felony murder rule." A victim's death during, or as a result of, a violent felony becomes first-degree murder even if accidental and unintended.

Assistant District Attorney Warren McSweeney advanced the state's view at both trials that Brower and Little went to Zapatero's home to rob him at gunpoint of a kilogram of cocaine — about 2.2 pounds. Testimony at the trials said Brower wanted some $20 bills to wrap around rolls of ones and fives. McSweeney contended that this showed they meant to steal, not to buy, drugs.

"That money was just to get them in the door," he said.

Romero set the whole thing up, according to the testimony, with a call to Zapatero. After police arrested Brower and Little, whom they found holed up in a Days Inn in Rockingham, Brower gave a statement in which he confessed to firing shots. He said he was on his way out, thinking the deal was done, when he heard a gunshot behind him.

Turning, he saw Little had shot his friend Romero. In what he told Detective Greg Beard he thought was a "do-or- die" situation, he drew his own .45-caliber automatic and began firing.

That statement was very important in the jury's consideration of the case, one juror said afterwards. More important, however, was what defense attorney James R. Van Camp described as missing evidence.

Van Camp, court assigned along with Bruce Cunningham to defend Brower, repeatedly

called the attention of jurors to unanswered questions: no questioning of people who'd been at the scene, no attempt to find and interview a number of people who entered that trailer before police got there, the failure of the state to put the first responder, Capt. Greg Maness of the Moore County Sheriff's Department, on the stand — and no attempt to track down the contents of a dumpster where testimony indicated the guns used had been discarded.

"When we first went back, a lot of the jurors thought there wasn't enough to convict," said the juror, who spoke on condition on anonymity. "Some were for first-degree pretty strongly at first, but others were for not guilty."

They went over charts and ballistic reports and decided Brower's bullets killed Carbajal and Hernadez, but not Zapatero.

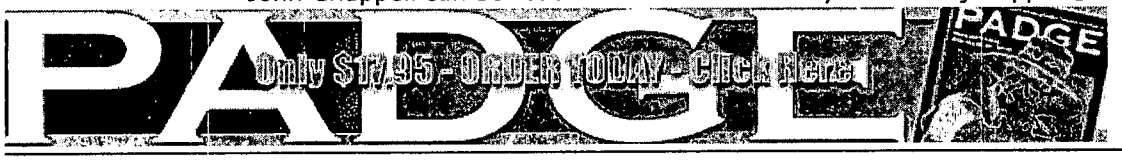
The biggest thing, the issue that took up the most time in the jury room, was the question of acting in concert. At the heart of the felony murder rule, when more than one person act in concert, each is equally guilty no matter what they individually do or don't do.

"We tried to ask when this acting in concert began," the juror said. "Was it when they started, with the money? Was it when they went in the trailer, or when Little shot Romero, or when they left with the money and the drugs?"

They decided the state had not proved any underlying felony. Brower didn't know Little would shoot his friend Romero, so he couldn't be guilty of felonious assault. There wasn't enough evidence they intended armed robbery, so that failed to trigger felony murder.

"Our foreperson, Alan Riley, was very, very fair to everybody on the jury," the juror said. "He made certain nobody rushed anybody else, that everyone could make their views heard, and that — in the end — we all agreed with our final verdict."

John Chappell can be reached at 783-5841 or by e-mail at jchappell@thepilot.com.



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Jurors in Verbal Case Call Killing an Accident

BY JOHN CHAPPELL: Staff Writer

Sending an Aberdeen man to prison for life without possibility of parole for accidentally killing another man was "grossly unfair," according to some jurors in the case.

The jury convicted Robert Alexander Verbal, 23, of first-degree murder in the death of David C. Blue last year. But a number of jurors have signed affidavits saying that they concluded the shooting was an accident.

North Carolina's "felony murder rule" left them no choice, jurors said.

"I concluded the state had failed to prove that the defendant had acted intentionally," said juror Mark Adams in his affidavit. "I believe that the sentence imposed is grossly unfair given that the evidence showed that the defendant's conduct was unintentional in this case."

Verbal's attorney, Richard Roose of Asheboro, has filed a motion asking that the conviction be vacated.

Roose filed affidavits from two jurors, Adams and Savin Chapel Camina, in support of his motion. Other attorneys familiar with the case say there are more to come.

The felony murder rule is controversial. It says any death during commission or attempt to commit certain felonies (arson, rape or other sexual offenses, burglary, robbery or kidnapping) is first-degree murder.

Jurors questioned the rule during trial in a note handed to Superior Court Judge Ron Spivey.

"Sir, under the North Carolina state law for first-degree felony murder, could the killing have accured [sic] by accident and still fall under the law?" they asked.

Spivey quoted the law in reply.

"The legislature intended to deter even accidental deaths," Spivey said.

All participants in the felony can be held equally culpable, even including those who did no harm, possessed no weapon, and did not intend to hurt anyone.

Roose's motion raises three issues.

It contends that the imposition of life without parole "when the jury did not find that the defendant intended to kill the victim" is cruel and unusual punishment and a violation of the eighth and 14th amendments.

Life without parole is the second most severe punishment, Roose argued in court

documents filed in clerk of court's office.

"It is more severe than the sentence imposed for second-degree murder, which is the intentional killing of the victim with malice," he wrote.

A second claim contends that the felony murder rule violates the separation of powers.

A mandatory sentence under these circumstances constitutes an impermissible intrusion by the legislative branch on the authority of the judicial branch to fashion appropriate criminal sentences, Roose argued.

The third claim says there was no finding that Verbal had the state of mind required for culpability.

"Some or all of the jurors believed the killing was accidental," his motion contends. "Accident is a complete defense to a criminal charge."

As a result, Verbal's sentence is a violation of due process, Roose argues.

Spivey has not called for arguments on the motion.

"He could just issue a written order denying the motion," said Assistant District Attorney Warren McSweeney, who prosecuted Verbal.

After the trial, he described it as the most difficult murder case he ever had to prepare, basically the choice of believing one story or another.

Verbal took the stand in his own defense, saying that his only intention was to buy $10 worth of marijuana.

"I went there to buy a dime bag of weed," he told the jury. But he admitted that he brought along a gun, the same .380-caliber pistol that killed Blue.

The gun was fired by accident, during a struggle with Roderick Lemont Hammond, Blue's nephew — the drug dealer he only meant to rob, Verbal said.

The juror's questions and long deliberation — they were out from midmorning until late afternoon — led Spivey and attorneys in the case to say it was a most intelligent and diligent jury.

"Juries keep getting smarter," McSweeney said Tuesday.

Now, some of those same jurors say they felt they had no choice, given the law. And that is wrong, they say.

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Murder Suspect Accepts Plea

BY JOHN CHAPPELL: Staff Writer

A second defendant charged in the shooting death of David C. Blue of Pinebluff will not face trial for first-degree murder.

Christopher L. Barkley, 42, of Aberdeen pleaded guilty to second-degree murder and conspiracy to commit armed robbery under a plea bargain reached in court Monday.

A co-defendant, Robert A. Verbal, 23, was convicted of first-degree murder last month and sentenced to life without possibility of parole.

"In effect, Verbal got a slow death sentence," said Barkley's court-appointed attorney, Bruce Cunningham of Southern Pines. "He was sentenced to die in prison."

Rather than take a chance on the same sentence, Barkley took an offer from assistant District Attorney Warren McSweeney. His guilty pleas mean he will serve 15 to 19 years in prison.

It also means Barkley will not benefit if North Carolina's felony murder law is later ruled unconstitutional.

The felony murder rule says that if a person commits a dangerous felony and somebody dies as a result, it is first-degree murder, according to McSweeney.

"I feel like the felony murder (rule) is a good law," McSweeney said later. "I would like to think it might be a deterrent. Essentially, we have two wrongs. We have a dangerous felony — robbery, burglary, rape — happening. And we have a death."

Generally, the law addresses felonies where weapons are involved.

"I am pleased with the outcome of the verdict with Verbal," he said. "Mr. Verbal was the shooter. I am satisfied with the outcome today."

Cunningham understood Barkley faced the risk of being sentenced to life in prison without parole.

"I am satisfied with the resolution to this case, particularly in the light of the jury verdict in the Verbal trial," Cunningham said.

The two defendants were not joined for trial after testing revealed Barkley has an IQ of 69, according to court documents. Execution of the mentally retarded is forbidden.

Verbal then no longer faced the death penalty, since dividing the cases left him with only one death-qualified attorney, not two as required by law.

A motion to vacate Verbal's verdict is pending. His attorney, Richard Roose of Asheboro, filed the motion and supported it with affidavits from trial jurors who say the evidence at

trial showed the shooting of Blue was an accident.

They say the sentence of life without parole is "grossly unfair."

The felony murder rule allows sentences of death or life without parole only if a defendant is found guilty of the underlying felony.

Blue's nephew, Roderick L. Hammond, 24, testified at the Verbal trial.

He accepted his own plea bargain Monday, pleading guilty to misdemeanor drug charges.

At the Verbal trial, Hammond was visibly upset as he described his struggle with Verbal over the gun that took his uncle's life.

On Monday, his attorney, Maureen Krueger of Carthage, told the court Hammond dearly loved "Unc," as he called Blue.

"Mr. Hammond has three children," she told Superior Court Judge Ron Spivey. "He has worked to pay child support. He testified at the hearing. He owned up to it. He loved his uncle very much."

Spivey sentenced Hammond to 45 days in jail and suspended the sentence and gave him two years probation, the first six months to be intensive probation.

About $1,233 seized will be forfeited to the Moore County school system, providing it has not already been claimed by the N.C. Department of Revenue, Spivey ordered.

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Judge Dismisses Appeal by Verbal

BY JOHN CHAPPELL: Staff Writer

A judge has denied an Aberdeen man's appeal of his sentence to life in prison without parole for his first-degree murder conviction.

Pending further appeal, Richard Alexander Verbal will spend the rest of his life in prison for killing David C. Blue last year.

A Moore County jury found him guilty of trying to rob a drug dealer, Blue's nephew, Roderick L. Hammond. That decision automatically meant Verbal was also guilty of first-degree murder under state law.

Several jurors said in affidavits after the trial that they believed the death was an accident, and Verbal's sentence was "grossly unfair."

Felony Murder Rule

North Carolina's felony murder rule essentially says that if somebody dies as a result of the commission of a dangerous felony, it is first-degree murder. There is no decision left to a jury once it finds a person guilty on the underlying felony.

There are two possible sentences for first-degree murder: life in prison without parole and death. The death penalty was ruled out in this case.

"We have two wrongs," assistant district attorney Warren McSweeney has said. "We have a dangerous felony — robbery, burglary, rape — happening. And we have a death."

Jurors thought the shooting was accidental, but the law did not let them take that into account.

At trial, Hammond testified that he lunged and grabbed a gun Verbal took from his pocket. In the struggle, shots were fired.

Verbal said the gun fell out as he reached for money to buy "a dime bag" of marijuana. Hammond jumped him, and he fought for his life.

His gun went off three times.

Two bullets hit Blue, who died at the scene. Blue was standing next to another defendant, Christopher L. Barkley, 42, of Aberdeen, who pleaded guilty to lesser charges at a later trial.

Another bullet struck Hammond's hand. That bullet was never found, though a shell casing not matching the other bullets was recovered, according to McSweeney.

Last week, Superior Court Judge Ron E. Spivey denied a motion by defense attorney

Richard Roose of Asheboro to vacate Verbal's sentence.

"He dictated an order, which I will be getting," Roose said in a telephone interview. "I have not seen it yet."

Finding Issued

Spivey issued a finding in at least one of the issues Roose raised in his motion.

"Basically, what I remember is he found as fact that the sentence was not grossly disproportionate," Roose said. "That was the key word. This was the Eighth Amendment issue."

Roose's motion contended that the imposition of life without parole "when the jury did not find that the defendant intended to kill the victim" is cruel and unusual punishment and a violation of the eighth and 14th amendments.

Life without parole is the second most severe punishment, Roose argued according to court documents.

"It is more severe than the sentence imposed for second-degree murder, which is the intentional killing of the victim with malice," his motion contended.

Roose has three affidavits in hand, another done but not yet collected, and a possible fourth in the works.

Jurors Mark Adams and Savin Chapel Camina said in affidavits: "I concluded the state had failed to prove that defendant had acted intentionally. I believe that the sentence imposed is grossly unfair given that the evidence showed that the defendant's conduct was unintentional in this case."

The other affidavits will say the same, Roose said.

Separation of Powers

Roose's motion also contended that the felony murder rule violates the separation of powers, that a mandatory sentence like this is a forbidden intrusion by the legislative branch on the authority of the judicial branch to fashion appropriate criminal sentences.

There was no jury finding that Verbal had the state of mind required for guilt, he argued. Verbal's sentence was therefore a violation of due process.

"Some or all of the jurors believed the killing was accidental," his motion said. "Accident is a complete defense to a criminal charge."

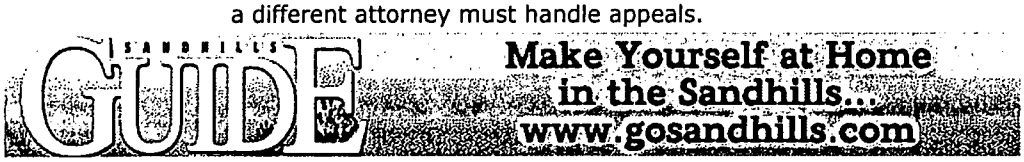
Spivey denied every claim, according to Roose, who is waiting for the written order.

"He denied the other claims," he said. "I would rather see the order than try to recall his exact words."

Roose has few options left.

He could, and may, move to have Spivey reconsider his decision on the motion.

Otherwise, Verbal's case will go to another lawyer. Under North Carolina judicial procedure, a different attorney must handle appeals.



The Felony Murder Rule in North Carolina:

A Matter of Life and Death

a presentation by
George Brown
Founder, North Carolina Citizens for Felony Murder Rule Change
March 21, 2006

Life or death. If we're on a jury, that's a pretty heavy decision to have to make. What gives us the right?

Here in the Bible Belt, some would make it a biblical prescription: an eye for an eye.

You can have the Bible provide support for a lot of things. There are two testaments: the Old and the New. Maybe we can think about them as conservative and liberal.

In the Old Testament, God is an angry god who floods the earth and drowns all but a few followers, turns one woman into a pillar of salt, and tells us that as we confront sinners in our lives, it is okay to take "an eye for an eye and a tooth for a tooth," but in at least one conflicting statement from the Ten Commandments, it also says, "Thou shalt not kill."

According to one Bible society, there are over six hundred capital offenses enumerated in the Old Testament, from following another religion to being a prophet whose prophecies do not come true. It's interesting that the church and society now ignore all but one of the biblical capital offenses.

In the New Testament, Jesus tells us that when confronted by wrong, we should "turn the other cheek." He doesn't really have a lot to say about capital punishment. His teachings were built around love, forgiveness, and reconciliation.

Of the religiously inclined people who enter the courtroom in a capital trial, which Testament are they more inclined to think about, the Old or the New? Psychologically, it matters.

I'm neither a minister, a lawyer or a psychologist. I'm just a John Doe citizen, but what I've discovered about the Felony Murder Rule raises some interesting psychological points about everyone involved in an FMR case.

I'll go first. For about 25 years I was in radio and TV broadcasting. After that, I was a graphic designer for about 20 years, seven years of which overlapped a short career as a marketing manager. I'm semi-retired now, supplementing a meager Social Security income with a part-time job at night to help ends meet. I have no wealth and I'm not vying for any position of power. How, then, and why, did I get involved in a quest to strike the Felony Murder Rule from our state's law books?

The short answer to that is Janet Danahey.

She came into my life uninvited, unless you count turning on my TV on a cold February night in 2002 as an invitation.

The image was of a Greensboro courtroom. On a closed circuit monitor from the Guilford County jail, the court and I saw Janet for the first time.

The judge read the charges against her: one count of first-degree arson and four counts of first-degree murder for setting a fire at a small apartment complex that killed four young adults.

"Do you understand these charges against you?" the judge asked.

She may have said, "Yes, your honor," but as I recall, she answered, "Yes sir," her voice soft, but strong.

It was then that I first saw the intelligence in her eyes, sensed the respect for the court, and also saw what had to be sheer fear and panic in her face.

"That's no murderer," I thought to myself, and dismissed Janet Danahey from my mind, confident that her lawyer would plead the charges down to something like arson and manslaughter.

Subsequent stories in the newspapers and TV said that she had set fire to an old futon—a sofa—outside an ex-boyfriend's apartment as a prank.

Months later, I snapped on the TV and the screen showed a reporter standing in front of the courthouse breathlessly reporting that Janet Danahey had just pleaded guilty to arson and four counts of first-degree murder. The judge immediately sentenced her to life without possibility of parole and she was on her way to Raleigh and the North Carolina Correctional Institution for Women as the reporter spoke.

I was astonished. Yes, Janet set a fire that caused four young people to lose their lives in a horrible way; but life without parole for Janet, who as it turned out, neither the judge nor the prosecutor thought had meant to harm anyone?

I went to bed that night with a heavy heart. After the gut-wrenching knowledge of four dead kids, the most prominent thing I felt was parental toward Janet Danahey, even though we had never met. She was at once my daughter—everyone's daughter, sister, and friend and she was in big trouble.

I thought of all the dumb things I had done as a teenager that could have cost lives: the drag racing on county roads at night, playing "chicken," the burning paper bag of fresh cow manure set ablaze one Halloween night on the porch of an old man my friends and I disliked. I thought of my son, who had participated in similar activities. My son and I lucked out. We didn't cause anyone to die or get hurt. Janet was not so lucky.

Reading the papers, the following cases leap into my mind as examples of murder cases, and, in comparison, how unfair the Felony Murder Rule can be:

DEMETRIUS D. HARRIS

2001 - Durham County. Harris was tried for second-degree murder. He was sentenced to a minimum of 14 years eight months to a maximum of 18 years five months. He escaped prison and had a year and two months added to his sentence and has 32 infractions in prison. He has suspended sentences for assault on a female, property damage, possession of a hypodermic needle, and sniffing glue.

GREGG BRYAN MCALLISTER

1997 - New Hanover County. McAllister was tried for hit and run—he hit and killed a girl on a bicycle while driving drunk—DWI, and second-degree murder. He was sentenced to a minimum of 20 years 11 months to a maximum of 25 years 11 months on the second-degree murder charge. He has a long list of DWI convictions for which he served time. He has three prison infractions.

ANN MILLER KONTZ

2000 - Wake County. Kontz was accused of the arsenic poisoning of her husband and was indicted for first-degree murder. She was allowed to plead guilty to second-degree murder and conspiracy to commit first-degree murder, for which she received sentences of 12 years six months minimum to 15 years nine months maximum for each charge, to be served consecutively. She has no prison infractions.

BECKY HILLIER

2004 - Mecklenburg County. Hillier was accused of shooting her boyfriend in the head. She rejected an offer to plead guilty to voluntary manslaughter which would have likely put her in prison for single-digit years. Instead, she went to trial and was convicted of second-degree murder and is serving a sentence of from 13 years one month to a maximum of 16 years six months. She has no prison infractions.

DEIDRA LANE

2003 - Mecklenburg County. Lane was accused of shooting her Carolina Panthers/ Indianapolis Colts football player husband, Fred Lane, in the face, killing him. Prosecutors asked the judge for a decision on whether they could seek the death penalty. While awaiting trial, Lane was also charged, along with another teller at the Wachovia Bank branch where she worked with stealing over $41,000. Lane was allowed to plead guilty to a charge of voluntary manslaughter and was sentenced to 7 years eleven months minimum, 10 years three months maximum. She currently has two infractions.

How can it be that a person can maliciously take another's life and be sentenced to between as few as twelve years for one defendant, to a maximum of 21 years for another, while Janet Danahey, with no malice or ill intent toward anyone is serving a sentence of life without possibility of parole, and might well be on death row had she not pleaded guilty?

The answer to that question is that there are many punishment options for those who cause another human being to die unless you are prosecuted and found guilty of felony murder. In the case of felony murder, the only options are that your life will be taken—either literally, or by imprisonment until you die.

The Felony Murder Rule gives prosecutors a free ride to a first-degree murder conviction if they can prove the underlying felony: burglary, arson, rape or other sexual offense, robbery, and kidnapping.

We have various murder laws so that defendants can be prosecuted according to what actually happened: first-degree murder, second-degree murder, and manslaughter.

The Felony Murder Rule allows the arbitrary and often fictional charge of first-degree murder to be applied if the defendant was engaged in one of the enumerated felonies. Someone might die out of excitement and fright of a heart attack. The death could be one of the perpetrators or anyone in the immediate vicinity of the crime. It makes no difference. It's still first-degree murder under the FMR.

The life-taking penalties of death and life imprisonment should be last resorts reserved for the worst of the worst among us—sociopaths whose mental makeup is so flawed that we must make sure that they are kept from society forever. But I emphatically do not believe these penalties should be automatic, as they are under the FMR.

We go far astray when we use these two penalties on young people who, in some cases, have gone along with the group in something that proves to be criminal with sometimes terrible results. Janet Danahey is a perfect example of someone who is no more of a criminal mind than you or I. She *did* something criminal, yes. But her motivation was not criminal. Yet she is paying a penalty one click away from the maximum.

When there is a death due to another's hand, survivors and sometimes the general public are understandably furious. The focus is an angry one, intent on making sure that everything possible is done to keep the perpetrator of the crime in prison for life, or even better—execute him or her—swiftly. They don't like an appeals process that can grind on for more than a decade. They speak of "closure" and "justice," but what they really want is revenge.

Our country is not a straight democracy. The founders wisely decided that this would mean mob rule. We have a democratic *republic*—and a representational system of checks and balances to put some distance between how the government is run and temporary public upset or excitement.

Our courts are supposed to accomplish the same end—there should be an *objective* hearing of the wronged and the wrongdoers at some distance from subjective emotion. Notice that the image holding the scales of justice is blindfolded.

But in an FMR case, co-defendants, who may be people who had no weapon, did no harm and meant no harm to anyone can be punished just as severely as the actual perpetrator. The judge and jury's hands are largely tied by the Felony Murder Rule. There is no "wiggle room." There are only two penalties possible if found guilty of felony murder: death, or life in prison without possibility of parole.

The "distance" in court proceedings can be eroded.

PROSECUTOR

Perhaps no one in court wields the power of the prosecutor. In capital cases we have seen many reports of overzealous prosecution, abuse, and withholding of evidence which might be helpful to the defense.

The power of a prosecutor to make up a story, a "theory" of what happened is unchecked by any higher authority I know of except maybe the judge. But I can't recall a press story in recent years

where the prosecutor was called down by the judge. These "theories" are presented to the judge and jury as undeniable fact. Sometimes, in capital cases, these theories are based on extremely thin circumstantial evidence.

CRIMINAL COURT JUDGE

In a felony murder trial, the judge has the say on what testimony may or may not be introduced. Sometimes evidence or testimony which could be helpful to a defendant is not allowed and vice-versa. The judge may or may not instruct the jury as to lesser charges possible.

JURY

The selection of the jury in a capital case is manipulated. Prospective jurors' views on capital punishment are a litmus test as to whether or not they will be allowed to serve. Those who are ambivalent or opposed to the death penalty will more than likely be excused, even though their opinion is well within the mainstream of public opinion.

Jurors color and gender can play a key role in whether they are chosen for a death penalty trial. Similar considerations work against those with certain religious beliefs.

Jurors in capital cases are not representative of the population as a whole. Those allowed to serve will be more pro-prosecution and conviction-prone than those who are excluded.

Jurors selected might expect a high quality pursuit of justice on a level playing field, but the truth—the *whole* truth—will often be hidden from them. Prosecutors may withhold critical evidence and the defense—especially court-appointed—may fail to investigate basic facts. Junk science, questionable jailhouse informants, and overly confident eyewitnesses will be offered as if they reliably present proof of the defendant's guilt.

Jurors' emotions will be strongly played upon as the most gruesome aspects of the crime are displayed in graphic detail. Couple that with victim impact statements from the family of the victim, and you have a powerful case weighing heavily for the prosecution.

Justice of the Supreme Court John Paul Stevens said last year, *"The admissibility of victim impact evidence that sheds absolutely no light on either the issue of guilt or innocence, or the moral culpability of the defendant, serves no purpose other than to encourage jurors to decide in favor of death rather than life on the basis of their emotions rather than their reason."*

Well, what does all that leave us with? Vigilante justice?

In North Carolina, jurors have expressed dismay with the choice they had to make in FMR trials. In one case, they questioned whether the defendant actually murdered, although they didn't question his guilt in the underlying felony.

In another case, some jurors came forward after the trial was over and said they would have voted differently if they had known facts about the case that had not been allowed in court. Where the legal community is concerned, once a trial is over, it's over. Jurors' second thoughts after hearing facts not allowed at trial are ignored.

It is also very interesting to note that where the penalty of life imprisonment is concerned, in a survey of jurors almost half believed that a defendant receiving that sentence would at some time in the future be eligible for parole.

VICTIM'S SURVIVORS

The family and friends of a victim are understandably furious. The convicted murderer took the life of their loved one and they almost always want "an eye for an eye." In any legal proceeding, be it a trial, a parole hearing, or a legislative hearing about the Felony Murder Rule, a single survivor's testimony will carry ten times the weight of a roomful of proponents. There have been stories in the press and on television about murderers who had a chance of parole. Some of these cases were decades old; one was over forty years old, yet the survivors' negative testimony held sway, even when the defendant's prison behavior and work had been exemplary.

THE PUBLIC

Until trial, the public normally hears about a murder case only from police and prosecutors, leaving a very one-sided, prejudiced impression. Angry, emotional letters to the editor on one side or the other are seen, as are public demonstrations in high-profile cases. Public opinion, however ill- or well-founded, puts more emotional pressure on a jury than on any other court entity.

With all of these "psychologies" in play, I think things are substantively different from the way the Founders planned it. Communications media in the past sixty years or so—particularly television and the Internet, have enabled all who enter courtrooms to do so with an overload of information—and not all of it necessarily enough or accurate. It's a very different situation than in the century following our country's founding, and very different from what I remember from my ninth-grade Civics classes.

Here are a few of the things I have come to believe in the past four years or so that I have earnestly been trying to learn all I can about our system of justice, our courts and the law:

- It doesn't work like your ninth-grade Civics book says it does.
- The qualities of honesty, integrity, courage, and solid moral character are not nearly so much in abundance as I had thought four years ago.
- Crooked judges, crooked lawyers, lawyers who sleep during a trial, defendants who lie even when the truth would be more favorable are not nearly as disappointing to me as prosecutors who are sneering, overly-zealous, vengeful, conniving, and vote-hungry.
- How many more new prisons does North Carolina have to build at a minimum cost of $80 million each to prove we're "tough on crime?"
- I wish there were more legislators who would actually stand up and vote for what they think is right, fair, and for the public good, regardless of imagined or actual negative public opinion.
- I used to be okay with the death penalty. I'm not anymore. Not for anyone.
- The Felony Murder Rule is so patently, demonstrably unfair, unjust, and I think, unconstitutional, that I am amazed that so many in a position to help get rid of it are so reluctant to try.

To sum up, I think the death penalty under either first-degree or felony murder laws has enough chance of sending an innocent person to death that I am not in favor of it. And, after much soul-searching, I am more inclined to think that sentencing someone to death is morally wrong. Two wrongs don't make a right.

Because of the inequities involved with the Felony Murder Rule compared to our other murder laws, I think the FMR should be struck from North Carolina's laws forever. It allows an arbitrary and often fictitious charge of first-degree murder to be part of an "if–then" equation: IF you are found guilty of an underlying felony THEN you are also guilty of first-degree murder—a charge which shall be indefensible—and you will be sentenced accordingly. In *any* other type of case, that's not how we handle justice in America. The Felony Murder Rule should not be allowed to be the exception that it is.

Janet Danahey's immaturity, an incredibly stupid decision, a cold February wind, the Felony Murder Rule, and a fanatical prosecutor all conspired to take her out of society for the rest of her life, while a woman like Deidra Lane can expect to have "paid her debt to society" as early as 2009.

How much does it take for us to get the point?

What's Wrong With the Felony Murder Rule?

Preface/Definitions (criteria for all vary from state to state)

a - First-Degree Murder - A premeditated (planned) killing accompanied by the intent to kill, malice afore-thought (planning to kill a particular victim or anyone who might try to prevent such a killing).

b - Second-Degree Murder - A killing done with malice, but without premeditation or deliberation in an action perpetrator knows that death is probable or highly likely.

c - Voluntary Manslaughter - Killing in the heat of passion, otherwise without malice, premeditation, deliberation, intent to kill or to inflict serious bodily injury.

d - Involuntary Manslaughter - Death which occurs accidentally, unintentionally, or in violation of a non-felony, or from negligence.

e - Homicide - The killing of a human being due to the act or omission of another. Murder and manslaughter are included among homicides, but not all homicides are a crime, particularly when there is a lack of criminal intent. Non-criminal homicides include killing in self-defense, accidents, such as a hunting accident, or a traffic accident where there is no violation of the law. Intent is the criterion which elevates a homicide, which may be innocent or criminal, to murder.

f- Felony Murder Rule - States that any death which occurs during the commission or attempt to commit certain felonies, which include arson, rape or other sexual offenses, burglary, robbery or kidnapping, is first-degree murder and all participants in the felony can be held equally culpable, including those who did no harm, had no weapon, and did not intend to hurt anyone. Intent does not have to be proved for anything but the underlying felony. Even if, during the commission of the underlying felony, death occurs from fright -- a heart attack for instance, it is still first-degree murder.

What's Wrong With The Felony Murder Rule - Common Sense:

1 - The felony murder rule operates as a matter of law upon proof of the intent to commit a felony to relieve the prosecution of its burden of proving intent to kill, which is a necessary element of murder.

2 - The intention to commit a felony does not equal the intention to kill, nor is the intention to commit a felony, by itself, sufficient to establish a charge of murder.

3 - The felony murder rule erodes the relation between criminal liability and moral culpability in that it punishes all homicides in the commission, or attempted commission of the proscribed felonies, whether intentional, unintentional, or accidental, without proving the relation between the homicide and the perpetrator's state of mind.

4 - Under the felony murder rule, the defendant's state of mind is irrelevant. Because intent is a characterization of a particular state of mind with respect to a killing, felony murder bears little resemblance to the offense of murder except in name. First-degree murder is an arbitrary assignment.

5 - Holding one or many criminally liable for the bad results of an act which differs greatly from the intended results is based on a concept of culpability which is totally at odds with the general principles of jurisprudence.

6 - It is fundamentally unfair and in violation of basic principles of individual criminal culpability to hold one felon liable for the unforeseen and unagreed-to results of another felon's action.

7 - The basic rule of culpability is further violated when felony murder is categorized as first-degree murder because all other first-degree murders (carrying equal punishment) require a showing of premeditation, deliberation and willfulness, while felony murder only requires a showing of intent to do the underlying felony.

8 - The purpose of creating degrees of murder is to punish with increased severity the more culpable forms of murder, but an accidental killing during the commission or attempted commission of a felony is punished more severely than a second-degree murder, which requires intent to kill.

9 - While the felony murder rule survives in North Carolina and other states, the numerous modifications and restrictions of it by some states' courts and legislatures throughout the United States reflect dissatisfaction with the basic harshness and injustice of the doctrine and call into question its continued existence.

10 - The felony murder rule can be used by prosecutors in a manner so as to cause grossly disproportionate sentencing, depending on the circumstances of each individual case.

11 - The felony murder rule is probably unconstitutional because presumption of innocence is thrown to the winds. The prosecution needs only to prove intent to commit the underlying felony; that done, first degree-murder becomes part and parcel of the underlying felony because intent to commit murder does not have to be proved.

12 - (a) The felony murder rule is probably unconstitutional because in some cases it violates the Eighth Amendment: cruel and unusual punishment, grossly disproportionate to the crime(s) actually committed.

(b) The felony murder rule holds unequally involved parties equally accountable and punishable. Again, cruel and unusual punishment if you're only the lookout for a robber who happens to kill in the process of the robbery.

13 - The felony murder rule violates the Fifth Amendment's guarantee of due process because no defense is allowed on the charge of first-degree murder, only the underlying felony.

14 - The felony murder rule bears no rational relationship or equity in its two penalties, with the penalties of other North Carolina murder laws, including, at times, the charge of first-degree murder.

15 - It is no longer acceptable to equate the intent to commit a felony with the intent to kill.

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Sunday

SPORTS



Justin Leonard turns a one-shot deficit into a surprising three-shot lead after the third round of the PGA Championship. **C1**

GREENSBORO

New homes and

Danahey plea questioned

Some say fire sentence is too harsh

BY STAN SWOFFORD
Staff Writer

GREENSBORO – Was justice served?

The question lingers in the Janet Danahey-Campus Walk fire case — almost as troubling to some as the charred, skeletal remains of the apartment complex where four young adults died Feb. 15.

Danahey, 23, pleaded guilty in Guilford Superior Court last month to four counts of first-degree murder and arson. Wracked with guilt and believing, perhaps erroneously, that she was about to be tried for her life, Danahey accepted a sentence of life without parole.

Many people believe she got what she deserves and that she's lucky not to be on death row.

Others, including criminal trial lawyers, law professors and people with no connection to the courts, Danahey or her crime, say Danahey's punishment is too harsh. A sentence of life without parole should be reserved for criminals who intended to kill, they say, and Danahey did not. They say she committed involuntary manslaughter or, at most, second-degree murder.

Some are critical of Guilford District Attorney Stuart Albright for charging Danahey with first-degree murder and demanding a punishment of at least life without parole — even though prosecutors themselves acknowledge that

See **Fire**, Page **A6**

MORE: Lawyers question fairness of felony murder rule. A6



At her sentencing July 29, 23-year-old Janet Louise Danahey turned to the families of the four fire victims and said she would spend the rest of her life atoning for her crime and trying to be a part of them.

TOM COPELAND
News & Record

House Select Study Committee on Capital Punishment

April 27, 2006

Minutes

The House Select Study Committee on Capital Punishment met on Thursday, April 27, 2006, at 10:00 a.m. in Room 1228 of the Legislative Building. Representative Joe Hackney, Co-Chair called the meeting to order and the following members of the Committee were present: Representative Beverly Earle, Co-Chair, Representatives Walter Church, Nelson Cole, Arlie Culp, Pricey Harrison, Hugh Holliman, Marvin Lucas, Mickey Michaux, Bill Owens, Bonner Stiller, Ronnie Sutton, Joe Tolson, William Wainwright, Jennifer Weiss, Roger West and Winkie Wilkins. Copies of the meeting agenda and the Visitor Registration are attached, (Attachments I and II).

Following welcoming comments, Cochair Hackney stated that he did not believe that the Committee would be in a position to make recommendations for the Short Session of the General Assembly. He said that it was the feeling of the cochairs to make recommendations late in the year for the long session in 2007, and added that the Committee is to report on or before December 31, 2006.

Cochair Hackney reminded the members that the Committee had been charged with looking at the process for judicial review of the merits of constitutional claims in State post-conviction and federal habeas corpus proceedings.

Mr. Hal Pell, Committee Counsel, was recognized to comment on the Judicial Review of Death Penalty Cases chart showing the steps in the appellate process that had been distributed to the members, (Attachment III).

Mr. Barry McNeill, Special Deputy Attorney General, North Carolina Department of Justice was recognized. Mr. McNeill discussed the process that death penalty cases go through and the way that his office is set up to handle those cases. He said that in North Carolina, the average time from the time that a defendant has received the latest sentencing until the time an execution is carried out is ten years and four months. He noted that the national average is very much the same. Mr. McNeill said that the answer as to why it takes this much time lies in the process that is often referred to as "super due process." He said that the current death penalty statute that was enacted in 1977 and amended in 1996, attempts to provide a defendant with one full and complete round of going through not only the direct appeal, but also the motion for appropriate relief, review of that motion for appropriate relief in the North Carolina Supreme Court by petition for Writ of Certiorari, and sometimes a petition to the United States Supreme Court for a second-time review of the post-conviction proceedings in state court. He said the case then moves to the next stage called the federal Habeas Corpus stage which is a federal post-conviction proceeding. From there, a case goes on appeal to the U. S. Court of Appeals for the Fourth Circuit and back to the U. S. Supreme Court again.

Mr. McNeill said that in order for a case to get to the post-conviction stage, it must first get through direct review by the North Carolina Supreme Court and the U.S. Supreme Court. According to the latest available numbers (2003), the North Carolina Supreme Court sent back death penalty cases 42% of the time for resentencing, and 14% of the time for new trials in the over 400 cases they reviewed. He added that the 42% was misleading because approximately 44 cases had to go back for resentencing as a result of McCoy, leaving a more accurate figure of 16% for the rate of reversal by the North Carolina Supreme Court on direct appeal for resentencing.

Mr. McNeill called attention to a handout that was distributed, (Attachment IV), and highlighted several things in the report. He stated that in the post-conviction stage a defendant is statutorily afforded two attorneys at which point the Capital Litigation Section of the Office of the Attorney General ordinarily becomes involved. He noted that they try to keep a local prosecutor involved, if possible. He said that last year, the office filed 18 answers to motions for appropriate relief and handled 5 evidentiary hearings in MAR matters, 2 Federal evidentiary hearings and 6 appeals to the U.S. Court of Appeals for the Fourth Circuit. He said that their section currently has 161 cases that are divided between 12 attorneys with a typical caseload of as few as 8 cases to as many as 15 or more for each attorney in addition to motions that they are constantly filing or responding to

Discussion followed regarding whether there is a timetable for courts to rule on appeals and reviews. Mr. McNeill stated that there really is no timetable in state court. Representative Holliman asked if other states have such limits. Mr. McNeill said that he was not aware of other states having imposed time limitations in state post-conviction proceedings, but that there are other ways in which states can go about in helping to move the cases along.

There was also discussion regarding whether or not there is a time limit for a judge to hear a motion for appropriate relief once it has been filed at the Superior Court level. It was asked if it is true that once a judge hears a motion, there is no time limit in which he has to rule. Mr. McNeill replied that this is correct.

Mr. Tye Hunter, Director, Office of Indigent Defense Services, was recognized. Mr. Hunter discussed the Indigent Defense Services' standards and procedures for appointment of post-conviction counsel. He pointed out that these procedures were effective July 1, 2001 and that the procedures do not apply to a majority of the cases still on post-conviction. Mr. Hunter said that since that date, IDS has had good standards for appointment of counsel at trial, at appeal and at post-conviction, but since those standards did not exist prior to July 1, 2002 he suggested that the Committee take into consideration that group of people who were sentenced and whose cases were partially reviewed prior to that time and think about a process for them.

Mr. Hunter said that under IDS standards, an attorney must demonstrate that he or she has the required legal knowledge and skill necessary for representation as post-conviction counsel in a capital case and will apply that knowledge and skill with

appropriate thoroughness and preparation. He stated that the lawyers must have five years of criminal or civil trial experience, at least five years of criminal or five years of criminal/civil appellate experience, or have at least five years of state or federal post-conviction experience and must be familiar with ethics requirements and current criminal practice and procedure in North Carolina. He discussed many additional requirements including familiarity and experience in the use of expert witnesses and scientific and medical evidence including mental health, social history and pathology.

Mr. Hunter stated that the $85 hourly rate that was set in 1994 is not adequate and suggested that it be raised by $10 an hour. He said that since 2001, 175 lawyers have been appointed to handle 92 capital post-conviction cases.

Mr. Hunter urged the Committee to consider ways to remove procedural bars and allow cases to be argued on their merits. He stated that there has been no genuine proportionality review in North Carolina for 15 years and suggested that the Committee look into this. Mr. Hunter stated that the statute specifically provides that there is no right to effective assistance of post-conviction counsel and that this is another example of a procedural matter that is getting in the way of determining justice in capital cases. He said that there should be a way to guarantee assistance of counsel if lawyers make errors.

Mr. Hunter was asked if IDS would be able to handle cases if a mechanism was put into place to expedite the process. He replied that it would depend upon that way in which the process was accomplished and suggested that removal of some of the procedural bar issues would speed things up with motions of appropriate relief.

Mr. Gordon Widenhouse, a post-conviction defense counsel, was recognized. He discussed the Kenneth Rouse case that illustrated some of the reforms that he thought the Committee should propose. Court documents related to this case were distributed to the Committee, (Attachments V and VI). He suggested several reforms to make judicial review of claims in state post-conviction proceedings fairer and more reliable. Among his recommendations were a requirement of an evidentiary hearing in state court and to have a hearing on the merits of the claims. Additional suggestions were the creation of a standard that would guarantee quality effective counsel and the right to appeal the denial of a motion for appropriate relief to the state supreme court.

Mr. Paul Green, a post-conviction defense counsel, was recognized. Mr. Green related experiences with death penalty cases. He spoke of procedural pitfalls at every stage of the post-conviction process that can bring about procedural default. He recommended that at the first post-conviction stage, trial counsel be allowed to make a showing to the court that they are unable to get affidavits or information to investigate or support claims, and allow subpoena power either for deposition or requests for documents, or allow for an evidentiary hearing. He expressed support for not barring later consideration of claims if the first post-conviction attorney has made errors such as missing a deadline. Mr. Green also discussed appellate review of the denial of a motion for appropriate relief.

Brief discussion followed regarding actual innocence not being grounds for relief in and of itself. Mr. Green stated that it is very hard to know, and harder to prove, if someone is "actually innocent."

There was also discussion regarding the amount of time that mandatory evidentiary hearings might add to the process. Mr. Widenhouse noted that he thought mandatory evidentiary hearings might move the process along more quickly. He said that if some of the default requirements were eliminated there would be no need for the constant search for affidavits, etc. and could help move toward a hearing with some sort of speed where the judge could adjudicate on the merits of the issue.

Mr. McNeill was recognized and commented on procedural default. He said procedural default rules in both capital and non-capital cases encourages the raising up of claims at the earliest possible time either at trial, at direct appeal or in the first motion for appropriate relief. He said that without this, the defendant is at liberty to wait until the first motion for appropriate relief to raise a claim that could have been raised at trial or on direct appeal. He said that without a procedural default rule, the defendants are then going to be able to go back and raise a second motion for appropriate relief, or a third or a fourth motion for appropriate relief because there is no impediment to them doing so.

Mr. Ken Rose, Director, Center for Death Penalty Litigation, was recognized. Mr. Rose stated that the safety net to catch mistakes made in trials is badly frayed and that often the system is unable to remedy the problems. He cited problems of incompetent counsel and of persons who were the victims of race. He said that two questions the Committee must address are: (1) Why does the system fail to catch mistakes and allow persons with serious problems in their cases to be executed, and (2) What reforms can be put into place that will better sort out the problem cases. Mr. Rose stated that the one realistic shot at relief is at the motion for appropriate relief and that this is where the focus of reform should be concentrated. He spoke of four problems at the motion for appropriated relief stage: (1) cases being heard by elected judges subject to popular will; (2) inadequate system of internal controls; (3) incompetent defense counsel; (4) and no right to evidentiary hearings. Mr. Rose urged the Committee to consider three specific reforms: (1) create a right to the effective assistance of post-conviction counsel; (2) allow mandatory hearings for the first-time motions for appropriate relief; (3) permit automatic appeal in post-conviction cases. A handout of recommendations is included in the attachments to the minutes, (Attachment VII). An additional handout was distributed to the members and is attached to the minutes, (Attachment VIII).

The Honorable James M. Webb, Superior Court Judge, was recognized. Judge Webb briefly reviewed the process for judicial review of death penalty cases in North Carolina. He shared with the Committee suggestions he had received from colleagues who recommended that motions for appropriate relief be abolished and that the system be fixed on the front end. Judge Webb then suggested some "front-end fixes." He said that instead of appointing two counsels at state expense at the MAR stage, require the appointment of two counsel on the direct appeal from the trial level to the Supreme Court

of North Carolina, and then when a motion for appropriate relief is filed, only allow for the appointment of one counsel to file and argue that at the Superior Court level. He said that this would require an amendment of 7A-451(c). Judge Webb stated that there was a concern among some of his colleagues regarding the appointment by IDS of attorneys to perfect the motions of appropriate relief saying that some think that there are talented and able attorneys that are not being included in this legal work. He said that they feel that a limited pool of attorneys drives up costs of MARs and that the legislature should take a look at the cost and how much money is being spent on these attorneys. Judge Webb recommended that the complete files be made available to the defendant's direct appellate counsel at the direct appeal stage. He further suggested that on direct appeal, the Supreme Court of North Carolina be required to consider whether or not there had been ineffective assistance of counsel claims.

Judge Webb encouraged the Committee to not enact legislation that would eliminate procedural bars. He stated that he did not endorse the idea of requiring as a matter of right, an appeal from MARs to the Supreme Court of North Carolina, or that MAR evidentiary hearings be made mandatory.

A packet of information regarding the post-conviction process in capital cases was made available to the members by the North Carolina Academy of Trial Lawyers and is attached to the minutes, (Attachment IX).

Following brief Committee discussion, the meeting was adjourned at 1:00 p.m.

Representative Beverly Earle
Co-Chair

Representative Joe Hackney
Presiding Co-Chair

Emily Reynolds Freeman
Commission Clerk

ATTACHMENTS:

Attachment I - Agenda
Attachment II - Visitor Registration
Attachment III - Judicial Review Chart – Hal Pell
Attachment IV - Handout – Barry McNeill
Attachment V - Court document – Gordon Widenhouse
Attachment VI - Court document – Gordon Widenhouse
Attachment VII - Suggested reforms in Post-Conviction Proceedings – Ken Rose
Attachment VIII - Handout – Ken Rose
Attachment IX - Handout – North Carolina Academy of Trial Lawyers

HOUSE SELECT COMMITTEE ON CAPITAL PUNISHMENT

Legislative Building, Room 1228
Raleigh, NC

APRIL 27, 2006

AGENDA

10:00 – 10:05 AM	**INTRODUCTION AND OPENING REMARKS**
	Rep. Joe Hackney, Co-Chair Rep. Beverly Earle, Co-Chair
	POST-CONVICTION PROCEEDINGS
10:05 – 10:40 AM	Barry McNeill Special Deputy Attorney General North Carolina Department of Justice
10:40 – 11:00 AM	Tye Hunter Director, Office of Indigent Defense Services
11:00 - 11:30 AM	Ken Rose Director, Center for Death Penalty Litigation
11:30 – 12:00 PM	Paul Green and Gordon Widenhouse Post-Conviction Defense Counsel
12:00 – 12:30 PM	The Honorable James M. Webb Superior Court Judge
12:30 PM	**COMMITTEE DISCUSSION**
	INSTRUCTIONS TO STAFF
	ADJOURNMENT

ATTACHMENT II

VISITOR REGISTRATION SHEET

House Select Committee on Capital Punishment 4-27-06

Name of Committee | Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Barry McNeill	Atty General
John Motley	Gov Office
Tyl Hunter	IDS
Steve Smith	NC Council of Churches
G McLeod	NC AFO
Charlie Reece	NC CDA
Peg Dorer	NC Conf. of D.A.'s
Mel Chilton	NCVAN
A. A. Adams	Victim Advocate
Johnny Massey	N.C. VAN
Chet Hodgin	Victim

VISITOR REGISTRATION SHEET

House Select Committee on Capital Punishment 4-27-06

Name of Committee Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
David Ingram	WSJ
Colleen Tschanek	Smith Moore
Jule Shanklin	Self
James D. Hunt	"
Mary Burgess	Self
Mac Beason	Beason Public Affairs
Jeremy Collins	NCCM
JUSTIN HARVEY	PFAOP

VISITOR REGISTRATION SHEET

House Select Committee on Capital Punishment — 4-27-06

Name of Committee — Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Troy Page	NC Sentencing Commission
Myles Wallace	247 Carolina Meadows Chapel Hill
Tye Hunter	IDS
Chad Hinton	Civitas Institute
C Fuller	CJPC
Jon Webb	Superior Court Judge
Mildred Spearman	NCDOC
DAVID MILLS	COMMON SENSE FOUNDATION
Brian Elderbroom	Common Sense Foundation
Jane Hurst	120 Pineland Circle Raleigh N.C. 27606

VISITOR REGISTRATION SHEET

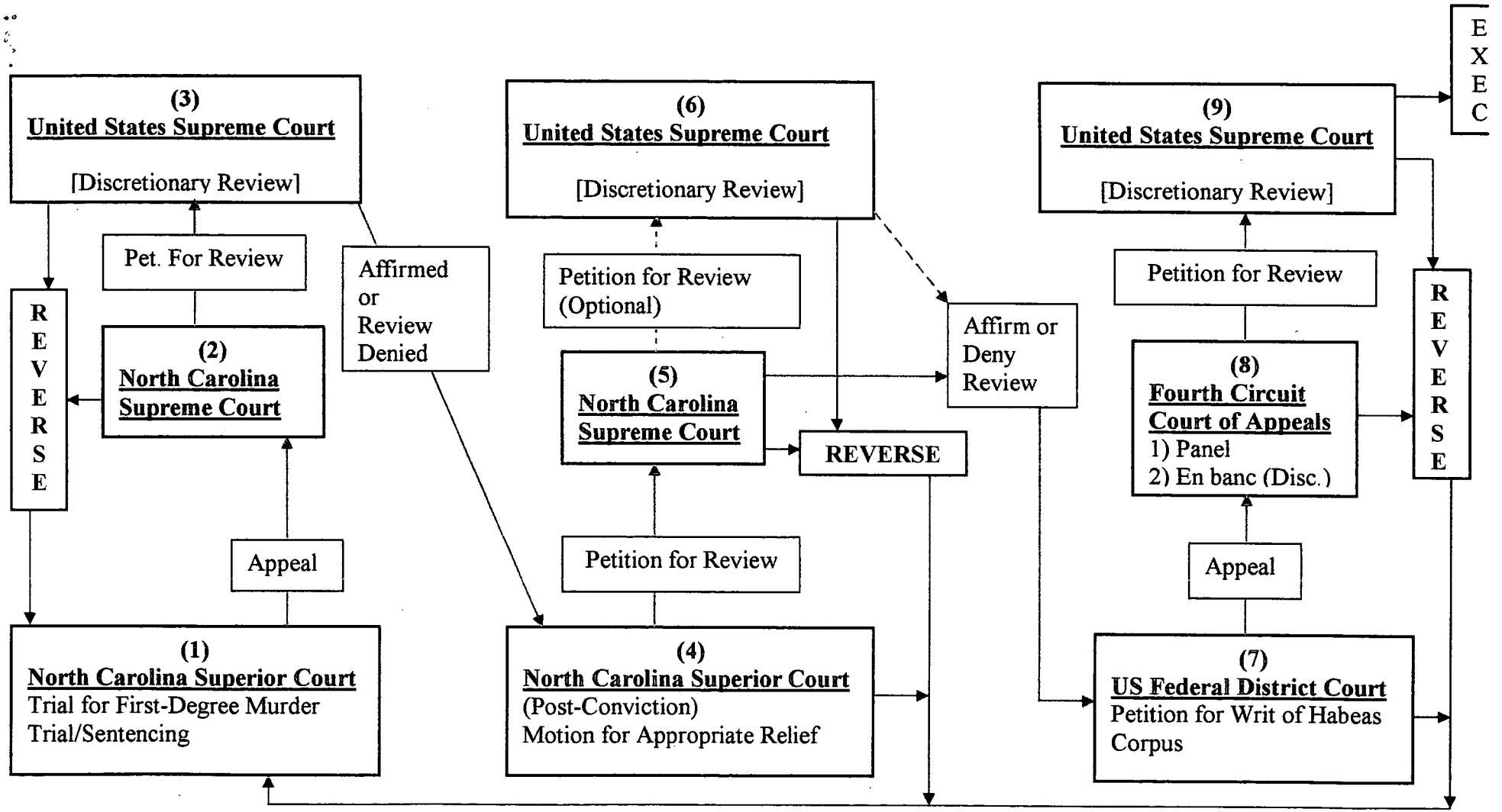
House Select Committee on Capital Punishment 4-27-06

Name of Committee Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Ken Rose	Center for Death Penalty Litigation
Earl M. Jones	Atty at Law
Gordon Widenhouse	Attorney at Law
Holly Bryan	NCATL
Chris Mumma	NC Commission on Actual Innocence
Gerda Stein	CDPL
Lee Rubert	CDPL
John Strange	PFAOP
Ted Frazer	Citizen
Robin Rogers	CDPL
John Madler	NC Sentencing Commission

JUDICIAL REVIEW OF DEATH PENALTY CASES IN NORTH CAROLINA



ATTACHMENT III

State and Federal Appellate and Post-Conviction Processes in North Carolina Death Penalty Cases and The Role of the Capital Litigation/Federal Habeas Section of the Attorney General's Office

Capital Punishment Study Committee
April 27, 2006

Barry S. McNeill
Special Deputy Attorney General
Capital Litigation/Federal Habeas Section

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629
(919) 716-6500
bmcneill@ncdoj.com

INTRODUCTION

The criminal appellate process is complex and confusing for lay persons. For those of us who are involved in that process for death penalty cases, we know that the painstaking review of capital cases by state and federal courts can take years, sometimes a decade or more. The often asked question is why does a capital case take so long. According to the latest statistical information for North Carolina death penalty cases, the average time from the most recent death sentence received to execution is ten years, four months (as of the execution of Willie Brown, Jr. on April 21, 2006, 42 death row inmates have been executed in North Carolina since 1977); the national average is also approximately ten years, four months, *Capital Punishment, 2004,* Bureau of Justice Statistics, p. 11, Table 11. The answer to this important question is not simple, and touches on a broad range of issues, from the complexity of such cases, to resources of the attorneys who are assigned to such cases and the judges who make the decisions in these cases.

Ultimately, there is a balancing point between the need for finality and carrying out of the court's judgment at the earliest possible completion of thorough court review, versus the desire for assurance of such full and fair court review so that only the guilty and most deserving defendants, as determined by the unanimous juries of their peers, are executed. These goals are in constant tension, especially when death row inmates sometimes express a desire to abandon their appeals, or, on the other extreme, file successive, last-minute rounds of post-conviction appeals to attempt to forestall their executions,

sometimes challenging not only their underlying convictions and sentences, but collateral issues, such as the execution method itself. The post-conviction statutes which were enacted in 1977, and amended in 1996, attempt to strike the appropriate balance between this need for finality, and yet full and fair appellate court review. In addition to the automatic direct appeal in death penalty cases, these statutes afford, at the very least, the opportunity for one full and complete round of state and federal post-conviction review of a death penalty case before the defendant faces a realistic execution date. Even after such initial state and federal post-conviction review, a defendant can obtain further post-conviction review if there is a showing of newly-discovered evidence of factual innocence or ineligibility for the death penalty, or he otherwise can overcome his failures to raise the claims in earlier proceedings. While lengthy, the present state and federal procedures for post-conviction review afford comprehensive judicial review of North Carolina death penalty cases. When state and federal courts find prejudicial errors, the result is new trials or resentencings. On the other hand, when the courts find no errors or that the errors were non-prejudicial, the convictions and sentences are affirmed. There is probably no other legal system in the entire world that affords more vigorous, thorough judicial scrutiny to its criminal cases.

The following summary provides an overview of these state and federal appellate processes. Although this summary focuses on the stages in a death penalty case, the appellate stages and steps are the same for both capital and non-capital cases.

SUMMARY OF STAGES IN A DEATH PENALTY CASE FROM TRIAL TO EXECUTION

Including the trial and sentencing of a capital case, there are five separate stages involving ten identifiable steps in the prosecution, direct appellate review, state and federal post-conviction review, and clemency determination by the Governor of capital cases. The attached chart on page 25 illustrates these stages, which include the following: (1) Trial/Sentencing; (2) Direct Appeal; (3) State Post-Conviction; (4) Federal Habeas Review; and, (5) Clemency proceedings before the Governor of the State of North Carolina. A brief synopsis of these stages follows, along with an explanation of the steps involved in each stage.

A. Trial/Sentencing Stage

A capital case is a case involving the conviction of a defendant for first-degree murder pursuant to N.C. Gen. Stat. § 14-17 (2005), in which the jury has recommended and the trial judge has imposed a sentence of death under the sentencing provisions of N.C. Gen. Stat. § 15A-2000 (2005). The prosecution of a capital case generally takes place in two stages before a jury at the superior court level, and constitutes the "Trial/Sentencing Stage." At the first phase, the jury hears the evidence and determines unanimously with its verdict whether the defendant is guilty or innocent of the first-degree murder charge(s).

If the defendant is found guilty, a second phase is held before the same jury (this separation of the proceedings is called "bifurcation"). During this second phase, the State is allowed, but not required, to present additional evidence in order to prove any of the statutorily-limited aggravating circumstances which support the imposition of the death

penalty, N.C. Gen. Stat. § 15A-2000(e). The State must prove beyond a reasonable doubt the existence of at least one specific aggravating circumstance in order for the jury to recommend the death penalty. The death penalty may not be imposed mandatorily, but only on a case-by-case basis determined by the egregiousness of the facts of the particular case relative to other first-degree murder cases. *Woodson v. North Carolina*, 428 U.S. 280 (1976). For all death penalty candidates, *Woodson* requires individualized consideration of the character and record of each offender and individualized consideration of the circumstances of the offense. The defendant may offer evidence of any mitigating circumstances which may warrant a life rather than death sentence. Mitigating circumstances are not statutorily limited, N.C. Gen. Stat. § 15A-2000(f) (2005). In contrast to its findings of aggravating circumstances and in conformity with the decision in *McKoy v. North Carolina*, 494 U.S. 433 (1990), the jury is not required to be unanimous in order to find that something is a mitigating circumstance. An individual juror may deem a factor mitigating even if all eleven other jurors do not agree. Specifically, the jury must unanimously find particular statutory aggravating circumstances, but any single juror can determine that a mitigating circumstance outweighs the aggravating circumstances, and therefore ensure a life rather than a death sentence. Only if the State proves and the jury finds beyond a reasonable doubt (1) one or more aggravating circumstances, (2) that the mitigating circumstances, if any, are insufficient to outweigh the aggravating circumstance or circumstances, and, (3) that the aggravating circumstances are sufficiently substantial to warrant the death penalty, is the jury required to recommend that the defendant be sentenced to death. In some cases, the defendant may plead guilty to having committed a capital first-degree murder, but a sentencing jury then must be chosen to hear the

sentencing phase and determine whether to impose a sentence of life or death. This bifurcation of process allows the Supreme Court of North Carolina to reverse and remand as to sentencing only. Because of the extra demand on resources involved with seeking the death penalty, prosecutors typically seek capital punishment in a very limited number of homicides. As of the enactment of N.C. Gen. Stat. § 15A-2004 (2005) in 2001, prosecutors have the discretion whether or not to seek the death penalty in a case, even if the case involves one or more possible aggravating circumstances.

The local district attorney is responsible for the prosecution of such capital cases on behalf of the State of North Carolina. N.C. Const. art. IV, § 18 (2005). The Special Prosecutions Section of the Attorney General's Office can, and sometimes does, upon request, accept responsibility for the trial and sentencing proceedings, particularly in the event of a conflict of interest by the district attorney. N.C. Gen. Stat. § 114-11.6 (2005), cited in *State v. Camacho*, 329 N.C. 589, 406 S.E.2d 868 (1991). The Attorney General also consults with and advises local district attorneys about criminal matters, including the prosecution of capital cases. N.C. Gen. Stat. § 114-2(4) (2005).

B. Direct Appeal Stage

Although the trial court may set a date for the capital defendant's death sentence to be executed, state law requires that "[t]he judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of North Carolina pursuant to procedures established by the rules of Appellate Procedure." N.C. Gen. Stat. § 15A-2000(d)(1) (2005). A criminal defendant's initial appeal of his/her conviction and sentence to the Supreme Court of North Carolina is called the "Direct Appeal Stage," and is the first and only required step in the appellate review process. On motion by the defendant, the

Supreme Court of North Carolina routinely grants a stay of an impending execution in order to permit this "automatic" direct appeal. The stay ordinarily continues in effect during the pendency of the appeal and expires upon the entry of the Supreme Court of North Carolina's decision on direct appeal. Cases reversed and remanded for resentencing because of sentencing phase errors can result in another subsequent death sentence, beginning the process again.

Typical issues on direct appeal can involve any matters of record. Included are errors in jury selection, evidentiary issues, attacks on sufficiency of the evidence, and constitutionality of aggravating circumstances during the sentencing phase. Claims of Ineffective Assistance of Counsel (IAC) where the issue can be resolved by the record are also appropriate at this stage.

By statute, it is the Attorney General's responsibility to represent the State on the direct appeal of such capital cases to the Supreme Court of North Carolina. N.C. Gen. Stat. § 114-2(l) (2005). A select number of qualified attorneys in the Office of the Attorney General are assigned to handle the direct appeal stage of a capital case. The responsibilities of such attorneys on appeal include, among other things: consultation with the local prosecutor as to the settling of the Record on Appeal which the Supreme Court of North Carolina will review; review of the transcripts of pretrial motions, jury selection, guilt-phase evidence, sentencing phase evidence, arguments by counsel, and instructions by the trial court; review of the defendant's Brief on appeal; legal research of the issues presented; preparation of the Brief on behalf of the State, including a summary of the procedural history of the case and the evidence presented at both stages, as well as the State's arguments in response; and, oral argument of the State's positions to the Supreme

Court of North Carolina.

If the conviction and death sentence are affirmed on the direct appeal, the capital defendant may (but is not required to) petition the United States Supreme Court to review the decision of the Supreme Court of North Carolina. The procedure by which such review is sought is called a "Petition for Writ of Certiorari." Certiorari review is discretionary, is granted by the United States Supreme Court in only a very limited number of cases, and usually is reserved for issues having national significance or import (in 2001, the United States Supreme Court granted certiorari in 88 of 7924 cases, or 1.1%, the majority of which were paid cases rather than *in forma pauperis*. Historically the Court grants review in approximately 4% of paid cases.) The Attorney General, in particular the attorney who was assigned the case on direct appeal, has the responsibility of filing a Brief in Opposition to the Petition for Writ of Certiorari, demonstrating why the Court ought not review the case. Conversely, in the event that a conviction and/or death sentence is reversed or vacated in the Supreme Court of North Carolina due to a federal constitutional violation, the Attorney General makes the determination whether the State should seek certiorari review and, if appropriate, prepares and files a Petition for Writ of Certiorari to the United States Supreme Court on behalf of the State. In the event that certiorari is granted, the Attorney General also would research, prepare, and argue the case on behalf of the State either as the Appellee or the Appellant.

The denial of certiorari by the United States Supreme Court ordinarily signals the end of the Direct Appeal Stage and renders the case "final" for most purposes, including whether decisions thereafter rendered apply retroactively. *See Teague v. Lane*, 489 U.S. 288 (1989). However, since the rules of the United States Supreme Court provide for

Petitions for Rehearing of the denial of certiorari review, Supreme Court Rule 44.2, capital defendants routinely file such petitions.

C. State Post-Conviction Stage

Following the denial of certiorari review and/or rehearing by the United States Supreme Court, the State formerly sought the rescheduling of a capital defendant's execution in order that the judgment of the court and sentence could be effectuated. A new execution date also served the purpose of setting into motion the defendant's opportunity to pursue what commonly are called post-conviction remedies, a Motion for Appropriate Relief pursuant to N.C. Gen. Stat. § 15A-1415 (2005). In North Carolina, post-conviction defense counsel for capital defendants are experienced attorneys paid by the Administrative Office of the Courts through the Office of Indigent Defense Services (IDS).

Typical issues raised during post-conviction include ineffective assistance of counsel (IAC) for matters outside the record, prosecutorial suppression of evidence under *Brady v. Maryland*, 373 U.S. 83 (1963), and juror misconduct and attempts to impeach jury verdicts.

In 1996, the North Carolina General Assembly enacted House Bill 9, "An Act to Expedite the Post-Conviction Process in North Carolina," making a number of significant changes to the post-conviction procedures in North Carolina capital and non-capital cases.[1] One of the major amendments established for the first time a 120-day time limit for the

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[1] Statistics on North Carolina executions currently show that for the eight death row inmates executed from 1984 until the enactment of House Bill 9 in 1996, the average time from the most recent death sentence received to execution was eight years, three months; since the enactment of House Bill 9 in 1996, thirty-four North Carolina death row inmates have been executed with an average time from the most recent death sentence received to execution of ten years, nine months.

filing of a Motion for Appropriate Relief in capital cases. N.C. Gen. Stat. § 15A-1415(a) (2005). Unlike the remainder of House Bill 9, which became effective on June 21, 1996, this time limit applied only to death sentences rendered after October 1, 1996.

Another provision in House Bill 9 required that the State make available (otherwise called "discovery") to a capital defendant's post-conviction counsel the complete files of all law enforcement and prosecutorial agencies involved in the investigation and prosecution of the crimes. N.C. Gen. Stat. § 15A-1415(f) (2005). The amendments to N.C. Gen. Stat. § 15-194 (2005), authorize the Secretary of the North Carolina Department of Corrections to schedule the execution date in a capital case upon notification that appellate proceedings are at an end, or the capital defendant has failed to take timely action to pursue one of the available appeals.

Normally, new and different attorneys are recruited by the defendant, his/her family, the Center for Death Penalty Litigation (CDPL), or IDS in order to reinvestigate the case and/or critique the actions of the defendant's original trial and appellate counsel. The new attorneys then file a Motion for Appropriate Relief (MAR) in the Superior Court where the defendant was tried, and, if necessary, request a further stay of the defendant's execution in order to allow for the hearing and adjudication of the new claims. The MAR is required by statute to be "supported by affidavit or other documentary evidence if based upon the existence or occurrence of facts which are not ascertainable from the records and any transcript of the case or which are not within the knowledge of the judge who hears the motion." N.C. Gen. Stat. § 15A-1420(b)(1) (2005). Once the MAR is filed with the Clerk of Superior Court, the Clerk is required to place the MAR on the docket and bring the MAR to the attention of the resident superior court judge or any superior court judge holding

court in that county or district, who (in capital cases) "shall review the motion and enter an order directing the State to file its answer within 60 days of the date of the order," and if the judge determines that a hearing is necessary, the judge "shall calendar the case for hearing without unnecessary delay." N.C. Gen. Stat. § 15A-1420(b1) (2) (2005).

Given the nature and complexity of such litigation, the local district attorney normally requests the assistance of the Attorney General in handling such MARs. The attorneys in the Attorney General's Capital Litigation/Federal Habeas Section advise, assist, and, in most capital post-conviction cases, assume the responsibility for the litigation of capital post-conviction hearings at the Superior Court level. Such assistance may involve investigating and researching the claims raised, interviewing witnesses, depositions, discovery, participation at the evidentiary hearing, briefing the legal issues, and preparation or review of proposed findings of fact and conclusions of law for the presiding judge.

Assuming the Superior Court denies the MAR, the capital defendant may continue his pursuit of post-conviction remedies by filing (within 60 days after delivery of the transcript of the hearing) a Petition for Writ of Certiorari in the Supreme Court of North Carolina pursuant to N.C. R. App. P. 21(e)-(f) (2005). The Attorney General, in particular the members of the Capital Litigation/Federal Habeas Section, normally assumes the responsibilities for this stage, including review of the petition and arguments; further legal research; and, drafting and editing a Response in Opposition setting out the State's reasons why the Court should not accept review of the case. Conversely, if the Superior Court rules against the State, the Attorney General must decide whether the State should pursue the case to the Supreme Court of North Carolina and, if so, research, draft, edit, and file a Petition for Writ of Certiorari attempting to persuade the Court to accept review

of the case. If review is granted either way, the Attorney General takes on the responsibility of briefing and arguing the case before the Supreme Court of North Carolina.

Finally, if the Supreme Court of North Carolina denies certiorari review, the capital defendant may (but is not required to) petition the United States Supreme Court to review the decision of the Superior Court. The Attorney General again has the responsibility of filing a Brief in Opposition to the Petition for Writ of Certiorari, demonstrating why the Court ought not review the case. Conversely, in the event that a conviction and/or death sentence is reversed or vacated by the Superior Court due to a federal constitutional violation and the Supreme Court of North Carolina has declined review, the Attorney General again makes the determination whether the State should seek certiorari review and, if appropriate, prepares and files a Petition for Writ of Certiorari to the United States Supreme Court on behalf of the State. In the event that certiorari is granted, the Attorney General also would research, prepare, and argue the case on behalf of the State, either as the Appellee or the Appellant.

D. <u>Federal Habeas Relief Stage</u>

A capital defendant must fully exhaust his/her state court remedies before pursuing any federal constitutional claims in federal court by means of a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. *See Rose v. Lundy*, 455 U.S. 509 (1982). Such exhaustion of state court remedies is accomplished by either having raised the claim on direct appeal to the Supreme Court of North Carolina, or by way of the post-conviction MAR in the Superior Court and then seeking certiorari review of the claim to the Supreme Court of North Carolina. The exhaustion principle seeks to minimize interference by federal courts into state court criminal proceedings. Failure to exhaust a claim in state

court requires dismissal by the federal court without prejudice so that the unexhausted claim(s) can be raised and exhausted first in the state courts. Exhaustion allows state courts to act, if possible, on adequate and independent grounds obviating the need for any subsequent litigation in federal courts, conserving judicial resources.

Similarly, defendants in state proceedings must raise issues if available during state court proceedings (e.g., during direct appeal or state post-conviction proceedings) or risk waiving the issue through procedural default. Provided the state's procedural rules are deemed adequate and independent, a federal court may not review constitutional claims when a state court has declined to consider the merits of these claims based on violations of state procedural rules. *See Harris v. Reed*, 489 U.S. 255, 262 (1989). North Carolina's procedural default rules bar subsequent petitions for post-conviction relief when: 1) the defendant failed to raise an issue that he was in a position to raise during a previous MAR; 2) there has been a prior determination on the merits (bars subsequent litigation in state courts only); 3) on direct appeal, the defendant fails to raise an issue he was in a adequate position to raise; and 4) the defendant failed to file a timely MAR (generally 120 days from one of several specific events). N.C. Gen. Stat. §15A-1419 (a) (1), (2), (3) and (4) (2005).

Defendants may overcome state procedural default in federal court only by showing 1) cause and 2) prejudice, or by showing why failure to review will lead to a fundamental miscarriage of justice. To demonstrate cause, the defendant must point to some objective factor external to the defense which impeded counsel's ability to comply with the procedural rule. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Several examples include deliberate governmental concealment of evidence, unavailability of specific claims during the prior MAR, and certain IAC claims. "'To establish actual prejudice,' the petitioner 'must

shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'" *United States v. Frady*, 456 U.S. 152, 170 (1982). Attorney neglect, by itself, does not satisfy the cause and prejudice requirements. To establish a fundamental miscarriage of justice, the petitioner must show that, more likely than not, but for the error being submitted, no reasonable juror would have found the defendant guilty, or eligible for the death penalty. Proving a fundamental miscarriage of justice is a difficult threshold to meet. New evidence, which must be clear and convincing, is one example where the court may find a fundamental miscarriage of justice has occurred.

Federal Public Defenders are not appointed to state capital defendants in federal habeas proceedings. Defense attorneys for such proceedings in federal court are selected from a pool of qualified attorneys, requiring the lead attorney to have at least 5 years experience with felony prosecutions, and the secondary counsel must have some amount of experience which would enable him or her to adequately represent the defendant. The federal courts currently appropriate $125 per hour for federal habeas defense to ensure competent defense counsel. Per-hour payments of defense counsel have led some circuits to offer a flat post-conviction fee rather than an hourly rate, reducing the incentive to maximize the total time spent in court.

Typically, after a capital defendant has exhausted his state court remedies, he/she can be expected to file a federal habeas corpus petition in one of the three trial districts (Eastern, Middle, and Western) of the United States District Courts in North Carolina. Federal Habeas Corpus is a civil suit claiming another person, namely the prison warden,

is violating the defendant's constitutional rights by continued incarceration.

On April 24, 1996, the "Antiterrorism and Effective Death Penalty Act of 1996" [hereinafter "AEDPA"] was signed into law making sweeping changes to federal habeas corpus procedures in both capital and non-capital cases. One of the most significant amendments established a one-year time limit for the filing of a federal habeas corpus petition, which begins to run from the latest of several events, typically from the conclusion of the direct review appellate process. The one-year time period is tolled - it does not run - while a properly filed application for post-conviction relief (i.e., MAR) is pending in state court. Thus, the AEDPA forces defendants to file expeditiously in state post-conviction proceedings if they wish to preserve the right to seek federal habeas corpus relief. Motions for a stay of execution are routinely granted at this stage. The AEDPA forced a greater focus on litigating all or as much as possible, as early as possible. The intended effect is to compress the federal habeas process, which historically has been the most time consuming phase of a capital case.

The federal habeas petition is filed in (or if misfiled it is transferred to) the federal district court for the county in which the case was tried. The Attorney General, as the legal representative of the North Carolina Department of Correction which has custody of convicted felons serving prison terms, including prisoners on the death rows of Central Prison and Women's Prison in Raleigh, North Carolina, has the responsibility of representing the State in such federal habeas actions. N.C. Gen. Stat. § 114-2(2) (2005). When the petition is filed and served, the Attorney General, in particular the members of the Capital Litigation/Federal Habeas Section, initially reviews the allegations; preliminarily assesses the merits of the allegations; determines what state court records and exhibits

are needed; contacts the offices of the local clerk or district attorney for the records, exhibits, and transcripts; ascertains whether any affidavits are needed and, if so, contacts and interviews the affiants; reviews the records, exhibits, and transcripts as they pertain to the legal issues raised; researches the legal issues; drafts and edits a written answer to the petition, along with appropriate motions; and, supervises the forwarding and filing of the State's answer, motions, and record to the federal district court.

If the case cannot be adjudicated on the pleadings and the federal district court deems that an evidentiary hearing should be held, the Attorney General's responsibilities include contacting the prospective witnesses about the case and setting up interviews; investigating the case and preparing for the interviews; following up leads from these interviews and the investigation; preparing direct and cross-examinations based on what is learned in the interviews and investigation; determining what exhibits will be introduced at the hearing; updating research on the legal issues; making strategic trial decisions; and, overseeing the issuance of subpoenas for the witnesses. Often these witnesses are experts in the fields of medicine, psychiatry, psychology, or statistics. At the actual evidentiary hearing, the Attorney General must be prepared to cross-examine the capital defendant and his/her witnesses, raise appropriate objections to the evidence, present the State's own witnesses and evidence effectively, and normally make oral closing arguments.

The United States Court of Appeals for the Fourth Circuit (and other circuits) hears federal habeas appeals only after granting a Certificate of Appealability (COA). Once the federal district court makes its decision on the habeas petition, and assuming that decision is favorable to the State (and fails to grant a COA), the capital defendant must request a COA directly from the Fourth Circuit. The Fourth Circuit requires the appellant to

demonstrate to a three-judge panel not that he or she would prevail on the merits of the constitutional claim, but only that reasonable jurists would find the federal district court's assessment of the constitutional claims debatable (the question is the debatability of the underlying constitutional claim, not the resolution of that debate). *See Miller-El v. Cockrell*, 537 U.S. 322 (2003). The COA process as defined in *Miller-El* clearly distinguishes the COA determination stage (whether to hear the appeal) from an ultimate determination of the merits of the appeal. Fourth Circuit Rule 22 (a) and (b) allow for a request for COA without briefing. If the appellant does not request a COA but rather files notice of appeal, it will be treated as a request for COA. If a COA is granted, the Attorney General's responsibilities on the Fourth Circuit appeal include consulting with counsel for the capital defendant about the records to be included in the joint appendix on the appeal; review of the capital defendant's brief on appeal and arguments; additional legal research; drafting, editing, and re-editing of the State's Brief; preparation for oral argument; and, normally, rehearsal of the oral argument. The oral argument on the appeal is heard before a three-judge panel of the Fourth Circuit, which thereafter renders a decision to affirm or reverse the federal district court's judgment, or perhaps remand back to the federal district court for further appropriate proceedings.

In most capital habeas appeals where the panel's decision is favorable to the State, the defendants take advantage of petitioning for rehearing or suggesting that the appeal be reheard before all the active circuit judges of the Fourth Circuit (commonly called *en banc* argument). Where cases of major significance and precedent are argued on rehearing before all the active circuit judges of the Fourth Circuit, the Attorney General would be responsible for the rebriefing and reargument of the appeal.

If the State loses at the federal district court level, the mechanics of the appellate process are much the same, except that the Attorney General is responsible for making the decision whether to appeal; filing a timely notice of appeal, along with the requisite fee for the appeal; taking action to stay the federal district court's decision pending the appeal; and, preparing the opening Brief and Appendix, along with a Reply Brief to the defendant's brief, if necessary.

Assuming the Fourth Circuit affirms the federal district court's decision in the State's favor, the capital defendant may (but again is not required to) petition the United States Supreme Court to review the decision of the Fourth Circuit. The Attorney General again has the responsibility of filing a Brief in Opposition to the Petition for Writ of Certiorari, demonstrating why the Court ought not review the case. Conversely, in the event that a conviction and/or death sentence is reversed or vacated by the Fourth Circuit due to a federal constitutional violation, the Attorney General again makes the determination whether the State should seek certiorari review and, if appropriate, prepares and files a Petition for Writ of Certiorari to the United States Supreme Court on behalf of the State. In the event that certiorari is granted, the Attorney General also would research, prepare, and argue the case on behalf of the State either as the Appellee or the Appellant.

E. Clemency Stage

The state post-conviction and federal habeas stages may be repeated several times before a capital defendant finally is executed by the State, but recent decisions of the United States Supreme Court have made it increasingly difficult for capital defendants to bring such successive actions. Generally, a capital defendant is entitled to review on direct appeal to the Supreme Court of North Carolina, and may seek one round of state and

federal post-conviction review on his initial Motion for Appropriate Relief and Petition for Writ of Habeas Corpus. Once the state and federal courts have denied such relief, the capital defendant may not abuse the process by raising new post-conviction claims or claims which could or should have been asserted earlier unless he/she can show "cause" for and "prejudice" from such procedural omissions.

The United States Supreme Court requires that capital defendants are sane and mentally competent (understanding the nature of their death sentence) at all stages of the legal process up to the actual execution event. *Ford v. Wainwright*, 477 U.S. 399 (1986). In 2002, the Court recently added an additional safeguard, making it unconstitutional to execute the mentally retarded. *Atkins v. Virginia*, 536 U.S. 534 (2002). Mental retardation is statutorily defined on a state-by-state basis, but typically involves subaverage intellectual functioning and significant limitations in adaptive functioning, both manifested prior to age 18. *See* N.C. Gen. Stat. § 15A-2005 (2005).

Once a capital case reaches the stage when all state and federal remedies have been exhausted, the capital defendant's final process to avoid execution is to petition the Governor of the State of North Carolina for clemency pursuant to N.C. Const. art. III, § 5(6) (2005). The Governor has the power to grant a reprieve, commute the death sentence, or even pardon the capital defendant. In anticipation of the clemency proceedings, the Attorney General confers with the Governor's Office on the status of the case and may provide, upon request, any records, transcripts, or exhibits which the Governor may deem necessary in order to make the clemency decision. The Attorney General also may appear before and argue to the Governor any reasons why clemency is, or is not appropriate for the capital defendant.

If the Governor denies clemency, the Attorney General then confers with the Warden of Central Prison about the status of any remaining legal proceedings and advises the Warden whether the execution of the capital defendant may proceed. The Attorney General also may be required to litigate any collateral civil suits related to the execution process.

In general, states have three clemency schemes. Either the executive has unbridled discretion to commute sentences (North Carolina, Illinois), limited discretion based on the majority vote of a pardons board (Texas), or the pardons board has complete discretion (Pennsylvania). The Supreme Court has held that applicants for clemency are entitled to at least minimal due process protections. *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998).

F. Conclusion and Recommendations

Although the passage of the AEDPA and House Bill 9 in 1996 were intended to speed up and increase the fairness of post-conviction death penalty litigation, ten years of experience shows mixed results. North Carolina's average is consistent with the national average in terms of the average time between the imposition of the most recent death sentence received by the defendant and the defendant's execution (10 years, four months), and experience shows that the federal and state legislation have made it more difficult, but certainly not impossible, for capital defendants to bring successive state and federal post-conviction litigation. It is doubtful North Carolina's average time will improve significantly in the near future.

The reasons are many. Ten years after the passage of House Bill 9, the parties (capital defendants and the State) still are litigating a number of issues related to the

procedural default rules of N.C. Gen. Stat. § 15A-1419(a), including whether MARs filed prior to and pending at the time of the enactment of House Bill 9 in 1996 are governed by the provisions of House Bill 9; and, whether, notwithstanding the provision in N.C. Gen. Stat. § 15A-1419(c) that "ineffective assistance of prior postconviction counsel" may not constitute "good cause" to excuse one of the procedural defaults of N.C. Gen. Stat. § 15A-1419(a), a defendant has a right to the effective assistance of post-conviction counsel. The absence of any authoritative guidance or precedents from North Carolina appellate courts on these, and other important procedural issues means that lower courts sometimes get bogged down in these matters and reach inconsistent results, creating even more confusion and uncertainty about the law.

Resources, for the courts as well as the parties, are also a major issue. The MARs in capital cases sometimes can be 200 to 300 pages in length, with reams of appendices. It is not uncommon to have 20 to 30 main issues, with some issues, such as IAC, having multiple sub-issues. In addition, capital defendants often file multiple "amendments" to the original MARs (AMARs), sometimes as lengthy and complicated as the original MARs, which also must be answered. The transcripts of capital trials are often voluminous. The assimilation, production, and review of "complete" discovery pursuant to N.C. Gen. Stat. § 15A-1415(f) can be overwhelming, with sometimes literally thousands of pages of material involved. It takes a great deal of time and manpower to not only prepare and file a capital MAR, but to also prepare and file a necessary answer by the State to such an MAR, along with supporting documentation.

Superior court judges also do not have the resources of a law clerk to assist in the judge's review of the massive materials, or to help prepare the judge's order

granting or denying the MAR. As a result, the judges oftentimes depend on the prevailing party to prepare a proposed order, which can frustrate the non-prevailing party and sometimes necessitate objections to the proposed order which further delay the process.

Last year (2005), the attorneys in the Capital Litigation/Federal Habeas Section filed 18 answers to original capital MARs, AMARs, or successive MARs. State court evidentiary hearings were held in five cases. The Section filed responses in the Supreme Court of North Carolina to eleven (11) capital petitions for writ of certiorari, and two petitions for such writs seeking review of adverse superior court decisions. The Section's attorneys filed nine (9) answers to capital federal habeas corpus petitions. Two federal evidentiary hearings were held in capital habeas cases. The Section's attorneys filed six briefs in appeals by capital defendants to the United States Court of Appeals for the Fourth Circuit, argued six times in the Fourth Circuit, and filed eight briefs in opposition to capital petitions for writ of certiorari in the United States Supreme Court. In addition, in 2005 the Section's non-capital attorneys filed answers, motions for summary judgment, and/or motions to dismiss in 155 non-capital federal habeas corpus case, the largest number of cases since 1997. Because of the increasing number of such non-capital federal habeas corpus cases, it sometimes becomes necessary for the Section's capital attorneys to assist with this caseload.

There were five executions during 2005 (William Dillard Powell; Earl Richmond; Steven McHone; Elias Syriani; and, Kenneth Boyd), four of which involved successive state and federal litigation, and one of which also involved a lethal injection challenge. Another death row inmate (John Wesley Jones) died of natural causes following the

denial of his appeal by the Fourth Circuit. In addition, the Section's attorneys handled related state and federal motions/responses, as well as their normal assignments of direct appeals to the Supreme Court of North Carolina and North Carolina Court of Appeals. So far in 2006, there have been three more executions (Perrie Dyon Simpson; Patrick Lane Moody; and, Willie Brown, Jr.), all with successive state and federal post-conviction litigation; another execution is scheduled for May 12, 2006 (Jerry Wayne Conner). Death row inmate Norris Carlton Taylor died of natural causes on January 28, 2006. Depending on the progress and outcomes of their petitions for certiorari in the United States Supreme Court, four to six other death row inmates are likely to complete their initial state and federal court review and, thereafter, be scheduled for executions before the end of 2006.

At present, there are twelve (12) attorneys, including the Section Head, in the Capital Litigation/Federal Habeas Section who handle capital post-conviction cases (a Supervisor II, eight Attorney IVs, three Attorney IIIs), and two attorneys who handle non-capital federal habeas corpus cases (Attorney III, Attorney II). These fourteen (14) attorney positions are supported by three Program Assistant Vs, and one Paralegal II. Currently, the twelve capital case attorneys are assigned to 161 cases (there are, at present, 174 death row inmates, some with multiple death sentences), and have caseloads ranging from eight (8) cases for the Section Head to as many as fifteen (15) cases per attorney.

Given the time and complexity of handling the state and federal post-conviction proceedings in capital cases, the caseloads of the Section's attorneys are extraordinarily heavy and well above a reasonable, manageable caseload. For

example, counterparts in the Attorney General's Office in Virginia only have approximately 11 capital cases assigned per attorney (22 capital cases; two attorneys); in South Carolina, the number is comparable, approximately 14 capital cases assigned per attorney (70 capital cases; five attorneys). New attorney positions (four) were allocated in 1998, but no new positions, either attorney or support staff, have been funded during the last eight years. As a result of such caseloads, at the superior court level, the Section's attorneys must prioritize their work according to cases in which judges are actively scheduling deadlines for pleadings to be filed or evidentiary hearings to be held, with the result that sometimes older cases (without deadlines) are neglected and stagnate for periods of time. Additional attorney and staff resources (two new attorney positions and a paralegal position) would help to reduce, if not alleviate the heavy per attorney caseload, and thereby assure that all cases receive the attention and priority they deserve. Because of the increasing need for investigative assistance which often cannot be readily obtained from law enforcement agencies, the Section also would benefit from a full or part-time investigator, such as a retired former SBI agent or detective.

STAGES OF A CAPITAL CASE

A. Trial/Sentencing Stage

1. Trial/Sentencing in Superior Court

B. Direct Appeal Stage

2. Automatic Direct Appeal to Supreme Court of North Carolina

3. Petition for Writ of Certiorari to United States Supreme Court, and possible Petition for Rehearing, to review decision on direct appeal

C. State Post-Conviction Stage

4. Motion for Appropriate Relief and possible Evidentiary Hearing in Superior Court (generally raising new claims not argued on direct appeal or alleging ineffective assistance of counsel)

5. Petition for Writ of Certiorari to North Carolina Supreme Court to review decision of Superior Court granting/denying Motion for Appropriate Relief

6. Petition for Writ of Certiorari to United States Supreme Court, and possible Petition for Rehearing, to review decision of Superior Court

D. Federal Habeas Relief Stage

7. Petition for Writ of Habeas Corpus to United States District Court, and possible Evidentiary Hearing (generally raising same federal claims as on Direct Appeal and State Post-Conviction)

8. Appeal of Federal District Court's decision granting/denying habeas relief to the United States Court of Appeals for the Fourth Circuit, and possible Petition for Rehearing

9. Petition for Writ of Certiorari to United States Supreme Court, and possible Petition for Rehearing, to review decision on appeal by the United States Court of Appeals for the Fourth Circuit

E. Clemency Stage

10. Petition and Hearing on Clemency before Governor

ATTACHMENT V

STATE OF NORTH CAROLINA

COUNTY OF RANDOLPH

IN THE GENERAL COURT OF JUSTICE
SUPERIOR DIVISION
FILE NO. _____

STATE OF NORTH CAROLINA)
)
VS.) AFFIDAVIT OF JOSEPH SCOTT BAYNARD
)
KENNETH BERNARD ROUSE)

The undersigned, first duly affirming, deposes and says:

1. My name is Joseph Scott Baynard. I reside at 611 Robbins Dr., Archdale, North Carolina.

2. I was a juror in the capital murder trial of Kenneth Bernard Rouse in Randolph County, North Carolina, in March, 1992. I was one of the twelve jurors who convicted Mr. Rouse of murdering Hazel Broadway in the first degree and who sentenced him to death.

3. In 1954, my mother, Margaret L. Baynard, was murdered by Joseph L. Ezzell in Jacksonville, Florida. Mr. Ezzell was convicted of my mother's murder and executed for it on January 21, 1957. I was 22 years old at the time of my mother's murder. She was 48 years old. See NOTE 1, next sheet

4. I did not reveal this information during the jury selection process of Mr. Rouse's trial. I knew that if I disclosed what had happened to my mother, I would be excused from serving on Mr. Rouse's jury. I wanted to serve on this jury, so I did not reveal the information. I was aware that ~~each~~ of us was being asked whether we or anyone in our families had been the victim of violent crime. I also was aware that one potential juror was excused from service when she revealed that her son had been murdered. However, since I was not asked the question individually, I decided not to volunteer the information so that I could serve on the jury. I WAS NOT COGNIZNANT OF ANY JURORS' GROUP QUESTIONING OR STATEMENTS ON THIS SUBJECT.

5. I noticed similarities between the facts of my mother's murder and that of Mrs. Broadway. In particular, the pictures of Mrs. Broadway at the murder scene reminded me of pictures of my mother after she had been murdered. In addition, robbery was involved in both crimes, as were suspected sexual assault and drug abuse. Furthermore, both crimes were highly publicized when they happened.

I have read the foregoing, and it is true.

This the 15th day of April, 1996.

Joseph Scott Baynard Jr.
Joseph Scott Baynard, Affiant

Affirmed to and subscribed to before me,
this the 15th day of April, 1996.

NOTE! BECAUSE THE EVENT WAS 40 YEARS IN THE PAST (appx.) AT THE TIME OF THE TRIAL, PLUS MY MOTHER/SON RELATIONSHIP WAS DISTANT IN THE 1950's, THIS SIMILARILY GRUESOME FAMILY TRAGEDY HAD VERY LITTLE - IF ANY - EFFECT ON MY DECISON IN THE K. ROUSE TRIAL. JSB 4/15/96

Joseph C. Jackson
Notary Public
Commission expires
4/3/01

P.S. THERE ARE NUMEROUS FACTORS * WHICH I FEEL COULD BE MORE INFLUENTIAL IN MAKING A LEGAL DECISION ASIDE FROM MY MOTHER'S ALMOST FORGOTTEN MURDER.

* BIGOTRY, ... et. JSB 4/15/96

STATE OF NORTH CAROLINA
COUNTY OF RANDOLPH

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
91 CrS 3316-17
92 CrS 2

STATE OF NORTH CAROLINA)
)
v.) AFFIDAVIT OF RENEE WALTHALL
)
KENNETH BERNARD ROUSE)

The undersigned, first duly affirming, deposes and says:

1. I am Renee Walthall. I am a third year law student at Duke University School of Law, and I reside in Raleigh, North Carolina.

2. I became involved in this case through my clinical coursework at Duke Law School. I was assigned to assist Kenneth Rouse's co-counsel, Andy Whiteman and Grady Jessup, in the investigation of possible grounds for a motion for appropriate relief. Becky Conrad, another Duke Law School student, was also assigned to this case.

3. During the course of our investigation, Becky and I met with Joseph Scott Baynard, a juror in Mr. Rouse's case, and his wife. Subsequently, I met with Mr. Baynard and his wife on one other occasion and with Mr. Baynard alone on one occasion. In each meeting, I informed Mr. Baynard that I was working for Mr. Rouse's attorneys as well as performing duties related to my coursework.

4. Mr. Baynard volunteered to Becky and me during our first meeting that his mother had been murdered in Florida by a drug addict in the mid-1950s and that the killer had been executed a couple of years later. Mr. Baynard informed me at our second meeting that his mother's name was Margaret L. Baynard, and that she was murdered by Joseph L. Ezzell in Jacksonville, Florida. Mr. Ezzell was a thorazine addict. Margaret Baynard was taking thorazine at the time, and Mr. Baynard stated that he believes that Mr. Ezzell murdered his mother after a chance encounter to obtain her thorazine. In addition, it was suspected that Mr. Ezzell had committed a sexual assault on Mr. Baynard's mother.

5. Mr. Baynard stated in our first meeting with him that he did not disclose the information about his mother's murder to the court during the jury selection process of Mr. Rouse's trial.

6. During the course of our third meeting, I showed Mr.

Baynard the attached newspaper and magazine articles concerning his mother. He stated that there were dozens of such articles published at the time, that his mother's murder was front-page news and rather notorious when it occurred. I requested Mr. Baynard to sign an affidavit attesting to the murder of his mother and to his deliberate withholding of this information at the Rouse trial, and he agreed to do so. He made statements to me indicating that he understood that Mr. Rouse's attorneys would use his affidavit in their efforts to help Mr. Rouse get a new trial or new sentence. After the meeting, I left Mr. Baynard with a complete copy of the transcript of his voir dire statements during the Rouse jury selection.

7. During the course of our discussions, Mr. Baynard also expressed views concerning racial matters. Mr. Baynard stated that "blacks do not care about living as much as whites do." Further, he stated that black men rape white women so that they can brag to their friends about having done so, and that such probably was Mr. Rouse's motivation for attacking Ms. Broadway. In my presence Mr. Baynard used the word "niggers" to refer to members of the black race.

8. Mr. Baynard also expressed his belief in the death penalty as "a life for a life," and "an eye for an eye." He stated also that the purpose of the death penalty is to get rid of defective human beings. He characterized Mr. Rouse as "one step above a moron."

9. Mr Baynard stated that he definitely wanted to serve on the Rouse jury and therefore did not reveal the information concerning his mother's murder because he knew that if he did so he would be excused from the jury for cause, as was another potential juror who had experienced violence in her family. He also stated that he listened closely to the questions asked of potential jurors during the jury selection process of the Rouse trial so that he could formulate answers that would keep him from being disqualified.

FURTHER AFFIANT SAYETH NAUGHT.

Renee Walthall

Renee Walthall

Sworn to and subscribed before me this 17th day of April, 1996.

Joyce E. Jacobs

Notary Public

My Commission Expires

12-21-98

Suggested Reforms in Post-Conviction Proceedings

The following reforms would make judicial review of claims in state post-conviction and federal habeas corpus proceedings fairer and more reliable:

a. Require an evidentiary hearing before a judge decides a motion for appropriate relief.

   Under current law, judges can (and routinely do) deny inmate's claims without holding a hearing where the inmate can present evidence that his attorney failed to meet minimal standards for representation, or that the prosecutor withheld evidence that would have helped his case at trial.

b. Create claim for ineffective assistance of post-conviction counsel to help inmates whose attorneys fail to represent their clients in accordance with professional standards.

   Under current law, a death row inmate whose lawyer makes egregious mistakes – such as missing a deadline or failing to provide to a court evidence of their client's innocence - has no remedy. No matter how strong the claims are on the merits, no court can review those claims if they were missed or defaulted by incompetent counsel.

c. Right to appeal the denial of a motion for appropriate relief.

   An inmate does not have the right to appeal the denial of a motion for appropriate relief and the North Carolina Supreme Court almost never reviews petitions for writs of certiorari filed by death row inmates. Because federal habeas judges are bound by the decisions of the state court MAR judge (unless the decision is not only wrong, but "unreasonably wrong), the absence of review by our state appellate judges allows error to go uncorrected. It also results in the reality that the ability of a death row inmate to get relief in post-conviction proceedings rests solely in the hands of one elected judge, sitting in the county where the crime was committed and where political pressures may be overwhelming.

d. For capital cases, allow review on direct appeal of constitutional errors made at trial on their merits, even if trial counsel failed to raise them.

   Under current law, if trial counsel misses a constitutional issue, the North Carolina Supreme Court can only review the issue for "plain error," a very high standard which allows that court to grant relief only in exceptional cases. The court should be allowed to address *all* issues relating to the defendant's constitutional rights on their merits.

e. Create innocence as ground for relief in post-conviction statute.

At present, actual innocence is not grounds for relief in North Carolina's post-conviction statute, and the United States Supreme Court has not held that being wrongfully convicted is itself a constitutional violation. In Darryl Hunt's case, as in many cases of wrongful convictions, the key element of a claim of innocence is not tied to a constitutional violation, but to mistaken eyewitness identification, botched police investigations, or other matters of fact. Making actual innocence a ground for relief in the post-conviction statute would allow defendants in such cases to present claims of factual innocence to a post-conviction court

f. Expand proportionality review to include non-death cases.

During direct appeal, the North Carolina Supreme Court is supposed to consider whether a death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and defendant.

At present, less than one percent of murderers are sentenced to death and the North Carolina Supreme Court compares death cases only to other death cases. Proportionality review should include cases that resulted in life sentences in order for the court to assess whether similar defendants committing similar crimes are routinely sentenced to death rather than life without parole or terms of years.

F O C U S

The Death Penalty in North Carolina: Systemic Problems Render Punishment Both Arbitrary and Ineffective

by Kenneth J. Rose and Mary Sheehan Pollard



Academy member Ken Rose is executive director of the Durham-based Center for Death Penalty Litigation, a non-profit organization representing capital defendants and assisting attorneys who represent persons charged or convicted in capital cases. He is a graduate of Washington University and earned his JD from the Boston University School of Law. Prior to joining the CDPL in 1996, Rose represented death row inmates in Mississippi for a number of years, then started a solo practice in [illegible]n representing defendants at capital murder proceedings throughout the Southeast.



Mary Sheehan Pollard is a staff attorney with the Center for Death Penalty Litigation. Before joining the Center 2002, Pollard practiced civil litigation with the firm of Womble Carlyle Sandridge and Rice in Raleigh for eight years. She obtained a BA from the University of Virginia in 1985 and earned her JD from Wake Forest University School of Law in 1993.

North Carolina sentences to death less than one percent of its murderers. At first blush, our system of execution appears to be little more than an elaborate lottery; however, we do not, in fact, randomly choose those persons executed. Instead, we base our choice on the poverty of the defendants, the location of their crime, the identity of their prosecutors, the quality of their attorneys, and the race and status of their victims. Sometimes we choose innocent people as our candidates for execution. Of those persons charged with first-degree murder, more people are acquitted or have their charges dismissed than are convicted as charged.

Its freakish use renders the death penalty a token punishment—cruel for its capriciousness and unusual for its rarity. The families of victims and the families of defendants suffer along with the person chosen for execution. We market the false promise of closure to the relatives of victims of homicide, when we know all along that execution is not a realistic punishment for murder because it is so rarely—and so randomly—imposed.

Recent changes in North Carolina law have resulted in fewer death sentences. Over the past decade, death sentences have dropped dramatically: from 25 in 1997; to four in 2004; to six in 2005. While there has been a decline in death sentences, there has been no decline in the number of death-eligible cases, and the imposition of the death penalty on the offenders who do receive it is no less arbitrary than it was 10 years ago.

Despite changes in the law, North Carolina still does not have a system that provides a meaningful basis to separate the few murderers who may deserve the death penalty from the many who do not.[1] Our state's very broad capital sentencing scheme, which allows the imposition of the death penalty even on persons who did not premeditate or deliberate a murder, results in a situation where almost every defendant charged with murder could end up facing a death sentence.[2] Indeed, at a recent hearing before a legislative committee at the North Carolina General Assembly, Indigent Defense Services (IDS) Director Malcolm Hunter told those attending that if they were presented with the case descriptions of 20 defendants who pled guilty to second-degree murder last year and the case descriptions of the last 20 defendants sentenced to death, no one present would be able to sort the cases apart.

The citizens of North Carolina are less comfortable with the death penalty than they have been in years past. Grassroots support for a moratorium on executions has grown markedly, and the state Senate passed moratorium legislation in 2004. A recent poll conducted by the Academy showed that 65 percent of North Carolinians favor suspending the death penalty while questions about its fairness are studied.[3] Hopes for passage of moratorium legislation by the General Assembly remain high, and proponents hope that the legislature will halt executions while studying the system.

Death Sentences

Why has the number of death sentences dramatically decreased? Several specific factors likely have led to fewer death sentences.

Public Skepticism

First, the public is concerned about executing innocent people and about the fairness of the punishment. People are less willing to take a chance on the government getting these cases right. Since North Carolina reinstated the death penalty in 1977, at least four innocent people have been sentenced to die.[4] The most recent was Alan Gell, who was acquitted in a 2004 retrial.

Another was Darryl Hunt, who served almost 20 years in prison for a murder he did not commit.

By several measures, public support for the death penalty is at its lowest in almost 30 years. A December 11, 2005, *News & Observer* headline declared "Life trumps death penalty," describing the sharply reduced number of annual death sentences in North Carolina. In the mid-1990's, the annual number of death sentences averaged 25 to 34, compared to fewer than six per year since 2002.

North Carolina's apparent unease with the death penalty mirrors a national trend. Polls show that support for the death penalty peaked at 80 percent in 1994, but has decreased to 64 percent today. That support drops even further when life-without-parole is offered as an alternative. Nationwide, death sentences have dropped by 55 percent and executions by 39 percent since 1999.[5]

New Laws

New state laws have affected the numbers of death sentences significantly. The new laws include a life-without-parole sentence as the alternative to the death penalty; DA discretion to prosecute first-degree murder cases without seeking death; prohibition of the death penalty for persons with mental retardation; open file discovery; and the creation of Indigent Defense Services to represent poor defendants.

Life-Without-Parole. The Structured Sentencing Act of 1993 abolished parole for anyone given a life sentence after October 1, 1994. Now, "life in prison" means just that. Prior to this law, the public's concern about the possibility that a defendant might get out of prison to kill again had a pronounced effect on jurors' decisions to return death sentences. Jurors frequently asked judges during sentencing deliberations whether an inmate could get out if sentenced to life imprisonment. When the legislature first passed the life-without-parole statute, many jurors still remained skeptical because of misconceptions about the possibility of an early release. Over time, however, publicity about this alternative to the death penalty educated potential jurors that all defendants convicted of first-degree murder will die in prison. In clemency proceedings, jurors frequently have stated that if given the option, they would have chosen life-without-parole instead of the death penalty for a defendant.

The Office of Indigent Defense Services. In August 2000, the North Carolina General Assembly passed the Indigent Defense Services Act, which created the Office of Indigent Defense Services and charged it with the responsibility of overseeing the provision of legal representation to indigent defendants.[6] Effective July 1, 2001, IDS became responsible for appointing counsel in capital cases.

To increase the quality of defense counsel in capital cases, IDS promulgated standards requiring a certain level of experience and continuing training for an attorney to represent a defendant charged with a capital crime.

All but 20 of the 174 offenders currently on North Carolina's death row were sentenced to die prior to the implementation of IDS guidelines for quality of counsel. Some of those 20 may have been represented by unqualified counsel, as well, because counsel for their cases may have been appointed by judges prior to the creation of IDS.

Even now, attorneys appointed prior to the creation of IDS represent defendants in perhaps as many as 70 first-degree murder cases. In one capital case tried in Robeson County in the summer of 2005, IDS attempted to intervene and seek the appointment of qualified counsel. The judge refused to revoke the appointment of the pre-IDS counsel, and the defendant was sentenced to death.

However, despite significant improvement in the quality of defense counsel, the IDS guidelines still fall short of the standards suggested for capital defense counsel by the American Bar Association.[7] Additionally, because North Carolina's capital sentencing scheme is so broad, the Capital Defender's Office must find and appoint qualified counsel in over 500 cases annually—a difficult task.

Prosecutorial Discretion. In 2001, the General Assembly amended the state's death penalty statute to give prosecutors discretion in first-degree murder cases.[8] This amendment took effect on July 1, 2001, and gives prosecutors the discretion not to seek the death penalty, even in first-degree murder cases where aggravating circumstances clearly are present. Before this change in the law, district attorneys were forced to seek the death penalty in cases where a statutory aggravating circumstance clearly existed. North Carolina was the only state to limit prosecutors' discretion in this way.

In clemency proceedings, jurors frequently have stated that if given the option, they would have chosen life-without-parole instead of the death penalty for a defendant.

Since the amendment took effect, DA discretion has helped to reduce the number of cases tried capitally by more than half. In 2001, North Carolina prosecutors sought the death penalty in 50 trials. In 2005, they brought just 20 capital cases to trial. Consistent with these numbers, some prosecutors have acknowledged that they would have exercised discretion in favor of life had the option been available prior to 2001.

No Death Penalty for the Mentally Retarded. N.C. Gen. Stat. § 15A-2005 prohibits sentencing a mentally retarded defendant to death. This law was passed in 2002, before the decision by the United States Supreme Court in *Atkins v. Virginia* barring the death penalty for the mentally retarded. The passage of this legislation was the result of more than 10 years of effort by the Academy and other proponents of reform.

The N.C. Conference of District Attor-

neys opposed passage of this legislation on the grounds that prosecutors did not seek death sentences against mentally retarded defendants. However, since passage of this law, 11 death-sentenced North Carolina inmates have been granted relief and re-sentenced to life in prison after proving that they are mentally retarded. Approximately 20 post-conviction mental retardation motions are pending. In addition, prosecutors continue to seek death sentences against the mentally retarded quite regularly; since the law was enacted, at least 24 capital cases subsequently proceeded non-capitally because defense counsel developed evidence that the defendant was, in fact, mentally retarded. Strong evidence of mental retardation resulted in plea bargains in another 20 pretrial capital cases.

Pretrial Open File Discovery. N.C. Gen. Stat. § 15A-903 now requires that the state, upon motion of the defendant, make available the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant. The open file discovery legislation became law in August 2004. All but six current death row inmates (168 of 174) were tried before this law took effect.

While the Conference of District Attorneys did not try to defeat this bill, they have worked to roll it back. In 2005, House Rep. Ronnie Sutton introduced a bill that would allow prosecutors to withhold identification of witnesses and informants "unless such disclosure is mandated by constitutional or statutory law."

No Death Penalty for Juveniles. Finally, while North Carolina statute continues to provide that a juvenile may be sentenced to death for first-degree murder, the United States Supreme Court made that provision null in the March 2005 case of *Roper v. Simmons*.[9] The *Roper* case held that evolving standards of decency rendered the execution of a person under the age of 18 at the time of his offense a violation of the Eighth Amendment's prohibition against cruel and unusual punishment. At the time of the *Roper* decision, North Carolina's death row housed four inmates for crimes committed when they were 17 years old; all have been re-sentenced to life-without-parole.

Significant Problems Remain

These recent reforms were intended to redress recognized problems in the death penalty system and, in fact, they have resulted in a greatly reduced number of death sentences. However, the reforms fall short in a number of respects.

Race

Sixty percent of inmates on North Carolina's death row are non-white. Post-conviction investigation in many cases has demonstrated that race affected the jurors' decision to impose a death sentence. For example, Kenneth Rouse was convicted by an all-white jury, one member of which admittedly concealed the fact that his mother had been raped and murdered so that he could sit on Rouse's jury. This same juror expressed intense racial prejudice against African Americans, calling them "niggers" and opining that African Americans care less about life than white people do, and that African American men rape white women in order to brag to their friends.[10]

Discrimination against the defendant is not the only way that race affects the system. A comprehensive study on race and the death penalty in North Carolina found that the odds of getting a death sentence increase by three- and one-half times if the victim is white rather than a person of color.[11] This study mirrors previous studies conducted in other states and by the federal government.

The University of North Carolina study also is confirmed anecdotally by a review of the race of the victims of the 31 people executed in the state since the death penalty was reinstated in 1977: more than 80 percent of the victims of those executed were white, while only about 40 percent of North Carolina homicide victims are white.

One proposed solution to the problem of systemic discrimination is the passage of a Racial Justice Act, which has been proposed in several death penalty states and adopted in Kentucky. Such an act would permit a capital defendant to introduce evidence of a pattern or practice of disparate treatment to prove an equal protection violation. Other suggestions include eliminating peremptory challenges in jury selection or requiring the prosecution to replace a minority juror who is struck peremptorily with another minority from the juror pool.

Arbitrariness

A very small percentage of murderers are death-sentenced in North Carolina each year. Statistics compiled by the N.C. Administrative Office of the Courts show an average of 700 murders charged each year for the past five fiscal years. However, death sentences are rare: juries imposed only five in 2002; six in 2003; four in 2004; and six in 2005.

Many factors influence whether the death penalty will be pursued and imposed, including the prosecutor's enthusiasm for the death penalty, the skill and experience of the defense lawyer, and the race and status of the homicide victim. The resulting inconsistency in the application of the death penalty led former N.C. Supreme Court Chief Justice and death penalty supporter Burley Mitchell, Jr., to remark a few years ago, "It's like being picked in a lottery. . . . It's totally arbitrary."[12]

This arbitrariness perhaps could be lessened by refining the state's very broad capital sentencing scheme. North Carolina defines first-degree murder to include felony murder; thus, a defendant may be eligible for a death sentence even if the murder was not premeditated or deliberated. The capital sentencing statute provides for 11 aggravating factors, including one that is rather vague and interpreted very broadly—that the capital felony was especially heinous, atrocious and cruel.[13] In fact, the statute is so broad that, since its inception, IDS has had to appoint counsel for over 1200 potential capital cases that resulted in a total of 21 death sentences.

It may be improbable to hope that narrowing the statute would allow the state to impose the death penalty more accurately on the "worst of the worst" when so many other factors—race, money, quality of counsel, location of the crime, status of the victim—are part of the mix. It is possible, however, that a tighter definition of what constitutes a capital crime would lessen the problem and save the state money by allowing IDS to narrow the pool of cases that require the appointment of two counsel at capital case rates.

For example, Virginia—a state whose citizens are not shy about imposing the death penalty—has a statute that could serve as a model for our legislators. Virginia does not make every first-degree murder

potentially death-eligible; rather, it has a separate crime of "capital murder" that requires that a murder be premeditated and deliberated, and that it involve other specific circumstances, such as that the victim was a member of law enforcement or that the murder took place during the commission of an enumerated felony.[14]

Innocence

After the exonerations of Alan Gell, Darryl Hunt, Alfred Rivera, Tim Hennis and others, no one can seriously question the fact that innocent people are wrongfully convicted of crimes and sometimes sent to death row. At present, actual innocence is not grounds for relief in North Carolina's post-conviction statute, and the United States Supreme Court has not held that being wrongfully convicted is itself a constitutional violation.[15] Alan Gell ultimately prevailed on his claim of innocence because it was tied to a related violation of the state and federal constitutions: the unconstitutional withholding of evidence favorable to the defense. However, in Darryl Hunt's case, as in many cases of wrongful conviction, the key element of a claim of innocence is not tied to a constitutional violation, but to mistaken eyewitness identification, botched police investigations, or other matters of fact. Making actual innocence a ground for relief in the post-conviction statute would allow defendants in such cases to present claims of factual innocence to a post-conviction court.[16]

Even with adequate post-conviction procedures and resources in place, North Carolina still may execute an innocent person. Alan Gell was convicted and sentenced to death on the word of two teenaged girls who had secured favorable plea bargains from the prosecution. No physical evidence of any kind linked Gell to the crime, while no evidence from any source corroborated the girls' stories. The killer did not leave DNA, so Gell did not have that means to prove his innocence. Had he not been fortunate enough to be residing in the Bertie County jail during the time the murder actually took place, post-conviction counsel would not have been able to establish Gell's alibi, and he likely would be on his way to the death chamber.

Under our current system, the word of an interested witness is sufficient evidence to send someone to death row. Perhaps our legislature should consider heightened evidentiary requirements—for example, that a jury would have to find that physical or scientific evidence linked a defendant to a crime—before imposing a death sentence.

Executions

Despite great changes in public opinion and improvements in state laws resulting in fewer death sentences, North Carolina executions are being carried out in greater numbers than in any other time in the modern era. From 1977 to 1997, our state executed eight persons. Since 1997, North Carolina has executed 32 persons, averaging almost four executions per year. The state courts, the federal courts, and the governor have paid little heed to the dramatic changes in public opinion and state laws. In fact, the courts and the governor appear to be seriously trailing current public and legal opinion, permitting executions of defendants in cases that likely would not be tried capitally today.

As of the writing of this article, 174 men and women live on North Carolina's death row. Fifty or more were sent by juries who did not have the option of sentencing them to life-without-parole. All but 20 of these inmates went to trial before IDS became responsible for appointing qualified counsel in capital cases, and many had counsel who would not be eligible to represent them under current IDS guidelines. More than 150 were sentenced before prosecutors had the discretion to pursue a case non-capitally. All but a handful of North Carolina's death-sentenced inmates were tried before felony defendants became entitled to open file discovery in August 2004.

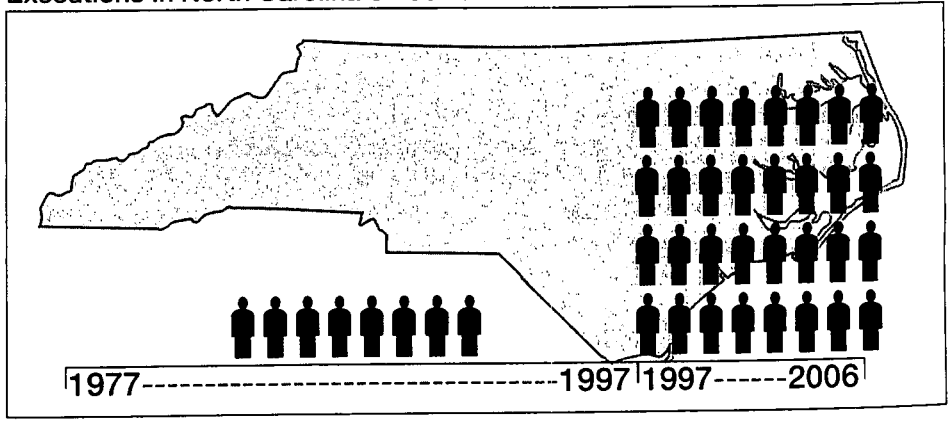
With a death row largely populated by inmates who did not have the benefit of the remedial measures instituted by our legislature in response to recognized problems, one might look to the courts to grant relief in cases where those problems contributed to the jury's decision to impose death. Sadly, the courts do not and in some respects cannot serve as a safety net for those who were ensnared in a flawed system. Moratorium opponents posture that "47 judges review" each and every death case over an eight- to fifteen-year period, assuredly winnowing out any unfairness in the proceedings. They imply that these scores of judges carefully review a fully-developed record and can make a binding independent determination about whether a defendant's constitutional rights have been violated. Reality is quite different.

Relief in the Courts?

Capital appeals bypass the court of appeals and go directly to the North Carolina Supreme Court. Over the past five years, that court has affirmed death sentences in approximately three-quarters of the cases brought before it. The issues on direct appeal, of course, are limited to legal error that may be discerned from the black-and-white record. Other constitutional claims—for example, the most serious ineffective assistance of counsel claims, prosecutorial misconduct, or juror misconduct—cannot be litigated at this stage of the proceedings because they require development of extra-record evidence.[17]

It is perhaps at the next stage of the proceedings that a death-sentenced inmate who has been prejudiced by incompetent counsel should have his best chance for re-

Executions In North Carolina Since 1977



lief—in state post-conviction proceedings pursuant to N.C. Gen. Stat. § 15A-1415. At this stage, counsel may investigate and present to the court evidence of a violation of the defendant's constitutional rights that was not available at trial or on direct appeal. Most frequently, death row inmates assert that the performance of their trial counsel was constitutionally ineffective. These claims are made in a motion for appropriate relief filed in the superior court in the county of conviction.

Prior to 1990, courts regularly held evidentiary hearings on these MARs, allowing counsel to develop fully a record upon which relief might be granted. Since then, however, more than half of the MARs filed pursuant to N.C. Gen. Stat. § 15A-1415 and raising ineffective assistance of counsel claims have been disposed of without a hearing. In many of these cases decided without hearings, the judge signs an order submitted by the state that imputes various strategic or tactical reasons for the trial counsels' actions or inactions to justify a finding that they were not ineffective. The supreme court very rarely accepts the defendant's petition for writ of certiorari from the denial of his MAR.

The creation of IDS and implementation of standards for counsel in capital cases came too late for most of the people currently on death row. However, the North Carolina legislature is not the only body concerned with the quality of counsel in capital cases. The United States Supreme Court has given the lower courts clear guidance on what constitutes effective assistance of counsel by granting relief in several recent cases. Accordingly, state post-conviction courts ought to consider these claims very carefully and not be so quick to deny them summarily.

In *Wiggins v. Smith*, the Supreme Court vacated a Maryland death sentence because trial counsel unreasonably failed to investigate the petitioner's family and social history.[18] Trial counsel had argued that their decision not to investigate and present mitigating evidence was a "trial tactic" designed to bolster their residual doubt strategy at sentencing.

The Court's decision was significant in a number of respects. First, the Court adopted the standards for capital defense counsel promulgated by the American Bar Association as "guides to determining what is reasonable." Further, the Court emphasized the need for a thorough and exhaustive mitigation investigation. Finally, the Court was unwilling to rubberstamp the alleged "tactical" decision presented by counsel, suggesting that the so-called strategic decision made by the petitioner's counsel "resembles more a post-hoc rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing." The *Wiggins* decision instructs courts to make a reasoned evaluation of trial counsels' proffered reasons for their actions—something that is difficult to do without an evidentiary hearing. Further, the Court instructs that the test for prejudice to the defendant is whether there is a reasonable probability that mitigation evidence that was not presented would have convinced even one juror to vote for a life sentence.

The creation of IDS and implementation of standards for counsel in capital cases came too late for most of the people currently on death row.

In *Rompilla v. Beard*, the Court concluded that trial counsel rendered ineffective assistance of counsel because they did not review the case file pertaining to a prior murder committed by their client, despite knowing that the state intended to use this prior crime as an aggravating factor.[19] The Court held that even when a capital defendant and his family members have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution probably will rely upon as evidence of aggravation at the trial's sentencing phase. The Court rejected as objectively unreasonable the state court's determination that the trial counsels' attempt to develop mitigation evidence through other means excused them from having to make inquiry into the file pertaining to the other offense.

Despite the Supreme Court's recent emphasis on the importance of effective assistance of counsel in capital cases, North Carolina death row inmates rarely have obtained relief on this ground in recent years. Since 2000, the North Carolina Supreme Court has accepted for review only two petitions for writ of certiorari filed by death-sentenced defendants following a denial of their MAR. Meanwhile, the court accepted two petitions sought by the state following grants of post-conviction relief. Only one of these four cases, *State v. Frogge*, was considered after the Supreme Court decision in *Wiggins*.[20] In *Frogge*, the court held that the trial court abused its discretion in granting post-conviction relief to an inmate whose trial counsel had failed to investigate the possibility that he suffered from organic brain damage.

After exhausting all state court remedies, a death-sentenced inmate may file a petition for writ of habeas corpus in the federal courts. However, the federal court's ability to grant relief on a habeas petition has been constrained greatly by the 1996 Anti-terrorism and Effective Death Penalty Act (AEDPA), which allows the writ to be granted only if the adjudication of the claim in state court was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings."[21]

On top of the high standard for relief imposed by the AEDPA, death-sentenced litigants from North Carolina often go into court with less than fully-developed records because of the superior court judges' propensity to sign an order denying relief drafted by attorneys for the state rather than to hold an evidentiary hearing.

Finally, the Fourth Circuit, which hears appeals from North Carolina cases, grants relief in death cases less often than any other circuit court of appeals.[22]

Thus, because of our state supreme court's reluctance to review post-conviction cases and apply *Wiggins* and *Rompilla*, there is no real remedy in the courts for many victims of this broken system—

those defendants who were convicted and sentenced to death without benefit of two competent counsel. Nor have the courts granted relief to the vast majority of defendants whose juries would have spared their lives had they been told that life-without-parole was an alternative, or to those who may not have been prosecuted capitally at all if their prosecutors had had a choice. Their last hope is that our governor might choose to spare their lives and allow them to die a natural death in prison.

Clemency

Imagine arriving at the courthouse for a malpractice case and finding that the assigned judge recently represented the opposing party, was the leading public advocate for curtailing punitive damages and, in his previous practice, refused in all cases to negotiate settlements. Further imagine that your client had no right to move to recuse the judge or to appeal an adverse decision. Impossible to imagine? Welcome to the challenging and somewhat surreal world of clemency litigation.

Governor Michael Easley represented the 13th Judicial District as prosecutor from 1982 to 1990. During that time, he successfully prosecuted two death penalty cases, and both persons are still on death row. While serving as attorney general from 1992 to 2000, Easley fostered a "no-negotiation" policy that prohibited his assistants from settling the cases of persons on death row—no matter what the circumstances or how weak the evidence. Also while he was attorney general, Easley's department promoted a policy of opposing evidentiary hearings and open file discovery in capital cases, while also supporting the death penalty for persons with mental retardation and for juveniles. When a leading assistant attorney general suggested publicly that perhaps a particular death row inmate had demonstrated sufficient contrition to justify clemency at some time in the distant future, Easley removed her from the Special Litigation Unit.

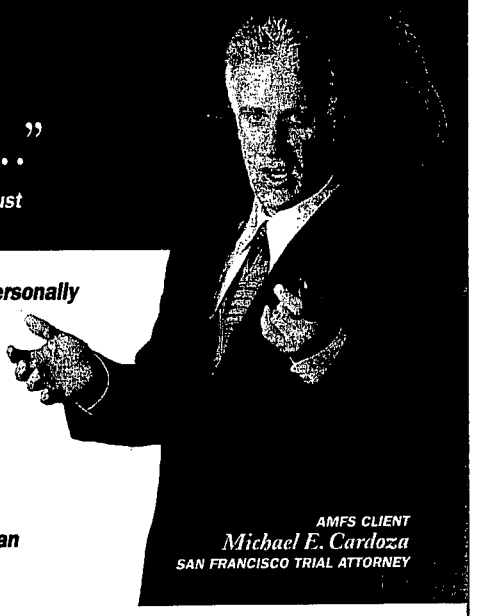
Attorneys representing death row inmates recognized early on the unlikely possibility that Attorney General turned Governor Easley would be capable of trading in his prosecutorial zeal for a new role requiring the exercise of both justice and mercy. Attorneys for Robert Bacon filed a lawsuit challenging the governor's conflict of interest and the lack of due process. However, the North Carolina Supreme Court did not resolve whether the governor labored under an actual conflict, deciding instead that the separation of powers doctrine rendered Bacon's claim nonjusticiable under state and federal law, and that the due process clause of the United States Constitution did not constrain a governor's broad discretion either to grant or to withhold mercy.[23]

Hopes that Governor Easley would succeed in putting aside his bias as a prosecutor have proven false. Easley's record for denying clemency and denying pardons is unparalleled in the modern history of the state. He has denied 24 of 26 clemency appeals and all but two of possibly hundreds of requests for pardons. In two of those cases, Ronnie Frye and Steven Van McHone, the Academy took the extraordinary—but ultimately futile—step of supporting the clemencies because of the phenomenally poor performance of the lawyers who represented the defendants at trial and the strength of the mitigating evidence withheld from the jurors who sentenced the defendants to die.

What Lies Ahead?

The North Carolina House of Representatives has failed to vote on proposed death penalty moratorium legislation, although the state Senate passed such a bill in 2004. In late 2005, House Speaker Jim Black established the House Select Study Committee on Capital Punishment, which consists of 22 House members and includes a number of the more staunch supporters and opponents of the moratorium bill.

The committee is charged with: (1) examining and reporting on the adequacy of counsel in all stages of capital cases and the sufficiency of guidelines for the appointment and performance of counsel appointed prior to the enactment of current guidelines and qualifications; (2) the process for judicial review of the merits of constitutional claims in state post-conviction and federal habeas corpus proceedings; (3) any disproportionate racial impact from any aspect of capital case processing;

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(4) whether there is discrimination in capital sentencing on the basis of the victim's or the defendant's race; (5) prosecutorial misconduct as a factor in the imposition of the death penalty; (6) the presence of innocent persons on death row; (7) whether the felony murder rule should be applied in capital cases; and (8) any other appropriate or relevant subject. A written report is due by December 31, 2006.

Moratorium proponents, weary of legislators turning a blind eye to evidence of systemic problems, including racial bias, hope that the Commission will take its work seriously and undertake a critical and comprehensive study. Other states have conducted earnest and thorough reviews of their death penalty systems, enlisting the assistance of experts to gather and evaluate extensive evidence relating to race, representation, and proportionality.[24] North Carolina should follow their lead in an effort to answer—definitively—the public's questions about the fairness of our capital sentencing scheme. Further, the legislature should implement significant reforms, not limited to those suggested in this article, to attempt to eradicate some of the blatant arbitrariness of the current system. ■

[1] The Constitution requires a state to tailor and apply its law so as to avoid the arbitrary and capricious application of the death penalty; in other words, to provide some meaningful framework to identify the alleged "worst of the worst." *See* Godfrey v. Georgia, 446 U.S. 420 (1980).

[2] N.C. Gen. Stat. § 14-17 defines first-degree murder to include felony murder, which does not require premeditation and deliberation, only that the murder took place during the course of certain felonies. N.C. Gen. Stat. § 15A-2000 provides for 11 separate aggravating circumstances that may be used in support of a death sentence, including "that the capital felony was especially heinous, atrocious, and cruel."

[3] The poll was conducted for the Academy by Peter D. Hart Research Associates, Inc. Hart Research surveyed more than 600 voters in North Carolina by telephone between October 7 and October 11, 2005.

[4] Timothy Hennis, Alfred Rivera, and Alan Gell were acquitted after receiving new trials. Charles Munsey died while awaiting his new trial. North Carolina Department of Corrections Web site. The killer of the victim in the Munsey case confessed while in prison. Joseph Neff, *Charles Munsey: DA Turned Blind Eye to Evidence Snitch Lied*, THE NEWS AND OBSERVER, Nov. 2, 2003.

[5] *See* THE DEATH PENALTY IN 2005:YEAR END REPORT, Death Penalty Information Center, December 2005, http://www.deathpenaltyinfo.org/YearEnd05.pdf.

[6] N.C. Gen. Stat. § 7A-452.

[7] *See* ABA Guidelines for the Appointment and Performance of Defense Counsel in Capital Cases, 31 HOFSTRA LAW REVIEW 913 (2003).

[8] *See* N.C. Gen. Stat. § 15A-2004.

[9] 543 U.S. 551 (2005).

[10] The state courts were unimpressed by Mr. Rouse's claims and the federal habeas court dismissed his petition, filed one day late, as untimely. A panel of the Fourth Circuit remanded his habeas petition for a hearing, but this was overturned by the Fourth Circuit sitting en banc. The court held that Mr. Rouse, a death row inmate who likely is mentally retarded, was responsible for the actions of his attorneys/agents, and therefore the case was not a proper one for equitable tolling. *See* Rouse v. Lee, 339 F.3d 238 (4th Cir. 2003).

[11] "Race and the Death Penalty in North Carolina," Dr. Isaac Unah, Professor John C. Boger, UNC-Chapel Hill, April 16, 2001, www.unc.edu/~jcboger/NCDeathPenaltyReport2001.pdf.

[12] Editorial, *Failure in Fairness*, THE NEWS AND OBSERVER, Sept. 23, 2000 (citing the Durham-based INDEPENDENT WEEKLY newspaper).

[13] N.C. Gen. Stat. § 15A-2000(e).

[14] Va. Code 18.2-31.

[15] *See* Herrera v. Collins, 506 U.S. 390 (1993) (Claims of actual innocence based on newly-discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding . . . This rule is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution, not to correct errors of fact).

[16] Though this change would not necessarily prevent a wrongful execution. A death row inmate could be barred procedurally under N.C. Gen. Stat. § 15A-1419 from bringing new evidence into the courts (after filing his motion for appropriate relief) unless he can demonstrate that his attorney exercised "reasonable diligence" in tracking down the new evidence. A condemned inmate who was unlucky enough to be appointed sub-par attorneys who did not investigate the case and uncover the new evidence currently is barred from bringing that new evidence before the court in a subsequent MAR, even when that evidence would point to his innocence. Furthermore, under N.C. Gen. Stat. § 15A-1419, "newly discovered evidence of factual innocence" is barred procedurally unless the individual can show by (1) "clear and convincing evidence," that (2) "no reasonable juror would have found the defendant guilty beyond a reasonable doubt."

[17] The North Carolina Supreme Court has suggested that some record-based IAC claims may be raised properly on direct appeal; however, because the adjudication of ineffective assistance of counsel claims requires an evaluation of trial counsels' proffered reasons for their action or inaction, such claims rarely are addressed on direct appeal. *See* State v. Fair, 354 N.C. 131 (2001); State v. Stroud, 557 S.E.2d 554 (N.C. App. 2001); State v. Long, 354 N.C. 534 (2001).

[18] Wiggins v. Smith, 539 U.S. 510 (2003).

[19] Rompilla v. Beard, 545 U.S. __ (2005).

[20] State v. Frogge, 359 N.C. 258 (2005).

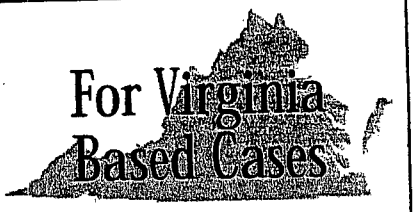
[21] 28 U.S.C. § 2254.

[22] It is noteworthy that the United States Supreme Court reversed the Fourth Circuit in *Wiggins*.

[23] State v. Bacon, 353 N.C. 696, 549 S.E.2d 840 (2001). According to the court, "[t]he clemency decision is necessarily influenced by the unique background and life experiences, and presumably the social and political philosophy, of the executive decision-maker. . . . clemency decisions by the Executive Branch are fundamentally different than adjudicatory proceedings within the Judicial Branch. Bacon's unilateral attempt, therefore, to superimpose recusal principles developed by, and applicable to, judges is wholly foreign to the executive's consideration of clemency requests." 353 N.C. at 714, 549 S.E. 2d at 852-53.

[24] *See, e.g.* FINAL REPORT OF THE PENNSYLVANIA SUPREME COURT COMMITTEE ON RACIAL AND GENDER BIAS IN THE JUSTICE SYSTEM (2002); REPORT OF THE FORMER GOVERNOR RYAN'S COMMISSION ON CAPITAL PUNISHMENT (Illinois, April 2002).

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To: Members, House Select Committee on Capital Punishment
From: NC Academy of Trial Lawyers
Re: Post-Conviction Process in Capital Cases
Date: April 27, 2006

Enclosed please find an assortment of press clippings noting the unfairness of the current post-conviction process to the inmates currently on death row. We are fortunate to have implemented some major reforms in 2001 (with the creation of IDS and other substantial changes to the capital process. However, a large majority of those currently on death row did not have the advantage of those reforms. As you will also see from the articles, death sentences imposed by juries have steadily declined since 2001.

Finally, you will find enclosed a Point-of-View column just published on April 26, regarding the shameful case of Jerry Conner. Jerry is scheduled to be executed on May 12. There is evidence in the case that can be tested for DNA in a much more precise way than was possible when Jerry was found guilty and sentenced to death. Jerry has asked the Attorney General and the State to at the very least permit this evidence to be tested before an execution is carried out, as Jerry has always maintained his innocence. However, the State has refused even this. How can this type of post-conviction practice by the State possibly ensure that the death penalty is reserved for the "worst of the worst," or ensure that we do not execute an innocent person?

We appreciate the opportunity to share these brief materials with you. Should you have any questions, please do not hesitate to contact us.

Richard M. Taylor, Jr.
Chief Executive Officer

Holly M. Bryan
Legal Affairs Counsel

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THE NEWS & OBSERVER
WEDNESDAY, APRIL 26, 2006

Other Opinion

A condemned man's DNA appeal

BY DONALD H. TAYLOR JR.
DURHAM

Even if you favor the death penalty, you should be worried about the execution of Jerry Conner, scheduled for May 12. Why? Because the State of North Carolina may be preparing to execute an innocent man. Even worse, both Gov. Mike Easley and Attorney General Roy Cooper have the power to remove all doubt prior to the execution, but so far both of them have refused to do so.

I don't know if Jerry Conner raped and murdered Linda Rogers and murdered Minh Rogers. But there is a DNA sample that was recovered from the crime scene that could provide definitive proof.

Conner was convicted in 1991, and the prosecutor held at trial that one person committed these heinous crimes alone. In 1991, DNA testing was not advanced enough to be able to say whether the recovered sample was from Conner or not. Thus, DNA evidence was not used to convict him at trial.

DNA testing is far more advanced today, and experts believe that a test will make clear whether Conner's DNA matches the sample collected from the rape of Linda Rogers. If it does, that is conclusive proof of his guilt. If it does not, that is proof of his innocence, given the state's case and the jury's verdict that Conner acted alone in committing these crimes.

So far, Conner's request for a test of this DNA sample has been denied by the courts, and his appeal for a test that he says will prove he is innocent is currently before the N.C. Supreme Court. Curiously, the State Bureau of Investigation has opposed re-testing even though the DNA evidence was handled by an SBI agent who was forced to resign from the state crime lab because of systematic mishandling of DNA evidence. The SBI has re-tested DNA samples in about 50 other cases handled by this agent, but has refused to conduct another test in Conner's case. Why?

POINT OF VIEW

• • •

Conner initially confessed to these crimes, but later recanted his confession and has consistently maintained his innocence since.

For most people reading this piece, the idea of confessing to a crime they did not commit is unimaginable. However, it is disturbingly common for people to confess to crimes for which they are later proven to have not committed. In fact, in one in four cases in which DNA has proven a convicted murderer or rapist innocent, the exonerated person initially confessed! This shows the importance of having physical evidence when the state wants to impose the harshest penalty.

In Conner's case there is physical evidence in the state's possession — a DNA sample that could prove his guilt or innocence. Attorney General Cooper's office is representing the state's position in Conner's appeal before the N.C. Supreme Court. Cooper is therefore directly involved and could assent to this test today. Why will he not do so?

Easley is the highest elected official in our state, and the one person with the absolute power and authority to halt an execution, or allow one to go forward. He is a strong believer in the death penalty, but I am confident that he doesn't want to see an innocent person executed. Why then will he not order a DNA test to make sure?

I am opposed to the death penalty, and therefore any execution. I know many citizens of this state disagree with me. But I don't believe that anyone wants an innocent person to be executed.

There is still time for a DNA test prior to the May 12 execution. We the people need to demand that our elected officials do not carry out this execution without first having all the information that is available to them and in their control.

Donald H. Taylor Jr. is assistant professor of Public Policy at Duke Duke University. More information on this case is at http://jerryconner.blogspot.com/

Greensboro News and Record

Greensboro News & Record (NC)

November 7, 2005

New parole directive overlooks death row

It's unfair to make one person serve more time in prison than another if both committed the same crime.

That idea drove a recent change in state law that encourages the parole commission to release more inmates who were locked up before sentencing guidelines changed in 1994. A prisoner serving 20 years for an offense that now requires only a 10-year penalty might deserve strong consideration for parole. It's a simple matter of fairness.

Too bad legislators didn't apply the same principle to inmates on death row. Since a 2001 change in the law, the number of death sentences imposed by North Carolina courts has fallen dramatically.

Under the new law, defendants can plead guilty to a charge of first-degree murder and receive a sentence of life without parole rather than go to trial and risk the death penalty. Many prosecutors agree to that outcome. It saves overworked district attorneys' staffs the time and expense of a trial, spares the state a lengthy appeals process and often relieves victims' families of the ordeal they endure when the facts of the crime are rehashed as the killer's execution approaches.

In addition, with public attitudes about capital punishment beginning to shift, many jurors are more comfortable voting for a life sentence rather than death as long as they know there's no possibility of parole.

The numbers tell the story: In 1999, 24 people were sent to North Carolina's death row; in 2000, 17; in 2001, 15. Then, after the new law went into effect, seven in 2002; six in 2003, four in 2004; and six so far this year.

Altogether, 156 of the 177 men and women on death row have been there since 2001 or earlier. Whether most North Carolinians still approve of the death penalty or not, North Carolina juries are slowly eliminating its use.

That invites an obvious conclusion: Death row is largely populated by inmates who, if tried again by today's legal standards, would not be sentenced to death. Yet many of them will be executed. The exceptions may win new trials for other legal reasons, be granted a commutation of sentence or perhaps die of natural causes.

These people on death row were left out when state legislators this year tried to insert a measure of fairness into the criminal-justice system. Lawmakers said to thousands of prisoners, "You shouldn't be held longer for your crime than you would be if you had committed the same offense after 1994." But to the inmates facing the most severe punishment, they said nothing.

Maybe it's not politically smart to give murderers a break. The question, however, isn't whether murderers should go free. Of course they shouldn't. But, if juries today are more inclined to sentence killers to life in prison without parole, it's only fair for legislators to consider the same leniency for those already on death row.

Memo:
Changes in sentencing laws create disparities in the state's prisons. A new provision addresses the inequities, except for the people facing execution.

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Capital inequity

Declining numbers of N.C. death sentences since 2001 reforms argue for a halt to executions while earlier cases are examined

Under the harsh light of questioning, warts have shown up on North Carolina's system of capital punishment. That's good. Problems can be eliminated once they've been discovered.

What's happened since some reforms took effect in 2001 leads to the inescapable conclusion that many unfair aspects of the system have been corrected. During that time more than two-thirds of all first-degree murder charges – charges that can bring a death sentence – have been dismissed or reduced to lesser charges. The number of death penalty verdicts has fallen from 14 in 2001 to six last year.

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But now that snakes have been found crawling under the rock of capital punishment, North Carolina ought to pay more attention to the death row inmates convicted beforehand. It's certainly true that most condemned prisoners have committed terrible crimes deserving of harsh punishment. But in the event that any of those inmates was treated unfairly, by 2001 standards, the state ought to thoroughly review their cases and hold off on further executions until it's completed.

The state's capital defender confirms what has long been suspected about first-degree murder charges. Prosecutors use them as a bargaining chip against defendants, the official, Bob Hurley, told a legislative committee on capital punishment last week. Surely two-thirds of the first-degree murder charges wouldn't have been dismissed or reduced if that weren't true.

Hurley works for the Indigent Defense Service, which was started in 2001 to ensure that all defendants receive qualified representation in capital cases. To be eligible, lawyers have to be screened by the agency and receive continuing education on the rigors of capital defense. A strategy session with experienced defense lawyers is legally mandatory before trial.

Incompetent or misbehaving lawyers made those reforms necessary – for example, lawyers who admitted to heavy drinking while defending people on trial for their lives. Yet for all the improvements the Indigent Defense Service has made, it has changed nothing for the 150 or so inmates condemned before 2001.

Most of them couldn't afford to hire legal talent. So judges used to assign lawyers to them from a list of volunteers. Some of those volunteers were first-rate. Others were simply out of their league.

Chances are that the larger number of death penalty verdicts before 2001 bears some relation to the caliber of defense. To those who may have been directly affected, the state of North Carolina owes them a systematic review of the record. Flaws found in their representation ought to be disclosed to a judge.

While that sort of process is under way, the state would be hard-pressed to justify continuing the rituals of execution. The next is scheduled March 17 for Patrick Moody, convicted in Davidson County years before North Carolina began wondering if the death penalty was being administered fairly in every instance. Unless a moratorium on executions is called while the pre-2001 cases are reviewed, North Carolinians will have to continue wondering.

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Getting gun shy

E 7520LV EDITORIAL

Juries are imposing fewer and fewer death penalties each year, in North Carolina and nationally, which is a welcome trend given the inequities and uncertainties that plague capital punishment.

The nonprofit Death Penalty Information Center says the number of death sentences being handed out in the United States has dropped by more than half since 1999. In North Carolina, juries sentenced defendants to death 28 times in 1994 but just four times last year and five so far this year.

It's true that the overall murder rate has declined as well, but not nearly as steeply as the trend line in death sentences. Rather, juries are more likely to impose life sentences, and for good reasons.

The average American who sits on a jury certainly has in mind cases of inmates spared from execution after their conviction was overturned. The hard science of DNA has helped in that regard. A jury of one's peers may be the best system going, but it is not foolproof. The controversial execution of gang founder and convicted killer Stanley "Tookie" Williams in California is likely to bring even greater intensity to the national death penalty debate.

It helps that North Carolina and other states have passed laws that let the courts send those who commit horrendous crimes to prison for life without a chance of parole. Prosecutors here also now have the option of not seeking the death sentence in first-degree murder cases.

The next logical step in this state is for the General Assembly to halt executions while a special committee it formed studies how the sentence is administered. A moratorium would ensure that nobody was executed while flaws in the system — discrepancies in sentences that are correlated with race and class, for example— are being studied.

In fact, it would make sense if the committee considered the benefits to the justice system and the cost savings of ending capital punishment, period. The timing could hardly be better for legislators to debate the troubling notion of the state as lethal plunger-pusher.

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MINUTES,

continued

House Select Study Committee on Capital Punishment

November 21, 2006

Minutes

The House Select Study Committee on Capital Punishment met on Tuesday, November 21, 2006, at 10:00 a.m. in Room 1228 of the Legislative Building. Representative Joe Hackney, Co-Chair called the meeting to order and the following members of the Committee were present: Representative Beverly Earle, Co-Chair, Representatives Nelson Cole, Arlie Culp, Rick Eddins, Pricey Harrison, Hugh Holliman, Paul Luebke, Danny McComas, Mickey Michaux, Earline Parmon, Wilma Sherrill, Ronnie Sutton, and Winkie Wilkins. Copies of the meeting agenda and the Visitor Registration are attached, (Attachments I and II).

Co-Chair Hackney welcomed the members and visitors. He reviewed the charge to the Committee and briefly commented on the topics that had been discussed at previous meetings. He noted that the topic for discussion at this meeting would be prosecutorial misconduct as a factor in the imposition of the death penalty. He further noted that the Committee would meet on December 13 for a discussion of disproportionate racial impact from any aspect of capital case processing and whether there is discrimination in capital sentencing on the basis of the victim or defendant's race.

Ms. Katherine Jean, Counsel, North Carolina State Bar was recognized to address the Committee. Ms. Jean stated that the Grievance Committee of the State Bar is the part of the State Bar that investigates potential attorney misconduct. She said that alleged misconduct can come to the attention of the State Bar in a number of ways including a formal grievance, anonymous letters, phone calls, or newspaper articles. She said that once alleged misconduct comes to the attention of the State Bar, a grievance file is opened by the director of investigations and is assigned to a staff attorney who reviews the grievance and conducts any investigation that is necessary to insure that the State Bar has the pertinent information that is necessary to make an informed decision. She said that the investigation usually includes issuing a letter of notice to the attorney informing the attorney of what the allegation is and requesting a written response from the attorney. Ms. Jean said that assistance is offered in the development of the file by a team made up mostly of retired FBI, SBI and Treasury Department investigators. At the conclusion of the investigation, the staff attorney develops a written report for the Grievance Committee explaining what the grievance is about, what the investigation has revealed and offers a recommendation of the attorneys' opinion as to what the ultimate action should be on the matter. She said that in cases involving alleged misconduct that would not warrant disbarment or a suspension, the Grievance Committee is empowered to issue discipline. Ms. Jean said that the Grievance Committee does not have the power to suspend an attorney's license or to disbar an attorney. In cases where the Grievance Committee believes that disbarment or suspension of license might be an appropriate outcome, they act instead as a grand jury, and will review the evidence and determine

whether there is probable cause to believe that misconduct sufficient to warrant suspension of the license or disbarment has occurred. The committee will then refer the case to the Disciplinary Hearing Commission which is an independent tribunal that holds trials regarding alleged attorney misconduct and has the power to suspend a license or to disbar an attorney.

Ms. Jean said the State Bar receives most allegations of alleged prosecutorial misconduct in non-capital cases from the defendant or members of the defendant's family. She said that during the last eighteen months only one grievance has occurred alleging prosecutorial misconduct in a non-capital case in which the State Bar was notified by someone other than the defendant. She said that the opposite is true in grievances in capital murder prosecutions alleging prosecutorial misconduct. In 2005-2006, the State Bar opened four grievance files involving allegations that a prosecutor engaged in misconduct in a capital murder prosecution. She said that they have not received any complaints in 2005-2006 directly from a defendant charged with a capital offense or from a member of the defendant's family. She said that in three of the four grievances opened by the State Bar in 2005-2006, the State Bar was the complaining party and that the fourth case was brought to the attention of the State Bar by the defendant's post-conviction defense counsel. She said that in all four cases, the allegation was that the prosecutor failed to turn over exculpatory materials that the prosecutor was required by law to turn over, or that the prosecutor failed to correct allegedly false testimony by a prosecution witness. Ms. Jean noted that the North Carolina Supreme Court recently approved a change to Rule 3.8 of the Rules of Professional Conduct that requires the prosecutor to make a reasonably diligent inquiry to determine what exculpatory or mitigating evidence is available or is in the prosecutor's possession and to turn that evidence over.

Co-Chair Hackney asked if there is a statute of limitations on the filing of a grievance. Ms. Jean replied that a review of the statute of limitations is currently before the North Carolina Court of Appeals. Currently, the statute states that a grievance must be initiated within six years of the misconduct unless it is a grievance alleging some sort of misconduct that involves concealment by the respondent attorney.

Co-Chair Earle noted that many defendants may be uneducated and unable to report prosecutorial conduct on their own and questioned whether the defense counsel are doing their job in reporting misconduct.

Representative Sherrill asked if defendants are instructed of their opportunity to file a grievance against an attorney. Ms. Jean replied that there is a means by which inmates in the North Carolina prison system become aware of the State Bar and its investigatory function, but that she is unaware of any formal effort that the State Bar makes to inform inmates of the existence of the services.

There was brief review of standards and requirements for attorneys that are appointed to represent defendants in capital cases. Co-Chair Hackney stated that those

guidelines were the result of significant reforms recommended by a study commission and put into place since 2001.

Representative Parmon noted that defendants convicted in capital cases prior to 2001 may have had an attorney that did not meet those standards now in place.

Representative Holliman asked if a prosecutor is required to turn over what he has in his possession, does it also apply to investigators and law enforcement. Ms. Jean replied it is the State Bar's position that a reasonable and diligent inquiry must be made to determine what evidence is in the possession of any law enforcement and turn the evidence over.

Hal Pell, Committee Counsel, asked if the State Bar monitors judicial proceedings to determine whether any judicial proceedings have found improper misconduct of the prosecutor. Ms. Jean replied that the State Bar does not have the manpower to be able to have someone in the courtrooms or going through the court files in all the counties of the state. She said that they rely upon judges, defense attorneys or the newspaper or other sources to let them know. She said that they would welcome the situation in which the clerk of court or the judge, upon granting a new trial in a capital murder case, would send such notice to the State Bar.

Representative Sherrill asked how that could be accomplished and Ms. Jean replied that she thought legislation could be enacted. Representative Sherrill requested that staff consider this when compiling their recommendations.

Representative Luebke expressed concern regarding geographical disparity with regard to imposition of the death penalty, and asked what standards might be put into place to end this discrepancy.

Ms. Susan Sitze, Committee Counsel was recognized to briefly remind the Committee of the change that was made in rules of prosecutory discretion. She said that previously if a district attorney brought a first-degree murder case, it was automatic that they had to seek the death penalty. The law was changed around 2000 so that a prosecutor has an option of still bringing a first-degree murder case, but not asking for the death penalty.

Representative Luebke stated that his question was not about the quality of defense counsel, but about the fact that we do not have sufficient standards so that the prosecuting attorney in one county or another has the same standards by which to judge. Co-Chair Hackney noted that it is not in the pervue of the State Bar to second guess the discretion of prosecutors in seeking the death penalty.

Mr. Tom Lock, District Attorney, 11th District, was recognized to address the Committee. Mr. Lock stated that he had tried over 24 capital cases with 12 resulting in sentences of death. He commented on the numerous motions for appropriate relief resulting from those trials saying that he had been accused of prosecutorial misconduct.

He said that examination of those claims indicate that they are not "misconduct" at all, but claims of neglect, oversight or error. Mr. Lock spoke briefly about prosecutorial misconduct versus ineffective assistance of counsel noting that when a prosecutor makes a mistake such as failing to deliver a document in discovery, or makes an overzealous jury argument, those mistakes are labeled "prosecutorial misconduct" implying something intentional or malicious. He urged the Committee to refrain from using the term "prosecutorial misconduct," and instead use the terms "prosecutorial neglect or prosecutorial error." Mr. Lock stated that he felt true prosecutorial misconduct is exceedingly rare and that most claims of misconduct result in the failure to provide complete discovery which usually is unintentional. He said that while the General Assembly has gone to great lengths to remedy these errors by requiring, since 2004, complete open file discovery in all criminal cases prior to trial, it has not gone far enough to assist in full and complete compliance with the discovery requirements.. He said that adequate resources in terms of personnel, technology and training have not been provided.

Mr. Lock stated that there is no epidemic of prosecutorial misconduct in North Carolina and that very few death sentences have been set aside as a result of misconduct. He said that prosecutors are answerable to the State Bar, and are the only group of lawyers who are subject to an additional set of rules that are applicable to them in addition to all the rules that apply to other lawyers. He further noted that prosecutors are subject to oversight of the courts, sometimes to civil liability, and that elected district attorneys are answerable to the voting public. Mr. Lock stated that to the extent that there may be concern about prosecutorial behavior, the best way to improve the quality of prosecution and the quality of justice is to provide prosecutors with the resources needed to at least place prosecutors on an equal footing with the criminal defense bar. He urged support for raising salaries especially for the assistant district attorneys, for more support staff, and to expedite the implementation of the automated discovery systems.

Co-Chair Hackney asked what the starting salary is for assistant attorneys. Mr. Lock replied that it is $34 600.

Representative Sutton noted that there is some public perception that there is not a balanced playing field between the district attorney's office and the defense bar noting the resources available to the district attorney such as the SBI, the sheriff's department, all law enforcement. Mr. Lock replied that such claims are often made in open court. He said that 20 years ago there may have been a fair amount of merit to that, but that now in most serious cases, and certainly in capital cases, defense lawyers have private investigators and have access to a number of defense experts, and that the playing field is much more level.

Representative Wilkins asked how one goes about grooming young assistant district attorneys to handle capital cases. Mr. Lock replied that he thought a prosecutor should have at least two or three years of experience in superior court before being assigned to a capital case. He added that he assigns two prosecutors to every capital case

with one being very senior. He said that an assistant prosecutor would be "second chair" for at least two or three cases before moving up to "first chair" on a capital case.

Co-Chair Earle asked what is in place to address intentional misconduct. Mr. Lock stated that he would dismiss a prosecutor if intentional misconduct was discovered on his staff and would report that person to the State Bar who would likely revoke the license of the prosecutor. He also said that it is highly likely that in such instances, the defendant would be granted a new trial.

Ms. Sitze stated that there are some statutory requirements regarding discovery that require prosecutors to turn over their open file except for their work product.

Dr. James E. Coleman, Jr., Duke University School of Law was recognized. Dr. Coleman stated that the work of the Committee will help to answer the question of whether the death penalty promotes justice in North Carolina or whether it undermines it. He spoke of prosecutors in several cases who were revered for what they had done in correcting injustices noting that when prosecutors stand up to the high standards of being ministers of justice, they are revered. He said that prosecutorial misconduct is not always a matter of good faith negligence, but sometimes intentional misconduct and willful blindness in failing to pursue facts that might suggest that something is wrong. Dr. Coleman spoke of a few cases of prosecutorial misconduct, noting that some of them were discovered long after they occurred and were examples what he thought were unprincipled exercise of discretion. He stressed the need for a change in culture rather than a change in pay.

Representative Sherrill asked what Dr. Coleman would recommend to bring about a change in culture. Dr. Coleman replied that this was a difficult subject and that he had no recommendation. Representative Sherrill asked if Dr. Coleman was advocating the abolishment of the death penalty as a way to change the culture. Dr. Coleman replied that he was not, and that he accepted that the state has the death penalty and would continue to have it until the people of North Carolina, the General Assembly and the Governor decide it has outlived its usefulness. He said that if North Carolina continues to have the death penalty, we must make sure that it promotes justice and is not administered in a way that undermines justice, but that when prosecutors engage in misconduct there should be consequences.

Representative Michaux asked Dr. Coleman to comment regarding inappropriate public comments that are made about capital cases by prosecutors. Dr. Coleman said that rule 3.6 makes it clear that prosecutors should not make statements in criminal cases that are intended to disparage a defendant or to turn the community against a defendant in advance of a trial.

Representative Culp asked if murder is the only crime that is subject to capital punishment.

Ms. Sitze replied that first-degree murder is the only crime that is subject to the death penalty. She added that in order for a jury to impose a death sentence there must be at least one aggravating factor.

Attorney Joseph B. Cheshire, V., was recognized to address the Committee. Mr. Cheshire stated that in the state of North Carolina, the service of justice has been greatly failed by not properly funding our courts, district attorneys, defense lawyers and law enforcement officers. He said that the people in the criminal justice system and the civil justice system should not be competing for money, but rather should be on the same team to see that justice is done. He said, however, that it cannot be expected, whether we have a moratorium or not, that all will act perfectly or that all will act alike and that this cannot be legislated or mandated, He said that we must recognize that that there are gross exceptions to the good people on both sides that must be dealt with.

Mr. Cheshire discussed several cases where prosecutorial misconduct occurred, and said that there is, and has historically been, a double standard as it relates to that misconduct. He suggested that Committee look at the statistics showing the counties having the most people on death row and see how those cases have been tried. Mr. Cheshire suggested that consideration should be given to creating a system similar to that in the federal courts where a panel of people looks at a case before it is tried and determines whether it is an appropriate case for the death penalty in order to bring about some consistency throughout the state.

Mr. Cheshire stated that without passage of legislation requiring the openness of the prosecutor's file, little would be known about prosecutorial misconduct. He praised recent efforts of the General Assembly, but stated that there are still holes that need to be fixed, and urged the Committee to resist any effort to roll back the open discovery law. Mr. Cheshire stated that he thought the people of North Carolina probably want the death penalty, but that they want the death penalty for people who really deserve it in a fair fight where everything is on the table and everyone sees what it is and where every argument is dealt with fairly. He said that the state needs a change in the political climate that surrounds the death penalty to make it a judicial and justice issue rather than a political issue.

Representative Harrison asked if any adjustment was needed regarding open file discovery law. Mr. Cheshire replied that there may be a need for tweaking as it relates to what law enforcements' role and obligation is to the district attorneys. He further added that to some extent, there is a need for judges to enforce what is already in place.

Representative Holliman asked why proportionality does not give consistency across with state with regard to imposing the death penalty. Mr. Cheshire replied that it may give consistency as to a few cases, but it does not stop whether one county prosecutes everybody for death and another prosecutes no one.

Representative Luebke asked what Mr. Cheshire would recommend for people who are on death row now who were tried and convicted prior to the establishment of the

Indigent Defense Services. Mr. Cheshire replied that beyond the funding of attorneys who can go back and look into those cases, there is little that he felt could be done. Representative Luebke asked if there is a need for a review of those cases. Mr. Cheshire said that he would have no objection to such review.

Representative Sherrill asked if such review did not already exist. Mr. Pell said that the state funds counsel for motions for appropriate relief.

Ms. Jean was again recognized to offer a recommendation to the Committee. She said that the State Bar would welcome legislation that would put the burden on someone in the county, whether it be the presiding judge or the clerk of superior court, to notify the State Bar when a capital murder conviction had been set aside.

There was brief discussion regarding whether the work of the Committee would have any effect on the recently established Innocence Commission. Representative Sherrill asked if consideration should be given to expanding the responsibility of the Innocence Commission.

Representative Harrison asked if the Committee planned to explore the topic of mental competency. Co-Chair Hackney noted that because of the limited number of meetings before the Session begins, and because of the magnitude and complexity of the subject, the Committee would not have the time to visit that topic and give it justice. Representative Sherrill suggested that the Committee recommend a study committee to look at the issue.

Representative Cole expressed support for the establishment of a panel to look at cases before they are tried to determine whether they are appropriate cases for the death penalty. Co-Chair Hackney noted that there are two aspects for such a panel. He noted that it could look forward to new cases as they come along, and another application would be to review pre-IDS death sentence cases.

Mr. Pell noted that during an earlier meeting of the Committee, it was suggested that consideration be given to narrowing the death penalty statute much like has been done in the State of Virginia to allow for more consistent application of the death penalty.

Representative Sherrill expressed interest in the panel suggested by Mr. Cheshire. She questioned how such a panel would be appointed and how consistency among those on the panel could be assured. She said that she would like to hear from the district attorneys about such a panel.

Representative Parmon asked if Mr. Cheshire thought there would be a lot of political resistance to appointing prosecutors. Mr. Cheshire stated that he would be open to appointing prosecutors.

The meeting was adjourned at 12:30 p.m.

Representative Beverly Earle
Co-Chair

Representative Joe Hackney
Presiding Co-Chair

Emily Reynolds Freeman
Commission Clerk

ATTACHMENTS:

Attachment I	Agenda
Attachment II	Visitor Registration

HOUSE SELECT COMMITTEE ON CAPITAL PUNISHMENT

Legislative Building, Room 1228
Raleigh, NC

November 21, 2006
10:00 AM

AGENDA

INTRODUCTION AND OPENING REMARKS

- Rep. Beverly Earle, Co-Chair
- Rep. Joe Hackney, Co-Chair

PROSECUTORIAL MISCONDUCT

- Katherine Jean, North Carolina State Bar
- Tom Lock, District Attorney, 11th District
- Dr. James E. Coleman, Jr., Duke University School of Law
- Joseph B. Cheshire, V, Attorney

COMMITTEE DISCUSSION

INSTRUCTIONS TO STAFF

ADJOURNMENT

ATTACHMENT II

VISITOR REGISTRATION SHEET

House Select Committee on Capital Punishment — November 21, 2006

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Katie Maslanka	People of Faith Against the Death Penalty 110 W. Main St., Suite 2G Carrboro, NC 27510
Mitch Kokai	John Locke Foundation
Becki Gray	Civitas Institute
Troy Page	Sentencing Commission
Tye Hunter	Indigent Defense Services
Chris Fitzsimon	NC Policy Watch
Rob Schofield	" " "
Patrick Buffkin	ALLEY ASSOCIATES INC.
Jim Coleman	Duke University Law School Box 90360 Durham NC 27708
Jeff Walton	Youth Advocacy
Gary Robertson	AP

VISITOR REGISTRATION SHEET

House Select Committee on Capital Punishment — November 21, 2006

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Lee Rubcat	CJPC
Megan Nerz	Francscan Coalition
Linda [illegible]	CJPL
CP[illegible]	NCATL
Gary Mc[illegible]	NCAGO
Wayne Uber	SCP
Colon Willoughby	DA 10th Dist.
Brian Eldersoon	Common Sense Foundation
Ken Rose	CDPL
Mark Kleinschmidt	Fair Trial Initiative.
Mary Ann Talley	NCATL

VISITOR REGISTRATION SHEET

House Select Committee on Capital Punishment — November 21, 2006

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Joe Cheshire	Att'y / Raleigh, N.C.
Katherine Jean	Counsel / NC State Bar
Charlie Reece	NC Conference of District Attorneys
Peg Dorer	Conference of D.A.s
Dan Rabon	DA - 11th Dist.
Charmaine Fuller	CJPC
Colleen Kochanek	Smith Moore
Lynn Burner	NAD
Mel Chilton	NCUAN
Heather Lange	McGuire
D.A. Hoffman	Victim Adv.

VISITOR REGISTRATION SHEET

House Select Committee on Capital Punishment — November 21, 2006

Name of Committee — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Jeremy Gillins	NCCM
Anna Arceneaux	Fair Trial Initiative Durham, NC
N. Carnell Robinson	N.C. Black Leadership Caucus
Stephen Dear	People of Faith Against the Death Penalty
Don Beeson	Capital Group

House Select Study Committee on Capital Punishment

December 13, 2006

Minutes

The House Select Study Committee on Capital Punishment met on Wednesday, December 13, 2006, at 1:00 p.m. in Room 643 of the Legislative Office Building. Representative Beverly Earle, Cochair called the meeting to order and the following members of the Committee were present: Representative Joe Hackney, Co-Chair, Representatives Jeff Barnhart, Nelson Cole, Pete Cunningham, Rick Eddins, Pricey Harrison, Hugh Holliman, Marvin Lucas, Paul Luebke, Bonner Stiller, Ronnie Sutton, Joe Tolson, Jennifer Weiss and Winkie Wilkins. Copies of the meeting agenda and the Visitor Registration are attached, (Attachments I and II).

Following opening remarks from Cochair Earle, Mr. Barry McNeill, Special Deputy Attorney General, North Carolina Department of Justice was recognized to begin the discussion of race and how it relates to capital punishment. Mr. McNeill spoke regarding the current safeguards in the law both by case law and statute that help protect the system against racial bias entering into the trial and sentencing of cases. Mr. McNeill discussed safeguards in the charging decision by the prosecutor, the indictment by the Grand Jury, appointment of counsel to represent capitally-tried defendants, jury selection, trial procedure, appellate review by the state and federal courts, post-conviction review and clemency review by the governor. Those safeguards are detailed in a handout that was distributed to the members of the Committee and is attached to the minutes, (Attachment III).

Mr. McNeill said that there are various ways that claims of racial prejudice or racial bias come up in trials or appellate courts regarding the selection of the jury or prejudicial evidence. He noted examples such as a juror making a racial slur, or a claim that all the members of a jury ended up being of one race or another. He said that he thought such claims are episodic and not systematic of the system, and that when such claims are investigated, they generally are proven to be unfounded.

Mr. McNeill said that several studies show that executions deter murders and that murder rates increase substantially during moratoriums. He offered to furnish copies of those studies to the members of the Committee. Representative Luebke and Cunningham requested copies of the studies and Representative Luebke asked Mr. McNeill to elaborate on his statement. Mr. McNeill said that studies conducted primarily by economists at various universities throughout the country since 2001, and have been published and subjected to peer review, have concluded consistently that the execution of individuals deters anywhere from 3 to 28 innocent people from being murdered. He said the studies also held that in states where a moratorium was put into place, murder rates climbed. Representative Luebke pointed out that this is a correlation and not causality. Mr. McNeill said that the economists attempt to take as many variables into consideration as they can and that there are consistent findings in the studies. He encouraged the

Committee to review the studies. (Those studies were provided to the members of the committee and are included in the minutes as Attachment IV).

Mr. McNeill briefly discussed the percentages of defendants executed in North Carolina to date, as well as those who have been sentenced to death. He noted that 39% are white, 54% are black, 5% are Indian and 2% are listed as "other." He called attention to a research bulletin included in his handout that was prepared by the Department of Correction in March 2006 stating that as of December 2005, North Carolina's general prison population was 35,620 inmates. Of this general population, 35% were white, 58% were black and 7% were of other races. He noted that the general population essentially mirrors the racial statistics of North Carolina's death row.

Mr. McNeill stated that, in his personal opinion, racial bias on a systemic or systematic scale, has not been apparent to him, and has not been shown to have been apparent, through statistics or otherwise, in North Carolina capital trials or sentencing. He said that racial prejudice or the study of racial prejudice is not a compelling reason for a moratorium on capital punishment in North Carolina.

Co-chair Earle asked how the crime rate, as it relates to deaths, compares to states that do not have capital punishment. Mr. McNeill was unable to offer a definite answer.

Co-chair Earle noted that a statistical update had been provided by the staff and was distributed to the members, (Attachment V).

Professor Emeritus Elliott M. Cramer, University of North Carolina at Chapel Hill, was recognized to discuss statistical evidence of racial discrimination in the death penalty. Professor Cramer stated that in the past, there can be no doubt that there has been a history of racial discrimination in the death penalty in North Carolina. He said that it should be a concern of the Committee as to whether this pattern of discrimination is ongoing. He briefly discussed the history of executions in North Carolina and referenced a handout showing the number of blacks and the number of whites that were executed from 1910 until 2006, (Attachment VI). Professor Cramer noted that from 1984 through 2006, there was a reversal from previous years having more whites executed than blacks. He noted that critics of the death penalty can no longer claim that there is discrimination in that African-Americans are more likely to be executed than whites. He said that statistical studies have shown the opposite. He discussed the nature of the racial characteristics for executions noting the number of executions for whites who murdered whites, blacks who murdered whites, blacks who murdered blacks, etc. He stated that his studies reveal that cross-racial homicides are particularly aggravated and he would expect those homicides to be more likely to result in the death penalty. Those statistics are found in his handout.

Professor Cramer discussed several cases and death penalty studies. More detail of these studies may be found in Professor Cramer's remarks that are attached to the minutes, (Attachment VII).

Representative Luebke assumed to chair in the absence of the Cochairs for part of the meeting. He noted that one of the speakers scheduled to make a presentation to the Committee had a later commitment, and asked if Professor Cramer would pause and allow that speaker to address the Committee.

Mr. Ben David, 5th Prosecutorial District, Conference of District Attorneys, was recognized. Mr. David began his comments by reminding the Committee that he enforces the laws that are enacted by the General Assembly and that he takes that obligation very seriously. He said that race should play absolutely no role in the prosecution of any case, let alone a death penalty case. He further stated that there are procedures in place in our criminal justice system to see that if errors are made or if bias is present, it is captured, is exhaustively reviewed and that appropriate actions are taken. Mr. David related his experience of being wrongfully accused as being racist. His experience is summarized in a handout that was distributed to the members of the Committee, (Attachment VIII). Mr. David stated that as a prosecutor he has to make tough decisions and must follow the law. He said that there must be agreement, even among those who oppose the death penalty, that we should be fighting the law and not the people who uphold the law. He said that if it is determined that race is injected into the system, or wrongful accusations are made, it should not be tolerated. He said that if the discussion is about fairness, it is only fair that the entire process is considered, and that one takes a look at both sides. An additional handout was distributed to the Committee and is attached, (Attachment IX).

Professor Cramer was recognized to continue his presentation. He stated that he was agnostic on the issue of the abolishment of the death penalty. He said that he is committed to the proper use of statistical methodology and that he does not believe there is any statistical support for the view that the death penalty discriminates against African-Americans or anyone else. He said that he did not think that the science of statistics has anything to contribute to the debate and that death penalty opponents would do better to focus on the morality of the death penalty and the remote possibility of executing an innocent person.

Professor Jack Boger, Dean and Wade Edwards Distinguished Professor of Law, UNC-CH School of Law, was recognized. Professor Boger noted that he had addressed the Committee at its December 19, 2005 meeting at which time he stated that the most important long-term contribution to the discussion of the death penalty might be less the views that any of the members ultimately reached on particular questions, than the capacity to bring forward new evidence on this matter. He urged the Committee to gather solid reliable evidence on the issue of racial discrimination in capital sentencing.

Professor Boger discussed various capital sentencing studies and they are detailed in a handout that was provided to the members of the Committee, (Attachment X). He said that in most of the studies, the clear answer has been that race does matter. He said that the studies should raise enough questions in the minds of the members to carry out an independently commissioned examination of the death penalty.

Representative Sutton asked if Professor Boger could offer a solution to the General Assembly to address the problem of discrimination by juries when they are in the back room deliberating a case. Professor Boger replied that the way juries are selected needs to be addressed more vigorously and that cutting down on allowing the changing of venue to different racially composed counties might make a difference. He also suggested narrowing of the category of cases that are death eligible.

Representative Sutton asked Professor Boger to offer a process of how the General Assembly can attempt to control what a jury does in their deliberations once they are determined that there is going to be some discrimination. Professor Boger replied that balance on the jury would provide more ears when someone on the jury makes discriminating comments. He suggested a statute stating that when a juror is removed another juror of the same race must be put into the jury box. Representative Sutton replied there could still be a problem if the initial twelve jurors are comprised of eleven whites and one black and the defendant is black.

Cochair Earle commented that there appears to be discrimination with regard to discretion on the part of the prosecutors as to what charge is made against a defendant. Professor Boger said that he felt there is too much discretion. He again urged the Committee to conduct its own study.

Representative Cunningham, noting a need for a study, asked Professor Cramer to comment. Professor Cramer stated that he was persuaded, having spent many hours on other studies, it would be impossible to draw any valid conclusions because there are so many variables that are impossible to quantify and allow for.

Representative Sutton stated that he thought we sometimes have our priorities wrong. He said that no matter how reprehensible or how heinous the crime, even when defendants admit their guilt and there is no question of their sanity, some of the most brilliant minds in the state still spend the scarce resources we have trying to find a way to prevent their execution, which is what the jury decided should happen. He said that this seems to be counter productive use of our assets.

Mr. Jonathan Broun, North Carolina Center for Death Penalty Litigation, was recognized. Mr. Broun said that while race should not play a role in the death penalty, it is happening in North Carolina. He said that racism can be blatant, subtle, intentional, and can be subconscious. He said it sometimes can be something involving events that happened years before the crime and the trial. Mr. Broun spoke of how race affects a prosecutor's decision in the charges that are made and how it affects jury selection. Mr. Broun spoke of cases showing how race influences the death penalty.

Mr. Broun recommended that the Committee consider the passage of a racial justice act that allows for challenges for relief if it can be shown that there has been racial discrimination on anyone's part, either before or after a trial, that led to a death sentence. He also recommended that objectivity be added to the process, whether by narrowing the statute or by the elimination of simply allowing the death penalty for felony murder. He

recommended considering the passage of a moratorium. He advocated studying race and its impact in a calm manner and that the only way to do so is under the calm of a moratorium. Two handouts were distributed to the members of the Committee, (Attachments XI and XII).

Dr. William Barber, President, North Carolina NAACP, was recognized. Dr. Barber stated that moratorium resolutions have been passed by more than eleven hundred businesses and organization throughout the state and that a moratorium petition has yielded well over forty thousand signatures. He said that the NAACP originated from the pain of capital punishment being used legally and illegally to perpetuate and preserve racial inequality. Dr. Barber said the organization has always been opposed to killing people as one of the tools of justice. He noted that African-Americans are not soft on crime and that most are quite conservative regarding crime issues. He said that while African-Americans make up only thirteen percent of the overall population, forty-two percent of the people currently on death row are black. Dr. Barber said that African-Americans are also over represented in the number of people on death row who are later found to be innocent. He stated that the United States Supreme Court said that there is a unique opportunity for racial prejudice to operate, but remain undetected, in trials of African-Americans where the jury is forced to make a highly subjective unique individualized judgment regarding the punishment that a particular person deserves. He said the court found that it remains an unfortunate factor in our society that violent crimes perpetuated against members of other racial or ethnic groups often raise a reasonable possibility that racial prejudice would influence the jury.

Dr. Barber said that there is a need for a study, but that it must be done correctly, funded in a proper manner and that the right issues are faced. He said that in the process of such a study, a moratorium must be put into place. He further stated that historically the NAACP has always held the position of abolition of the death penalty. Dr. Barber requested that the position of the NAACP be included in the record:
Ensure that government and states place a moratorium on utilization of capital punishment until race and ethnicity is no longer statistically significant in predicting sentencing and execution.

Cochair Earle announced that the Committee would meet in early January to review recommendations. She urged the members to contact the staff with suggestions for the recommendations. She further noted that the next meeting would include time for a public hearing.

The meeting was adjourned at 4:00 p.m.

Representative Beverly Earle
Co-Chair

Representative Joe Hackney
Presiding Co-Chair

Emily Reynolds Freeman
Commission Clerk

I

ATTACHMENTS:

Attachment I - Agenda
Attachment II - Visitor Registration
Attachment III - Handout – Barry McNeill
Attachment IV - Death Penalty Deterrence Studies – Barry McNeill
Attachment V - Handout – Staff – Statistical update
Attachment VI - Handout – Professor Cramer
Attachment II - Remarks – Professor Cramer
Attachment VIII - Handout – Ben David
Attachment IX - Handout – Ben David
Attachment X - Handout – Professor Boger
Attachment XI - Handout – Jonathan Broun
Attachment XII - Handout – Jonathan Broun

ATTACHMENT I

HOUSE SELECT COMMITTEE ON CAPITAL PUNISHMENT

Legislative Office Building, Room 643
Raleigh, NC

December 13, 2006
1:00 PM

AGENDA

INTRODUCTION AND OPENING REMARKS

- Rep. Beverly Earle, Co-Chair
- Rep. Joe Hackney, Co-Chair

RACE AND CAPITAL PUNISHMENT

- Barry McNeill, Special Deputy Attorney General, North Carolina Department of Justice
- Professor Emeritus Elliott M. Cramer, Univ. of North Carolina at Chapel Hill
- Jack Boger, Dean and Wade Edwards Distinguised Professor of Law, UNC-CH School of Law
- Ben David, 5th Prosecutorial District, Conference of District Attorneys
- Jonathan Broun, NC Center for Death Penalty Litigation
- Dr. William Barber, President, NC NAACP

COMMITTEE DISCUSSION

INSTRUCTIONS TO STAFF

ADJOURNMENT

VISITOR REGISTRATION SHEET

House Select Committee on Capital Punishment
Name of Committee

Date Dec. 13, 2006

VISITORS: PLEASE SIGN BELOW AND RETURN TO COMMITTEE ASSISTANT

NAME	FIRM OR AGENCY
Howard Lenga	NC Bar
Stephen Deal	People of faith Against the Death Penalty
Katie Maslanka	People of Faith Against the Death Penalty
Megan Sheridan	People of Faith Against the Death Penalty
Jennifer Lorenz	ACLU of NC
Elliot Cramer	U of NC
[illegible]	NCATL
Bill Gural	People of Faith Against Death Penalty
Scott Bass	Nazareth House
Jonathan Brown	[illegible]
Ken Rose	NCATL
Charmaine Sweet	CJPC
Mark Kleinschmidt	Fair Trial Initiative
Zach Rowles	Fair Trial Initiative
Gerda Stein	Raleigh
Brian Eldersroom	Common Sense Foundation
Jack Boger	UNC School of Law
Megan Nerz	Franciscan Coalition for Justice + Peace
Ted Frazer	N.C. Citizen - Durham N.C.
[illegible]	NCATL
[illegible]	NAACP
[illegible]	NCDOJ
[illegible]	NC Conference of DAs
Ben David	DA - 5th District
Jon Dunn	ADA - 5th
William P. Hart	N.C. Dept. of Justice

12-13-06

VISITOR REGISTRATION SHEET

Hse - Select Comm - on Capital Punishment

Name of Committee | Date

VISITORS: PLEASE SIGN BELOW AND RETURN TO COMMITTEE ASSISTANT

NAME	FIRM OR AGENCY
Bart Lyscd	Justice For Citizens
Margaret Shinn	Justice for Citizens
Bucki Funk	NCUAN
Mel L Guilton	NCUAN
Chuck Stone	SEANC/SEIU
Lao Robert	Carolina Justice Policy Center
Doug Heron	NC BAR ASSOCIATION
Kimberly N Overton	Conf. of DAs
Charlie Reece	NC Conference of DA's
Rebecca Barber	NAACP
Mary P Shand	CNPL
Chris Fitzsimon	NC Policy Watch
Carnell Robinson	NC Black Leadership Caucus
Joal Brown	

The Death Penalty in North Carolina: Case Law & Statutory Protections

Capital Punishment Study Committee
December 13, 2006

Barry S. McNeill
Special Deputy Attorney General
Capital Litigation/Federal Habeas Section

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629
(919) 716-6500
bmcneill@ncdoj.gov

INTRODUCTION

At its April 26, 2006 meeting, the House Select Committee on Capital Punishment was provided a summary of the trial and state and federal appellate processes in North Carolina death penalty cases. Today's meeting focuses more specifically on the current safeguards in the law, both by case law and statute, which ensure that the death penalty in North Carolina is administered fairly and impartially, without regard to a defendant's or victim's race. First, this presentation will highlight in outline format some of, but certainly not all of the important safeguards which exist to prevent the matter of race from affecting the prosecution and sentencing of North Carolina capital cases. Second, this presentation will provide a brief overview of North Carolina's death row population in terms of racial demographics and statistics.

A. Safeguards Against Race Impacting North Carolina Capital Prosecution and Sentencing

1. Charging decision by District Attorney

a. Newly-enacted prosecutorial discretion whether to try a defendant capitally pursuant to N.C. Gen. Stat. § 15A-2004, effective as of July 1, 2001

b. Prosecutorial discretion is limited by Constitutional principle under the Equal Protection Clause of the Fourteenth Amendment that prosecution may not be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler v. Boles*, 368 U.S. 448, 456 (1962); *State v. Cherry*, 298 N.C. 86, 103, 257 S.E.2d 551, 562 (1979) (There may be selectivity in prosecutions and that the exercise of this prosecutorial prerogative does not reach constitutional proportion unless there be a showing that the selection was deliberately based upon

"an unjustifiable standard such as race, religion, or other arbitrary classification.") (quoting *Oyler v. Boles*, 368 U.S. at 456), *cert. denied*, 446 U.S. 941 (1980).

c. "In order to prevail on a claim of selective prosecution, the defendant must demonstrate that his prosecution 'was motivated by a discriminatory purpose and had a discriminatory effect.'" *State v. Garner*, 340 N.C. 573, 588, 459 S.E.2d 718, 725 (1995) (citing *Wayte v. United States*, 470 U.S. 598 (1985)), *cert. denied*, 516 U.S. 1129 (1996).

2. Indictment by Grand Jury

a. The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, U.S. Const., Amend. XIV, and N.C. Const., Art. 1, § 19 and § 26 forbid any discrimination in selection of grand jury pursuant to N.C. Gen. Stat. § 15A-622, or in selection of grand jury foreman; members of race may not be systematically excluded from grand jury or grand jury foreman; if defendant establishes *prima facie* case of racial discrimination in selection of grand jury or foreman, then the State may attempt to rebut such a showing by offering evidence that the process used was in fact racially neutral. *See State v. Cofield*, 320 N.C. 297, 357 S.E.2d 622 (1987).

3. Appointment of two counsel to represent capitally-tried defendants

a. Pursuant to N.C. Gen. Stat. § 7A-450(b1), an indigent capital defendant is afforded the appointment of two appointed attorneys, now qualified under the rules and regulations of the Office of Indigent Defense Services, N.C. Gen. Stat. 7A-498.2.

4. Jury Selection

a. A defendant has "the constitutional right to be tried by a jury from which members of his own race have not been systematically and arbitrarily excluded." *State v. Cornell*, 281 N.C. 20, 32, 187 S.E.2d 768, 775 (1972).

b. If the circumstances of a particular case indicate a significant likelihood that racial bias may influence a jury, the United States Constitution requires that a defendant be allowed to question prospective jurors as to such bias. *Ristaino v. Ross*, 424 U.S. 589, 596 (1976).

c. "We hold that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias. *Turner v. Murray*, 476 U.S. 28, 36-37 (1986).

d. Pursuant to N.C. Gen. Stat. § 15A-957, upon motion by the defendant, if the court determines that there exists in the county in which the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial, the court must either transfer the trial to another county in the prosecutorial district, or to another county in an adjoining prosecutorial district, or order a special venire of jurors from another county pursuant to N.C. Gen. Stat. § 15A-958.

e. Pursuant to N.C. Gen. Stat. § 15A-1211, a defendant may challenge the entire jury panel.

f. Pursuant to N.C. Gen. Stat. § 15A-1212, an individual juror may be challenged for cause if he or she is unable to render a fair and impartial verdict.

g. Pursuant to N.C. Gen. Stat. § 15A-1217, in capital cases each

defendant is allowed 14 peremptory challenges, and the State is allowed 14 challenges for each defendant.

h. A defendant may establish a *prima facie* case of discrimination in the prosecutor's exercise of peremptory challenges by showing that he or she is a member of a racial group; that members of that group have been excluded from the jury; and, that the facts and circumstances of the case raise an inference that such exclusion was based upon race. If the *prima facie* case is established, the burden shifts to the State to show a neutral explanation which cannot be done on the mere assumption that the jurors would be partial to the defendant because of their shared race or by affirming the good faith in individual selections. *Batson v. Kentucky*, 476 U.S. 79 (1986), *overruling, Swain v. Alabama*, 380 U.S. 202 (1965) (requiring defendant to show prosecutor exercised peremptory challenges against blacks in case after case in order to establish a *prima facie* case of discrimination).

i. The rule of *Batson* prohibiting the exercise of peremptory challenges on the basis of race applies to defendants as well as prosecutors; in other words, a defendant may not exercise his or her peremptory challenges in a discriminatory manner. *Georgia v. McCollum*, 505 U.S. 42 (1992).

j. A defendant has standing to object to the race-based exclusion by peremptory challenges of jurors on equal protection grounds under *Batson* even if he or she is not of the same race as the challenged jurors; in other words, a white defendant may assert the equal protection rights of the excluded black jurors. *Powers v. Ohio*, 499 U.S. 400 (1991).

5. Trial Procedure

a. Pursuant to N.C. Gen. Stat. § 8C-1, Rule 402, only relevant evidence is admissible at trial, and pursuant to N.C. Gen. Stat. § 8C-1, Rule 403, even such relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

b. Pursuant to N.C. Gen. Stat. § 15A-1061, upon motion by a defendant the court must declare a mistrial at any time during the trial "if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case."

c. The United States Constitution prohibits racially biased prosecutorial arguments. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).

6. Appellate Review on Direct Appeal

a. Pursuant to N.C. Gen. Stat. § 15A-2000(d)(1), a defendant's death sentence is subject to automatic review by the Supreme Court of North Carolina.

b. Pursuant to N.C. Gen. Stat. § 15A-1442, a defendant may raise on direct appeal to the Supreme Court of North Carolina issues involving racial discrimination, such as discrimination in the prosecutor's charging decision; discrimination in the selection of the grand jury or grand jury foreman; jury selection and lack of an impartial jury; prejudicial evidence admitted, etc.

c. Pursuant to N.C. Gen. Stat. § 15A-2000(d)(2), the Supreme Court

of North Carolina examines each death sentence on direct appeal for, among other things, whether "the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor."

d. Pursuant to N.C. Gen. Stat. § 15A-2000(d)(2), the Supreme Court of North Carolina also examines each death sentence on direct appeal for whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

7. Post-Conviction Review

a. Pursuant to either N.C. Gen. Stat. § 15A-1414 or N.C. Gen. Stat. § 15A-1415, after conviction and sentencing a defendant may seek to raise claims by way of a Motion for Appropriate Relief and present evidence that he or she did not receive a fair and impartial trial.

b. If unsuccessful in State courts, the defendant may seek to raise similar claims in federal court by way of a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.

B. Overview of North Carolina's Death Row Population

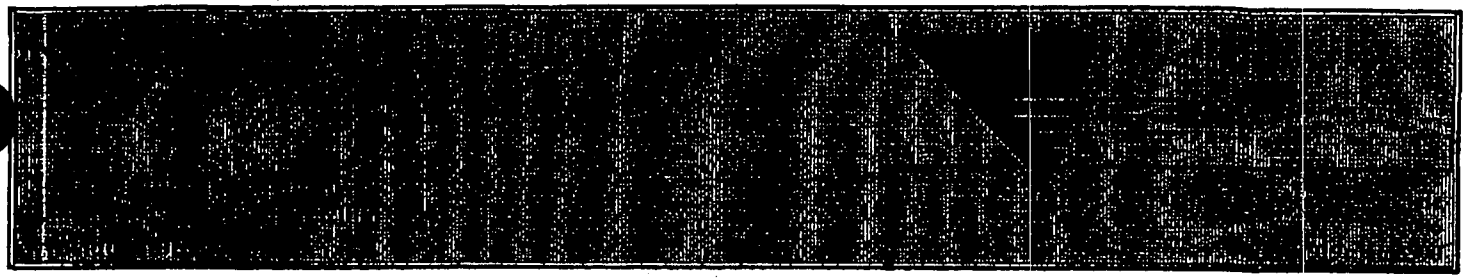
According to the demographics compiled by the North Carolina Department of Corrections, http://www.doc.state.nc.us/dop/deathpenalty/deathrow.htm, there presently are a total of 166 inmates on North Carolina's death row, including: 62 white males; 2 white females; 88 black males; 1 black female; 8 Indian males; 1 Indian female; and, 4 "other" males. In terms of percentages for North Carolina's death row population, 39% are white, 54% are black, 5% are Indian, and 2% are other. By comparison, the latest statistical information from the United States Department of Justice's Bureau of Justice

Statistics (Capital Punishment 2004), indicates that, nationally, at the end of year 2004, of the 3,314 prisoners under sentence of death in the 36 death penalty states and the Federal prison system, 56% were white, 42% were black, and 2% were of other races. http://www.ojp.usdoj.gov/bjs/abstract/cp04.htm, Also, for comparison purposes, according to the latest information as of December 31, 2005 for North Carolina's general prison population of 36,620 inmates, 35% were white, 58% were black and 7% were of other races, essentially mirroring the racial statistics for North Carolina's death row. Attachment 1, *Research Bulletin, North Carolina Department of Correction*, Issue No. 49 (Mar. 30, 2006); http://crrp41.doc.state.nc.us/docs/pubdocs/0006915.PDF

Since capital punishment was reinstated in North Carolina in 1977 by the enactment of N.C. Gen. Stat. § 15A-2000 and related laws, there have been a total of 43 death row inmates executed in North Carolina within the past 22 years. Of these 43 executed inmates, 28 were white, 13 were black, one was Indian, and one was other race. http://www.doc.state.nc.us/dop/deathpenalty/executed.htm In terms of percentages for North Carolina's death row inmates executed since 1977, 66% have been white, 30% have been black, 2% have been Indian, and 2% have been of other race. Attachment 2, Racial Percentages of North Carolina Death Row Inmates Executed Since 1977. Of these 28 executed white death row inmates, in 27 of the 28 cases the victims were white; in one case (Kermit Smith, Jr.), the victim was black. Of the 13 executed black death row inmates, in 6 of the 13 cases the victims were white; in the remaining 7 cases the victims were black. In the one case of an executed Indian death row inmate, the victims were also Indian. In the one case of an executed death row inmate designated by the DOC as "other" race (Elias Syriani), the race of the victim

was listed by the DOC as white (the victim was Syriani's estranged wife). Attachment 3, Percentages of North Carolina Death Row Inmates Executed Since 1977/Race of Victims.

ATTACHMENT 1



This document provides a quick reference of information from different sources within the North Carolina Department of Correction. Information about the Department and the Divisions can be found on the web site (www.doc.state.nc.us).

	White	Black	Other	Total Percent
Male	*39%*	*18%*	*2%*	*59%*
Female	*20%*	*20%*	*1%*	*41%*

Total Authorized Budget Requirements for Fiscal Year 2004-2005:

Excluding Capital Expenditures.....$1,039,461,373

Cost per day per Probationer/Parolee (FY 2004-2005)		Cost per day per Prison Inmate (FY 2004-2005)	
$1.93	Regular Supervision	$74.52	Close Custody
$12.95	Intensive Supervision	$68.90	Medium Custody
$6.71	Electronic House Arrest	$51.25	Minimum Custody
$0.72	Community Work Service	*$63.56*	*Average Cost*

Total Supervised as of 12/31/2005			**117,886**
	Probation/Dual	***Parole***	***Post-Release***
	114,438	1,902	1,546
Sex			
Male	77%	94%	93%
Female	23%	6%	7%
Race			
White	45%	42%	27%
Black	46%	53%	66%
Other	9%	5%	7%

Entries to Supervision 2005		**66,885**
Entry Type		
Community	35,619	*56%*
Intermediate	14,617	*23%*
DWI Probation	9,276	*15%*
Probation (Other)	3,857	*6%*
Total Probation	**63,369**	
Parole	990	*54%*
DWI Parole	850	*46%*
Total Parole	**1,840**	
Total Post Release	**1,676**	

As of 12/31/04 North Carolina ranked 15th in Probation Population, 18th in Probation Supervision Rate (1,737 per 100,000 Population), 33rd in Parole Population, and 47th in Parole Supervision Rate (45 Parolees per 100,000 Population) of the 50 states and the District of Columbia. Bureau of Justice Statistics (2005).

Sanctions	**Population as of 12/31/05**	**Entries to sanction in 2005**
Intensive Supervision	7,001	14,290
Spilt Sentence	613	3,493
Electronic House Arrest	885	3,023
Day Reporting Center	828	1,582
Other Residential	225	300
DART-Cherry (90 Day)	198	751

Exits from Supervision in 2005

	Probation		**Parole**		**Post Release**	
Completions	11,337	*18%*	1,375	*78%*	1,246	*82%*
Supervision Terminated	28,104	*45%*	298	*17%*	50	*3%*
Incarcerated *	22,910	*37%*	97	*5%*	223	*15%*
Total	**62,351**		**1,770**		**1,519**	

*(revoked or elect to serve)

Drug charges were the most frequent type of crime (22%) committed by new entries to probation in 2005, followed by driving while impaired (15%), assault (12%), and other traffic violations (12%). Nearly half of parole entries during 2005 were driving while impaired (47%). Other crimes were murder (9%) robbery (8%), and drug charges (8%). The most frequent crime category for post-release supervision cases was robbery (29%). Other crimes were assaults (25%), habitual felonies were next frequent (19%) followed by sexual assaults (9%).

North Carolina Department of Correction
Office of Research and Planning
4221 Mail Service Center
Raleigh, NC 27699-4221

For more information on probation, parole, post-release, and prison populations visit the Research and Planning web page at **http://www.doc.state.nc.us/rap/rapweb/web/index.htm.**

Average Yearly Populations					
1991	19,048	1996	30,775	2001	31,885
1992	20,351	1997	32,075	2002	32,982
1993	20,986	1998	32,601	2003	33,646
1994	23,446	1999	31,780	2004	34,988
1995	26,943	2000	31,535	2005	36,263

As of 1/31/2004, North Carolina ranked 12th in Prison Population and 31st for Incarceration Rate of inmates sentenced for more than 1 year (357 Prisoners per 100,000 population) of the 50 states. Bureau of Justice Statistics (2005).

Prison Population as of 12/31/2005: 36,620			
Sex	*Males*	33,990	*93%*
	Females	2,630	*7%*
Race	*White*	12,754	*35%*
	Black	21,392	*58%*
	Other	2,474	*7%*
Conviction Status			
	Felony	34,526	*94%*
	Misdemeanant	2,083	*6%*
	Missing	11	*<1%*
Age	*Adults*	34,798	*95%*
	Youths 18 to 20	1,653	*5%*
	Youths <18	169	*<1%*

Program Assignments	Full Time	Part Time
Admission Processing	1,980	0
Academic Education	1,937	1,760
Vocational Education	1,597	451
Institutional Life	1,279	102
Health Maintenance	1,086	141
Drug/Alcohol Programs	951	8,310
Social Skills Development	152	2,676
Personal Growth/Religious Activities	61	2,108
Family Oriented Programs	0	384

Work Assignments	
Unit Services	5,387
Food Services	3,399
Road Squads	2,214
Enterprise	1,866
Maintenance	1,658
Work Release	1,090
Community Work Crew	906
State Agency	380
Local Government	315
Construction	236
Other Job	1,209

New Admissions in 2005: 26,603			
Sex	*Males*	23,091	*87%*
	Females	3,512	*13%*
Race	*White*	10,788	*41%*
	Black	14,288	*54%*
	Other	1,527	*5%*

Education Level of Felon Prison Admissions in 2005		
Grade	Highest Grade Claimed	Achieved Reading Grade
0-6	*1%*	*30%*
6.1-11.9	*67%*	*45%*
12.0 +	*32%*	*25%*

Age	*Adults*	23,904	*90%*
	Youths 18 to 20	2,279	*9%*
	Youths <18	420	*1%*

Most Frequent Crimes of 2005 Admittants		
Drugs Possession/ Sell (or intent)	5,267	*20%*
Assault	3,053	*11%*
Larceny	2,889	*11%*
DWI	2,583	*10%*
Breaking and Entering	2,570	*10%*
Traffic Violations	1,649	*6%*
Robbery	1,344	*5%*
Sexual Assault/Sex Offense	1,222	*5%*
Fraud	1,145	*4%*
Drug Trafficking	764	*3%*
Murder/Manslaughter	694	*3%*
Habitual Felon	608	*2%*
Forgery	531	*2%*
Possession of Firearm/Weapon	457	*2%*
Burglary	276	*1%*
Kidnapping & Abduction	266	*1%*
Other Crimes	1,285	*4%*

Median Percent of Sentences Served		
	Structured	Pre-Structured
Felon	108%	58%
Misdemeanant	95%	45%

PRISON FACILITIES as of 12/31/2005

Half-way House:	1
Substance Abuse Facilities:	2
Prisons:	76
Total	79

Standard (SOC) and Expanded (EOC) Operating Capacities:

	# of Units	SOC	EOC
Close	17	12,274	14,725
Medium	22	10,684	13,200
Minimum	37	8,316	10,403
	Total:	31,274	38,328

			SOC	EOC
Largest:	NC Correctional Institution for Women	Capacity of	956	1,362
Smallest:	Wilmington RFW	Capacity of	26	36

Department of Correction Facility Construction

Facilities Completed in 2005:
None

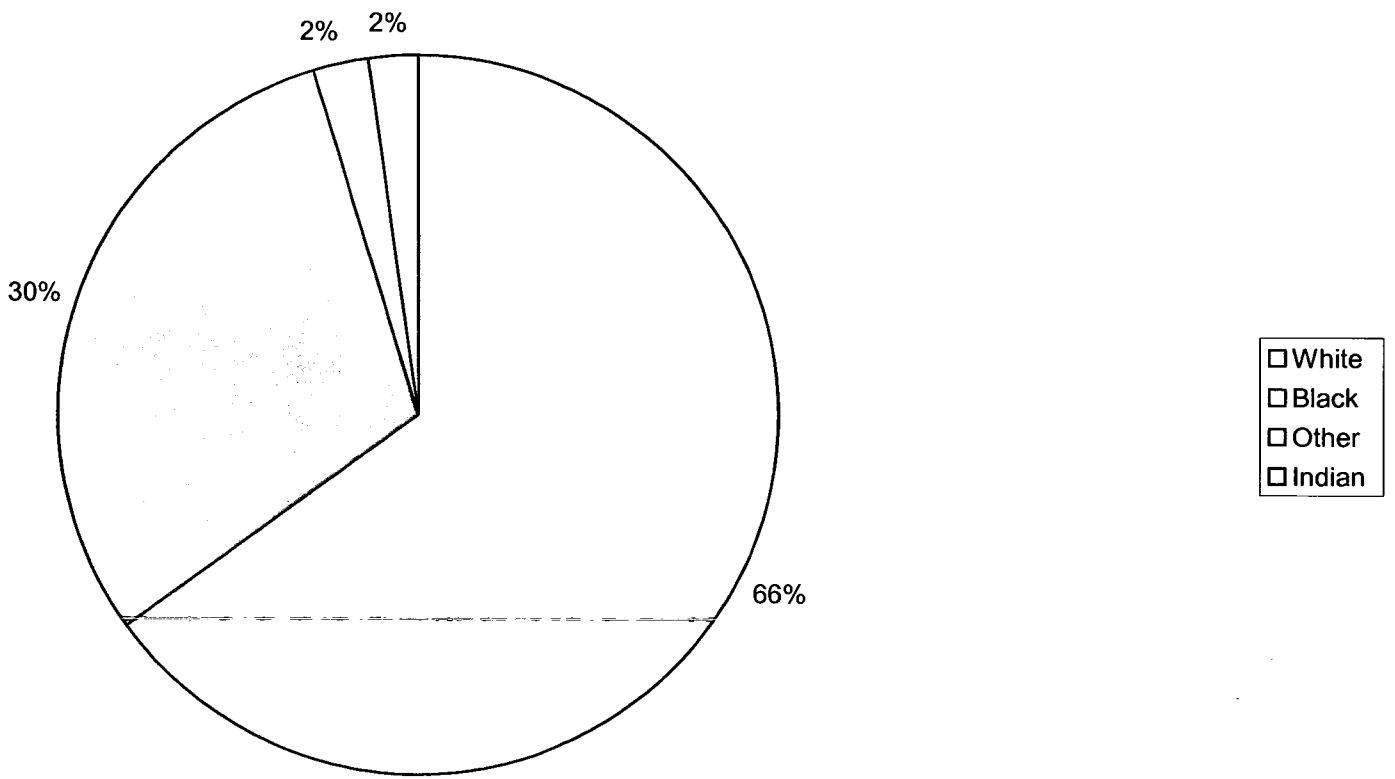
Facilities to be Completed in 2006:

Prison Unit	Custody Level	Number of Beds	Construction Costs
Maury Correctional Institution	Close	1,000	$78,200,000
Bertie Correctional Institution	Close	1,000	$80,500,000

ATTACHMENT 2

Racial Percentages of North Carolina Death Row Inmates Executed Since 1977

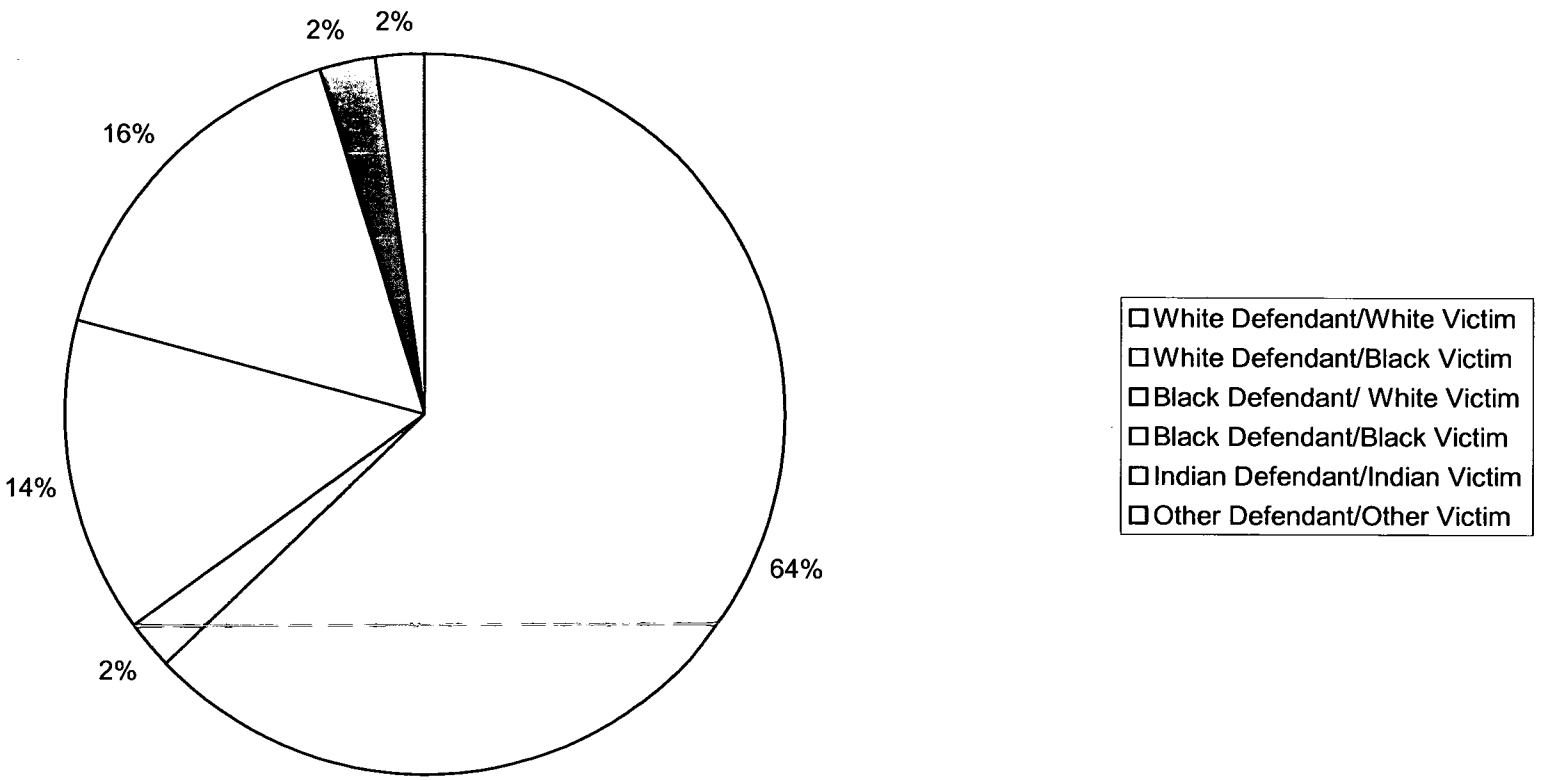
(Source: NC Department of Justice September 2006)



ATTACHMENT 3

Percentages of North Carolina Death Row Inmates Executed Since 1977/Race of Victims

(Source: NC Department of Justice September 2006)



ATTACHMENT IV

Reply to: BARRY S. MCNEILL
CAPITAL LITIGATION/FEDERAL HABEAS SECTION
TELEPHONE #: (919) 716-6570
FAX #: (919) 716-0001
E-MAIL TO: BMCNEILL@NCDOJ.GOV

January 2, 2007

House Select Committee on Capital Punishment
c/o Mr. Hal Pell
Suite 545, Legislative Office Building300 N. Salisbury St.Raleigh, NC 27603-5925

Re: Death Penalty Deterrence Studies

Dear Members of the House Select Committee on Capital Punishment:

At the meeting of the House Select Committee on Capital Punishment on Thursday, December 13, 2006, I was requested to provide to the Committee members the deterrence studies which I mentioned in my oral presentation. Since the meeting last Thursday, a number of additional papers/studies have been discovered and/or brought to my attention, two that appear to support the robustness of the deterrence studies, others which critique and caution against drawing such conclusions from these deterrence studies, and at least four others which respond to the criticisms. The working papers and/or studies are listed below, along with brief synopses of the conclusions.

I am providing you a disk containing all 16 papers/studies, and also am delivering to you a set of hard copies of each paper/study.

The following are the names and citations of the papers/studies:

1. Hashem Dezhbakhsh and Paul H. Rubin, Emory University, and Joanna M. Shepherd, Clemson University and Emory University, *Does Capital Punishment Have a Deterrent Effect? New Evidence from Post-Moratorium Panel Data*, 5 American Law and Economics Review 344 (2003) [Dezhbakhsh/Rubin/Shepherd Study]

2. H. Naci Mocan, University of Colorado at Denver, and R. Kaj Gittings, Cornell University, *Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 Journal of Law and Economics 453 (2003) [Mocan/Gittings 2003 Study]

3. Dale O. Cloninger and Roberto Marchesini, University of Houston-Clear Lake, *Execution and Deterrence: A Quasi-Controlled Group Experiment*, 33 Applied Economics 569 (2001) [Cloninger/Marchesini Texas Study]

4. Zhiqiang Liu, State University of New York at Buffalo, *Capital Punishment and the Deterrence Hypothesis: Some New Insights and Empirical Evidence*, 30 Eastern Economic Journal 237 (2004) [Liu Study]

5. Joanna M. Shepherd, Clemson University, *Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment,* 33 Journal of Legal Studies 283 (2004) [Shepherd Study]

6. Paul R. Zimmerman, *State Executions, Deterrence and the Incidence of Murder*, 7 Journal of Applied Economics 163 (2004) [Zimmerman 2004 Study]

7. Hashem Dezhbakhsh, Emory University, and Joanna M. Shepherd, Clemson University, *The Deterrent Effect of Capital Punishment: Evidence from a "Judicial Experiment,"* (American Law & Economics Ass'n Working Paper No. 18, 2004) [Dezhbakhsh/Shepherd Study]

8. Dale O. Cloninger and Roberto Marchesini, University of Houston-Clear Lake, *Execution Moratoriums, Commutations and Deterrence: The Case of Illinois*, 38 Applied Economics 967 (2006) [Cloninger/Marchesini Illinois Study]

9. H. Naci Mocan, University of Colorado at Denver, and R. Kaj Gittings, Cornell University, *The Impact of Incentives on Human Behavior: Can We Make It Disappear? The Case of the Death Penalty*, National Bureau of Economic Research Working Paper No. 12631 (Oct. 2006) [Mocan/Gittings 2006 Study]

10. Joanna M. Shepherd, Emory University, *Deterrence versus Brutalization: Capital Punishment's Differing Impacts Among States,* 104 Michigan Law Review 203 (2005) [Shepherd 2005 Study]

11. John Donohue, Yale University, and Justin J. Wolfers, The Wharton School, University of Pennsylvania, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 Stanford Law Review 791 (2005) (American Law & Economics Association Annual Meeting Working Paper No. 44) [Donohue/Wolfers Study]

12. Jeffery Fagan, Columbia Law School, *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment*, 4 Ohio State Journal of Criminal Law 255 (2006) [Fagan Study]

13. Richard Berk, *New Claims About Executions and General Deterrence: Déjà vu All Over Again*, 2 Empirical Legal Studies 303 (2005) [Berk Study]

14. Paul R. Zimmerman, *On the Uses and "Abuses" of Empirical Evidence in the Death Penalty Debate*, (2006) [Zimmerman 2006 Study]

15. Gary S. Becker, *On the Economics of Capital Punishment*, Economists' Voice 3, article 4 (Mar. 2006), *available at* **http://www.bepress.com/ev/vol3/iss3/art4/**.

16. Richard A. Posner, *The Economics of Capital Punishment*, Economists' Voice 3, article 3 (Mar. 2006), *available at* **http://www.bepress.com/ev/vol3/iss3/art3/**.

17. Paul H. Rubin, *Reply to Donohue and Wolfers on the Death Penalty and Deterrence*, Economists' Voice 3, article 4 (Apr. 2006), *available at* **http://www.bepress.com/ev/vol3/iss5/art4/**.

SYNOPSES OF PAPERS/STUDIES:

(2003) Emory University Economics Department Chairman Hashem Dezhbakhsh and Emory Professors Paul Rubin and Joanna Shepherd state that "our results suggest that capital punishment has a strong deterrent effect. An increase in any of the probabilities -- arrest, sentencing or execution -- tends to reduce the crime rate. In particular, each execution results, on average, in eighteen fewer murders -- with a margin of error of plus or minus ten."[1] Their data base used nationwide data from 3,054 US counties from 1977-1996.

[1] Hashem Dezhbakhsh and Paul H. Rubin, Emory University, and Joanna M. Shepherd, Clemson University and Emory University, *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 American Law and Economics Review 344 (2003), [Dezhbakhsh/Rubin/Shepherd Study]

(2003) University of Colorado (Denver) Economics Department Chairman Naci Mocan and Graduate Assistant R. Kaj Gottings found "a significant relationship among the execution, removal, and commutation rates and the rate of homicide. Each additional execution decreases homicides by about five, and each additional commutation increases homicides by the same amount, while one additional removal from death row generates one additional homicide." Their data set contains detailed information on the entire history of 6,143 death sentences between 1977 and 1997 in the United States.[2]

(2001) University of Houston Professors Dale Cloninger and Roberto Marchesini found that death penalty moratoriums contribute to more homicides. They found: "The (Texas) execution hiatus (in 1996), therefore, appears to have spared few, if any, condemned prisoners while the citizens of Texas experienced a net 90 (to as many as 150) additional innocent lives lost to homicide. Politicians contemplating moratoriums may wish to consider the possibility that a seemingly innocuous moratorium on executions could very well come at a heavy cost."[3]

(2004) SUNY (Buffalo) Professor Zhiqiang Liu finds that legalizing the death penalty not only adds capital punishment as a deterrent but also increases the marginal productivity of other deterrence measures in reducing murder rates. "Abolishing the death penalty, therefore, not only discards a valuable deterrent but also lowers the marginal productivity

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[2] H. Naci Mocan, University of Colorado at Denver, and R. Kaj Gittings, Cornell University, *Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 Journal of Law and Economics 453 (2003) [This is a revised version of H. Naci Mocan and R. Kau Gittings, University of Colorado at Denver, *Pardons, Executions and Homicide*, Journal of Law and Economics (forthcoming) (Oct. 2001) Online versions located at **http://econ.cudenver.edu/beckman/kai.pdf**]

[3] Dale O. Cloninger and Roberto Marchesini, University of Houston-Clear Lake, *Execution and Deterrence: A Quasi-Controlled Group Experiment*, 33 Applied Economics 569 (2001).

of other possible deterrents in reducing murder." "[T]he deterrent effects of the certainty and severity of punishments on murder are greater in retentionist [death penalty] states than in abolitionist [non death penalty] states. These results are fairly robust to alternative specifications and competing hypotheses and lend support to the deterrence hypothesis concerning capital punishment and other deterrents."[4]

[4] Zhiqiang Liu, State University of New York at Buffalo, *Capital Punishment and the Deterrence Hypothesis: Some New Insights and Empirical Evidence*, 30 Eastern Economic Journal 237 (2004).

(2003) Clemson University Professor Joanna Shepherd found that "each execution results in, on average, three fewer murders. Longer waits on death row reduce the deterrent effect. Therefore, recent legislation to shorten the time prior to execution should increase deterrence and thus save more innocent lives. Moratoriums and other delays should put more innocents at risk. In addition, capital punishment deters all kinds of murders, including crimes of passion and murders by intimates. Murders of both blacks and whites decrease after executions.[5]

(2004) Dr. Paul Zimmerman, Senior Economist, Federal Communications Commmission, finds: "Specifically, it is estimated that each state execution deters somewhere between 4 and 25 murders per year (14 being the average). Assuming that the value of human life is approximately $5 million [i.e. the average of the range provided by Viscussi (1993)], the estimates imply that on average each execution results in society avoiding the loss of approximately $70 million per year, all else equal (i.e., ignoring all other corresponding social benefits and costs of implementing capital punishment." The study used state level data from 1978 to 1997 for all 50 states (excluding Washington D.C.).[6]

(2003) Emory University Economics Department Chairman Hashem Dezhbakhsh and Clemson University Professor Shepherd found: "The results are boldly clear: executions deter murders and murder rates increase substantially during moratoriums. The results are consistent across before-and-after comparisons and regressions regardless of the

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[5] Joanna M. Shepherd, Clemson University, *Murders of Passion, Execution Delays and the Deterrence of Capital Punishment*, 33 Journal of Legal Studies 283 (2004).

[6] Paul R. Zimmerman, *State Executions, Deterrence and the Incidence of Murder*, 7 Journal of Applied Economics 163 (2004).

data's aggregation level, the time period, or the specific variable to measure executions."[7]

(2006) In a review of Illinois state data, University of Houston Professors Dale Cloninger and Roberto Marchesini found that the data suggested 150 additional Illinois citizens died in a four year period because Governor George Ryan suspended executions and commuted all death sentences.[8]

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[7] Hashem Dezhbakhsh, Emory University, and Joanna M. Shepherd, Clemson University, *The Deterrent Effect of Capital Punishment: Evidence from a "Judicial Experiment,"* (American Law & Economics Ass'n Working Paper No. 18, 2004) available at **http://law.bepress.com/cgi/viewcontent.cgi?article=1017&context=alea**

[8] Dale O. Cloninger and Roberto Marchesini, University of Houston-Clear Lake, *Execution Moratoriums, Commutations and Deterrence: The Case of Illinois*, 38 Applied Economics 967 (2006).

(2006) University of Colorado (Denver) Economics Department Chairman Naci Mocan and Graduate Assistant R. Kaj Gottings found that the original findings of their Mocan/Gittings 2003 Study "are robust, providing evidence that people react to incentives in the domain of capital punishment."[9]

(2005) Emory University School of Law Assistant Professor Joanna M. Shepherd found that the impact of executions differs substantially among the states, and that, in general, states that have executed more than nine people in the last twenty years experience deterrence. In states that have not reached this threshold, executions generally increase murders or have no significant impact. "On average across the U.S., executions deter crime because the states with deterrence execute many more people than do the states without it."[10]

(2005) Yale University Law Professor John J. Donohue and Justin Wolfers, Assistant Professor of Business and Public Policy at the Wharton School, University of Pennsylvania, critique, among other deterrence studies, the Dezhbakhsh/Shepherd

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[9] H. Naci Mocan, University of Colorado at Denver, and R. Kaj Gittings, Cornell University, *The Impact of Incentives on Human Behavior: Can We Make It Disappear? The Case of the Death Penalty*, National Bureau of Economic Research Working Paper No. 12631 (Oct. 2006) [available at **http://www.nber.org/papers/w12631**]

[10] Joanna M. Shepherd, Emory University, *Deterrence versus Brutalization: Capital Punishment's Differing Impacts Among States,* 104 Mich. L. Rev. 203 (2005), available at **http://papers.ssrn.com/sol3/papers.cfm?abstract_id=781504**.

Study, the Mocan/Gittings 2003 Study, the Zimmerman Study, the Dezhbakhsh/Rubin/Shepherd Study, the Cloninger/Marchesini Illinois Study, and the Cloninger/Marchesini Texas Study, concluding that "[t]he U.S. data simply do not speak clearly about whether the death penalty has a deterrent or antideterrent effect.[footnote omitted] The only clear conclusion is that execution policy drives little of the year-to-year variation in homicide rates. As to whether executions raise or lower the homicide rate, we remain profoundly uncertain."[11]

(2006) Columbia Law School Professor Jeffrey Fagan critiques the recent deterrence studies, and concludes that "[t]he new deterrence literature fails to provide a stable foundation of scientific evidence on which to base law or policy."[12]

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[11] John Donohue, Yale University, and Justin J. Wolfers, The Wharton School, University of Pennsylvania, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 Stanford Law Review 791 (2005) [American Law & Economics Association Annual Meeting Working Paper No. 44, available at http://law.bepress.com/cgi/viewcontent.cgi?article=1842&context=alea]

[12] Jeffery Fagan, Columbia Law School, *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment*, 4 Ohio St. J. of Crim. L. 255 (2006), available at **http://ssrn.com/abstract=935102**

(2005) UCLA Statistics Professor Richard Berk critiques the Mocan/Gittings 2003 Study, and concludes that "the results raise serious questions about whether anything useful about the deterrent value of the death penalty can ever be learned from an observational study with the data that are likely to be available."[13]

(2006) Dr. Paul Zimmerman, Senior Economist, Federal Communications Commission shows that the Donohue/Wolfers Study makes "a number of misrepresentations and errors in assessing the results and conclusions put forward in the [Zimmerman 2004 Study]'s analysis, and as such, their criticisms of the latter are effectively vacuous."[14]

(2006) Gary S. Becker, Nobel Laureate, Senior Fellow at the Hoover Institution, and a University Professor of Economics and Sociology at the University of Chicago, in response to the Donahue/Wolfers Study, states that "capital punishment has an important deterrent effect even with the way the present system actually operates," and that "[i]t is very disturbing to take someone's life, even a murderer's life, but sometimes highly unpleasant actions are necessary to deter even worse behavior that takes the lives of innocent victims."[15]

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[13] Richard Berk, *New Claims About Executions and General Deterrence: Déjà vu All Over Again*, 2 J. Empirical Legal Stud. 303 (2005) [Berk Study]

[14] Paul R. Zimmerman, *On the Uses and "Abuses" of Empirical Evidence in the Death Penalty Debate*, (Nov. 2006), available at **http://ssrn.com/abstract=948424**.

[15] Gary S. Becker, *On the Economics of Capital Punishment*, Economists' Voice 3, art. 4 (Mar. 2006), *available at* **http://www.bepress.com/ev/vol3/iss3/art4/**.

(2006) Richard A. Posner, Circuit Judge of the United States Court of Appeals for the Seventh Circuit, and a Senior Lecturer at the University of Chicago, states that "even with the existing, excessive, delay [in executions], the recent evidence concerning the deterrent effect of capital punishment provides strong support for resisting the abolition movement."[16]

(2006) Paul H. Rubin, Professor of Economics and Law at Emory University, responds to the criticisms of the Donahue/Wolfers Study about the Dezhbakhsh/Rubin/Shepherd Study.[17]

Please let me know if the Committee desires any further information related to the deterrence studies.

Sincerely,

Barry S. McNeill
Special Deputy Attorney General

Enclosures

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[16] Richard A. Posner, *The Economics of Capital Punishment*, Economists' Voice 3, article 3 (Mar. 2006), *available at* **http://www.bepress.com/ev/vol3/iss3/art3/**.

[17] Paul H. Rubin, *Reply to Donohue and Wolfers on the Death Penalty and Deterrence*, Economists' Voice 3, article 4 (Apr. 2006), *available at* **http://www.bepress.com/ev/vol3/iss5/art4/**.

ATTACHMENT V

HOUSE SELECT COMMITTEE ON CAPITAL PUNISHMENT

RACE AND CAPITAL PUNISHMENT

STATISTICAL UPDATE

December 13, 2006

1. 2005 - Murder Offenders By Age, Sex, and Race
   State Bureau of Investigation, 6/15/06

2. 2005 - Murder by Race. Victim and Offender Race Analysis
   State Bureau of Investigation, 6/15/06

3. Offenders on Death Row (Offender Sex and Race)
   Department of Correction, as of 11/17/06

4. Executions Carried Out Under Current Death Penalty Statute
   (Offender Sex and Race/Victim Sex and Race)
   Department of Correction, as of 8/21/06

1. 2005 -- Murder Offenders by Age, Sex, and Race

State Bureau of Investigation, 6/15/06

State Bureau of Investigation MurOffAgeRac

Jun/15/2006

Murder Offenders by Age, Sex and Race - 2005

Offender Age	Offender Sex	Total Offenders	White	Black	American Indian/Alaskan Native	Unknown
11 to 14	Female	1	1			
	Male	2	1	1		
15	Male	3	2	1		
16	Female	1		1		
	Male	13	2	10		1
17	Female	1	1			
	Male	23	6	16	1	
18	Female	5	2	3		
	Male	19	3	16		
19	Male	45	13	31		1
20 to 24	Female	14	5	8	1	
	Male	125	45	77	3	
25 to 29	Female	13	7	6		
	Male	88	38	44	2	4
30 to 34	Female	5	3	2		
	Male	51	19	29	1	2
35 to 39	Female	8	6	2		
	Male	25	13	11		1
40 to 44	Female	11	5	5	1	
	Male	25	11	14		
45 to 49	Female	4	3	1		
	Male	21	12	9		
50 to 54	Female	2	2			

	Male	17	12	4	1	
55 to 59	Female	3	2	1		
	Male	4	2	2		
60 to 64	Female	1	1			
	Male	5	3	2		
65 to 69	Male	2	2			
70 to 74	Male	1	1			
75 & over	Male	3	2	1		
Unknown	Female	2		2		
	Male	62	9	48	1	4
	Unknown	149	4	1		144
Total		754	238	348	11	157

2. 2005 -- Murder By Race. Victim and Offender Analysis

State Bureau of Investigation, 6/15/06

State Bureau of Investigation

MurRaceAnal05.rep

Jun/15/2006

Murder by Race, 2005
Victim and Offender Race Analysis

Total Murder Victims by Race

Race	Murder Victims	Percent Distribution
White	258	44.3 %
Black	294	50.5 %
American Indian/Alaskan Native	17	2.9 %
Asian/Pacific Islander	5	0.9 %
Unknown	8	1.4 %
Total Victims	**582**	**100.0 %**

Offenders of White Victims by Offender Race

Race	Offenders of White Victims	Percent Distribution
White	221	66.4 %
Black	60	18.0 %
American Indian/Alaskan Native	2	0.6 %
Unknown	50	15.0 %
Offenders of White Victims	**333**	**100.0 %**

Offenders of Black Victims by Offender Race

Race	Offenders of Black Victims	Percent Distribution
White	14	3.7 %
Black	281	73.6 %
American Indian/Alaskan Native	2	0.5 %
Unknown	85	22.3 %
Offenders of Black Victims	**382**	**100.0 %**

3. Offenders on Death Row (Offender Sex and Race)

NC Department of Correction, as of 11/17/06

North Carolina Department of Correction Go to...

Offenders on Death Row

Last updated November 17, 2006

There are currently 166 offenders on Death Row

To search for a specific name or DOC number press CTRL-F on your keyboard

Download this list as an Excel spreadsheet (.xls)

Received	DOC #	Last Name	First Name	Sex	Race	County of Conviction
8/21/85	0234897	Laws	Wayne A.	M	W	Davidson
11/5/90	0207779	Jennings	Patricia W.	F	W	Wilson
11/16/90	0288088	Moore	Blanche T.	F	W	Forsyth
11/22/91	0265106	McCollum	Henry L.	M	B	Cumberland
12/19/91	0351933	Rose	Clinton R.	M	W	Rockingham
3/12/92	0100579	Davis	Edward E.	M	W	Buncombe
3/25/92	0353186	Rouse	Kenneth B.	M	B	Randolph
5/14/92	0339314	Reeves	Michael M.	M	W	Craven
5/19/92	0347839	Robinson	Eddie C.	M	B	Bladen
9/23/92	0264009	McCarver	Ernest P.	M	W	Cabarrus
10/1/92	0294214	Moseley	Carl	M	W	Forsyth
10/19/92	0084604	Conaway	John L.	M	B	Richmond
2/5/93	0039561	Bowie	Nathan	M	B	Catawba
2/5/93	0039569	Bowie	William	M	B	Catawba
4/1/93	0057308	Burke	Rayford L.	M	B	Iredell
4/21/93	0058316	Burr	John	M	W	Alamance
4/28/93	0104984	Decastro	Eugene	M	B	Johnston
5/18/93	0156518	Gregory	Warren	M	B	Pitt
5/27/93	0251740	Lynch	David	M	W	Gaston
6/1/93	0021418	Barrett	Jeffrey	M	B	Northampton
6/7/93	0030124	Best	Norfolk	M	B	Columbus
7/8/93	0063592	Campbell	James	M	W	Rowan
9/3/93	0141374	Garner	Daniel	M	W	Robeson
10/4/93	0099090	Daughtry	Johnny R.	M	W	Johnston
10/8/93	0054499	Buckner	George C.	M	W	Gaston
11/3/93	0441726	Williams	James E.	M	W	Randolph
11/20/93	0217191	Jones	Levon J.	M	B	Duplin

11/20/93	0149506	Goode	George E.	M	B	Harnett
11/22/93	0343075	Richardson	Martin A.	M	B	Union
12/8/93	0012311	Atkins	Randy L.	M	W	Buncombe
12/16/93	0153856	Gray	William	M	W	Lenoir
2/3/94	0017060	Ball	Terry L.	M	W	Beaufort
3/10/94	0071799	Chambers	Frank J.	M	B	Rowan
3/10/94	0020590	Barnes	William L.	M	B	Rowan
4/20/94	0221506	Kandies	Jeffrey	M	W	Randolph
4/29/94	0453231	Wooten	Vincent M.	M	B	Pitt
5/4/94	0120038	Elliott	John R.	M	W	Davidson
6/14/94	0082151	Cole	Wade L.	M	B	Camden
8/5/94	0348505	Robinson	Marcus	M	B	Cumberland
8/12/94	0166056	Hardin	Alden	M	B	Mecklenburg
9/15/94	0438643	Wilkinson	Phillip	M	W	Cumberland
9/29/94	0143501	Geddie	Malcolm	M	B	Johnston
11/16/94	0072845	Chapman	Glenn E.	M	B	Catawba
12/16/94	0095279	Cummings	Daniel	M	I	Brunswick
1/25/95	0443375	Williams	Marvin E.	M	B	Wayne
4/30/91	0085045	Connor	Jerry W.	M	W	Gates
2/9/95	0478925	Stroud	Isaac J.	M	B	Durham
2/24/95	0404386	Thomas	James E.	M	B	Wake
3/15/95	0368820	Sidden	Tony M.	M	W	Alexander
3/24/95	0036850	Bond	Charles P.	M	B	Bertie
4/28/95	0233526	Larry	Thomas M.	M	B	Forsyth
5/22/95	0497100	Woods	Darrell C.	M	B	Forsyth
6/1/95	0492102	Richardson	Timothy	M	B	Nash
6/16/95	0061528	Cagle	Richard	M	W	Cumberland
7/22/95	0180479	Morganherring	William	M	B	Wake
10/6/95	0487180	Warren	Leslie	M	W	Buncombe
10/27/95	0393145	Strickland	Darrell	M	I	Union
10/31/95	0511057	Hill	Jerry Dale	M	W	Harnett
11/8/95	0511998	East	Keith B.	M	B	Surry
11/10/95	0275678	McNeil	John D.	M	B	Cumberland
11/14/95	0414853	Tyler	Stacey A.	M	B	Hertford
12/20/95	0388922	Stephens	Davy G.	M	W	Johnston
2/21/96	0413011	Tucker	Russell	M	B	Forsyth
2/26/96	0495163	Neal	Kenneth	M	B	Rockingham

4/9/96	0528622	McNeill	Elmer R.	M	W	Wake
4/18/96	0499258	Murillo	Eric F.	M	W	Richmond
4/26/96	0310202	Page	George F.	M	W	Forsyth
4/26/96	0238344	LeGrande	Guy T.	M	B	Stanly
5/10/96	0376917	Smith	Jamie L.	M	B	Buncombe
5/14/96	0246186	Locklear	Robbie D.	M	I	Robeson
6/5/96	0471315	Billings	Archie L.	M	W	Caswell
6/20/96	0506556	Guevara	Angel	M	O	Johnston
7/23/96	0440399	Williams	David K.	M	B	Bertie
8/9/96	0405380	Thomas	Walic C.	M	B	Guilford
9/27/96	0037215	Bonnett	Shawn D.	M	B	Martin
10/2/96	0510234	Davis	James F.	M	W	Buncombe
10/15/96	0434355	White	Melvin L.	M	B	Craven
8/15/94	0156529	Gregory	William	M	B	Davie
11/15/96	0275780	McNeil	LeRoy	M	B	Wake
11/19/96	0412440	Trull	Gary A.	M	W	Randolph
12/12/96	0320825	Peterson	Lawrence E.	M	B	Richmond
1/29/97	0422350	Wallace	Henry L.	M	B	Mecklenburg
2/18/97	0539901	Taylor	Terrence	M	B	Lenoir
3/24/97	0311966	Parker	Johnny S.	M	W	Sampson
4/8/97	0571536	Fleming	John H.	M	B	Northampton
7/3/97	0176701	Hedgepath	Rowland	M	W	Halifax
7/3/97	0538027	Cheek	Jamey	M	W	New Hanover
7/15/97	0255136	Mann	Leroy	M	B	Wake
8/22/97	0585797	Davis	Phillip	M	B	Buncombe
8/29/97	0352024	Roseboro	Christopher	M	B	Gaston
9/10/97	0033802	Blakeney	Roger	M	B	Union
11/4/97	0488288	Mitchell	Marcos	M	B	Wake
11/11/97	0095361	Cummings	Jerry	M	I	Robeson
11/14/97	0134151	Fowler	Elrico	M	B	Mecklenburg
11/18/97	0552017	Moses	Erroll	M	B	Forsyth
11/21/97	0043529	Braxton	Michael	M	B	Halifax
12/11/97	0597164	Lawrence	Jimmie	M	B	Harnett
3/5/98	0599379	Williams	John	M	B	Wake
3/27/98	0137368	Frogg	Danny	M	W	Forsyth
4/7/98	0587681	Holman	Allen	M	W	Wake

4/13/98	0507433	Smith	Clinton	M	B	Halifax
4/24/98	0158506	Grooms	Timmy	M	W	Scotland
5/13/98	0590940	Golphin	Tilmon	M	B	Cumberland
6/1/98	0155512	Greene	Gary	M	W	Caldwell
7/23/98	0542024	Hyde	Johnny	M	I	Onslow
8/28/98	0388640	Steen	Patrick	M	W	Mecklenburg
9/3/98	0584095	Brewington	Robert	M	I	Harnett
10/23/98	0472274	Taylor	Rodney	M	B	New Hanover
11/23/98	0226428	King	James	M	B	Guilford
2/4/99	0280127	Meyer	Jeffery	M	W	Cumberland
2/22/99	0330166	Prevatte	Ted	M	W	Stanly
3/2/99	0515143	Thibodeaux	Raymond	M	W	Forsyth
3/18/99	0580028	May	Lyle	M	W	Buncombe
4/1/99	0311386	Parker	Carlette	F	B	Wake
5/18/99	0125241	Fair	Nathaniel	M	B	Wake
5/22/99	0542384	Call	Eric	M	W	Ashe
5/27/99	0654009	Wiley	Keith	M	B	New Hanover
6/3/99	0654093	Anthony	William	M	W	Gaston
6/4/99	0206197	Jaynes	James	M	W	Polk
7/8/99	0291861	Morgan	James	M	B	Buncombe
7/13/99	0139378	Gainey	David	M	B	Harnett
10/26/99	0007328	Anderson	Billy	M	B	Craven
11/12/99	0491889	Barden	Iziah	M	B	Sampson
11/18/99	0670167	Nicholson	Abner	M	B	Wilson
12/09/99	0130628	Fletcher	Andre L.	M	B	Rutherford
02/07/00	0199877	Hyatt	Terry A.	M	W	Buncombe
02/09/00	0561692	Hooks	Cerron T.	M	B	Forsyth
04/10/00	0349019	Robinson	Terry L.	M	B	Wilson
04/11/00	0544664	Queen	Eric D.	M	B	Cumberland
05/17/00	0688223	Squires	Mark L.	M	B	Pitt
07/06/00	0626944	Walters	Christina	F	I	Cumberland
08/11/00	0051026	Brown	Paul A.	M	B	Wayne
08/31/00	0434845	White	Timothy L.	M	W	Forsyth
09/08/00	0189289	Holmes	Michael D.	M	B	Johnston
11/9/00	0217326	Jones, Sr.	Marcus Douglas	M	W	Onslow
3/19/01	0486636	Carter	Shan E.	M	B	New Hanover
4/19/01	0702066	Garcia	Fernando L.	M	O	Wake

6/6/01	0561943	Haselden	Jim E.	M	W	Stokes
7/19/01	0428143	Watts	James Hollis	M	W	Davidson
8/24/01	0592464	Bell	Bryan Christopher	M	B	Onslow
10/25/01	0742512	Miller	Clifford Ray	M	O	Onslow
3/14/02	0379083	Smith	Reche	M	B	Washington
3/28/02	0064125	Campbell	Terrance	M	B	Pender
5/29/02	0765397	Smith	Wesley Toby	M	W	Rowan
10/23/02	0612123	Augustine	Quintel	M	B	Brunswick
11/14/02	0406487	Thompson	John Henry	M	B	Guilford
6/14/03	0290634	Moore (Al-Bayyinah)	Terry (Jathiyah)	M	B	Davie
7/15/03	0507467	McNeill	Jimmy	M	B	Scotland
9/26/03	0113234	Duke	Jeffrey Neal	M	W	Gaston
10/8/03	0133102	Forte	Linwood Earl	M	B	Wayne
11/18/03	0005091	Allen	Scott D.	M	W	Montgomery
12/18/03	0120236	Elliott	Terrance R.	M	B	Moore
3/10/04	0562597	Berry	Kyle O.	M	W	New Hanover
3/17/04	0509565	Hurst	Jason Wayne	M	W	Randolph
5/6/04	0014016	Badgett	John Scott	M	W	Randolph
9/8/04	0523493	Cummings	Paul Dewayne	M	B	New Hanover
2/7/05	0801680	Polke	Alexander C.	M	I	Randolph
2/8/05	0150949	Goss	Christopher	M	W	Ashe
6/14/05	0245105	Locklear	Dane Jr.	M	I	Robeson
7/11/05	0667195	Lane	Eric Glenn	M	W	Wayne
8/24/2005	0762634	Taylor	Eddie Larmar	M	B	Harnett
9/9/2005	0526698	Raines	William H.	M	W	Henderson
2/17/2006	0940436	Murrell	Jeremy Dushane	M	B	Forsyth
4/4/2006	0831753	Maness	Darrell W.	M	W	Brunswick
4/4/2006	0775602	Garcell	Ryan G.	M	O	Rutherford
4/26/2006	0290914	Moore	William Joseph	M	W	Chowan

Demographics

	Male	Female	Total
White	**62**	**2**	**64**
Black	**88**	**1**	**89**
Indian	**8**	**1**	**9**
Other	**4**	**0**	**4**

Total	**162**	**4**	**166**

The Death Penalty

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4. Executions Carried Out Under Current Death Penalty Statute
(Offender Sex and Race/Victim Sex and Race)

NC Department of Correction, as of 8/21/06

North Carolina Department of Correction

Go to...

Executions carried out under current death penalty statute

Last updated August 21, 2006

	Photo	Name	Sex	Race	Date Executed	County of Conviction	Method of Execution	Victim(s)
1		James W. Hutchins	M	W	3/16/84	McDowell	Lethal Injection	Roy Huskey W/M Owen Messersmith W/M Pete Peterson W/M
2		Velma M. Barfield	F	W	11/2/84	Bladen	Lethal Injection	Stuart Taylor W/M
3		John William Rook	M	W	9/19/86	Wake	Lethal Injection	Ann Marie Roche W/F
4		Michael McDougall	M	W	10/18/91	Mecklenburg	Lethal Injection	Diane Parker W/F
5		John S. Gardner	M	W	10/23/92	Forsyth	Lethal Injection	Richard Adams W/M Kim Miller W/F
6		David Lawson	M	W	6/15/94	Cabarrus	Lethal Gas	Wayne Shinn W/M
7		Kermit Smith	M	W	1/24/95	Halifax	Lethal Injection	Whelette Collins B/F
8		Phillip Ingle	M	W	9/22/95	Rutherford	Lethal Injection	William Fred Davis W/M Margaret Shufford Davis W/F
9		Ricky Lee Sanderson	M	W	1/30/98	Iredell	Lethal Gas	Sue Ellen Holliman W/F
10		Zane Hill	M	W	08/14/98	Buncombe	Lethal Injection	Randall Hill W/M
11		John Noland	M	W	11/20/98	Mecklenburg	Lethal Injection	Troy Milton W/M Cindy Milton W/F
12		James Rich	M	W	03/26/99	Greene	Lethal Injection	Paul Gwyn W/M

13		Harvey Lee Green	M	B	09/24/99	Pitt	Lethal Injection	Sheila Marlene Bland W/F John M. Edmundson W/M
14		Arthur Martin Boyd	M	W	10/21/99	Surry	Lethal Injection	Wanda Phillips Hartman W/F
15		David Junior Brown	M	B	11/19/99	Union	Lethal Injection	Shelly Diane Chalflinch W/F Christina Chalflinch W/F
16		Michael E. Sexton	M	B	11/9/2000	Wake	Lethal Injection	Kimberly Crews W/F
17		Willie Ervin Fisher	M	B	03/09/2001	Forsyth	Lethal Injection	Angela Johnson B/F
18		Clifton Allen White	M	W	08/24/2001	Mecklenburg	Lethal Injection	Kimberly Ewing W/F
19		Ronald W. Frye	M	W	08/31/01	Catawba	Lethal Injection	Ralph Childress W/M
20		David Junior Ward	M	B	10/12/01	Pitt	Lethal Injection	Dorothy Mae Smith B/F
21		John Hardy Rose	M	W	11/30/01	Haywood	Lethal Injection	Patricia Stewart W/F
22		Ernest West Basden	M	W	12/6/02	Duplin	Lethal Injection	Billy White W/M
23		Desmond Keith Carter	M	B	12/10/02	Rockingham	Lethal Injection	Helen Purdy W/F
24		William Quentin Jones	M	B	8/22/03	Wake	Lethal Injection	Edward Peebles B/M
25		Henry L. Hunt	M	I	9/12/03	Robeson	Lethal Injection	Larry Jones I/M Jackie Ransom I/M
26		Joseph Bates	M	W	9/26/03	Yadkin	Lethal Injection	Charles Jenkins W/M
27		Edward Hartman	M	W	10/3/03	Northampton	Lethal Injection	Herman Larry Smith Sr W/M

28		Joseph Timothy Keel	M	W	11/7/2003	Edgecombe	Lethal Injection	John Simmons W/M
29		John Dennis Daniels	M	B	11/14/2003	Mecklenburg	Lethal Injection	Isabelle Daniels Crawford B/F
30		Robbie Lyons	M	B	12/5/2003	Forsyth	Lethal Injection	Stephen Stafford W/M
31		Raymond Dayle Rowsey	M	W	1/9/2004	Alamance	Lethal Injection	Howard Rue Sikorski W/M
32		Sammy Crystal Perkins	M	B	10/8/2004	Pitt	Lethal Injection	Lashenna Moore B/F
33		Charles Wesley Roache	M	W	10/22/2004	Haywood	Lethal Injection	Mitzi Phillips W/F Katie Phillips W/F
34		Frank Chandler	M	W	11/12/2004	Surry	Lethal Injection	Doris Poore W/F
35		William Dillard Powell	M	W	3/11/2005	Cleveland	Lethal injection	Mary Gladden W/F
36		Earl Richmond	M	B	5/6/2005	Cumberland	Lethal Injection	Helisa Hayes B/F Philip Hayes B/M Darien Hayes B/F
37		Steven McHone	M	W	11/11/2005	Surry	Lethal Injection	Mildred Adams W/F Wesley Adams Sr. W/M
38		Elias Syriani	M	O	11/18/2005	Mecklenburg	Lethal Injection	Teresa Yousef Syriani W/F
39		Kenneth Boyd	M	W	12/2/2005	Rockingham	Lethal Injection	Thomas Dillard Curry W/M Julie Curry Boyd W/F
40		Perrie Simpson	M	B	1/20/2006	Rockingham	Lethal Injection	Jean Ernest Darter W/M
41		Patrick Lane Moody	M	W	3/17/2006	Davidson	Lethal Injection	Donnie Ray Robbins W/M
42		Willie Brown	M	B	4/21/2006	Martin	Lethal Injection	Vallerie Roberson Dixon B/F

								
43		Samuel R. Flippen	M	W	8/18/2006	Forsyth	Lethal Injection	Britnie Nichole Hutton W/F

The Death Penalty

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ATTACHMENT VI

The House Select Committee on Capitol Punishment
December 13, 2006

Statistical Evidence of racial discrimination in the death penalty

Elliot M. Cramer University of North Carolina
Cramer@unc.edu www.unc.edu/~cramer

Executions in North Carolina

Data from http://www.doc.state.nc.us/dop/deathpenalty

1910-20	42 blacks executed	8 whites executed
1921-30	51 blacks executed	7 whites executed
1931-40	98 blacks executed	32 whites executed
1941-50	78 blacks executed	26 whites executed
1951-61	13 blacks executed	2 whites executed
1961-83	No executions	
1977	New death penalty statute enacted	
1984-2006	13 blacks executed	28 whites executed
2000-2006	11 blacks executed	15 whites executed
1984-2006	81 whites removed from death row. 84 blacks removed from death row	

White kill White	27	White kill Black	1
Black kill Black	7	Black kill White	6

Blacks kill 2-WF 2-WM 5-BF 1-BM 1-WF+WM 1-WF+WF 1-BF+BF+BM

Whites kill 9-WF 11-WM 1-BF 4-WM+WF 2-WF+WF 1-WM+WM+WM

Blacks 10/13 involve women
Whites 15/28 involve women

On death row Nov 17, 2006

	Male	Female	Total
White	62	2	64
Black	88	1	89
Indian	8	1	9
Other	4	0	4
Total	162	4	166

From Nakell and Hardy
The arbitrariness of the death penalty (1987)

Victim deaths due to homicide June 1, 1977 - May 31, 1978

Ordered by indictment rate from 10.5% to 100%

	Indictment Rate	
Judicial district	*First degree murder*	*All homicide indictments*
8	2	19
21	5	19
25	6	22
12	12	28
13	8	14
11	11	18
9	14	18
14	11	14
10	8	10
15	8	10
18	32	40
4	19	23
17	10	12
23	5	6
3	15	17
22	7	8
29	8	9
20	9	10
27	19	21
7	10	11
16	14	15
19	15	16
26	35	36
2	1	1
1	3	3
24	4	4
30	4	4
6	11	11
5	12	12
28	13	13
Total	331	444

talk
The House Select Committee on Capitol Punishment
December 13, 2006

Statistical Evidence of racial discrimination in the death penalty

Elliot M. Cramer University of North Carolina
Cramer@unc.edu www.unc.edu/~cramer

Background

I'm Elliot Cramer. I'm a retired UNC professor. I taught and did research in quantitative methods and I've worked as an applied statistician for over 40 years in a variety of areas. I've published extensively in statistical and quantitative journals. I've done a good deal of consulting and legal testimony on statistics related to discrimination and I've been qualified as an expert in statistics in a number of court cases. I've testified for the State in one death penalty case. I am neither a proponent or opponent of the death penalty.

Introduction

There can be no doubt that there has been a history of racial discrimination in the death penalty in North Carolina. A concern of this committee is whether or not this discrimination is ongoing.

In my handout you can see that from 1910 through 1961, many more blacks were executed than whites, beginning with 42 blacks and 8 whites in 1910-20 and continuing to 78 blacks and 26 whites in 1941-50. Executions plummeted with 13 blacks and 2 whites in 1951-61 but no further executions until 1984. Prisoners were executed for rape and robbery as well as for murder. This shows and obvious pattern of racial discrimination,

From 1984 through 2006 the situation changed dramatically with 13 blacks and 28 whites executed, a complete reversal from previous years. No longer could critics of the Death penalty claim that many more Blacks than Whites were being executed in North Carolina, Instead it is claimed that there is a new form of discrimination revealed in the pattern of executions.

Looking at intra-racial executions, one finds

White kill Black 1 Black kill White 6

This is readily explained by the fact that murders involving Whites killing Blacks are relatively rare; There are about five times as many murders involving Blacks killing Whites as Whites killing Blacks. This does not appear to indicate to be evidence of discrimination and studies in North Carolina have not claimed racial discrimination in inter-race murders. A more interesting statistic is the comparison for intra-racial murders where they appears to be discrimination against Whites since there are approximately equal numbers of homicides involving white victims as black victims.

White kill White 27 Black kill Black 7

Death penalty opponents have turned things around by claiming that Black life is undervalued so that murderers of Blacks are less likely to get the death penalty than murderers of Whites.

Since about 94% of the murderers of Blacks are Black, executing more murderers of Black victims would inevitably mean executing more Blacks.

My work on the death penalty

I first became involved in death penalty issues in 1985 when I was asked by the attorney general's office to be an expert witness in the case of Wake County vs Rook. I was unfamiliar with death penalty issues and I assumed that if there were discrimination in application of the death penalty, it would involve a tendency for African-Americans to be unfairly sentenced to death. I was someone surprised to learn that this was not the claim at all; rather the claim was that murderers of African-Americans were LESS likely to receive the death penalty than murderers of whites. This conclusion was not based on looking at actual Court decisions but rather on complex statistical analyses that attempted to take into account the many factors that might be relevant to these decisions.

I believe that this claim was first put forward by Baldus in Georgia in a study that has received an undeservedly good press. His study was severely criticized in District Court and Baldus's statistical arguments were jusafiably rejected by the Court. The Court of Appeals court and Supreme Court never had to consider the validity of the Baldus study because they rejected generalized statistical evidence as being relevant.

The theory expressed by Baldus was that Black life is undervalued so that less attention is paid to homicides with Black victims. In the case I was involved with, John Rook a young white male raped and a young white woman, ran over her with his car, and left her to bleed to death in a field. It was argued that the death penalty was discriminatory because if he had raped an murdered a black woman, he would have been less likely to receive the death penalty.

I was presented with the first of three quantitative death penalty studies that have been performed in North Carolina and I had access to the actual data. It turned out that of about 1700 homicides, over half the victims and suspects were African-American although African-Americans comprised less that 20% of the population. Most involved Whites killing Whites and Blacks killing Blacks. Cross racial homicides were very much in the minority. If one were to sentence more of these murderers of African-Americans to death, a majority of them would probably be African-American. I do not believe that this is what opponents of the death penalty have in mind.

There is another explanation; perhaps homicides involving African-American victims are different from those involving white victims. Indeed inspection of the data showed that for cases involving white victims, there were two or more associated aggravating circumstances over three times as often as for black victims. This pattern of less aggravating circumstances in African-America homicides has been shown to generally be the case in North Carolina and other states. This is the most plausible explanation for the disparities that have been observed.

Professor Gross, the study author, claimed that he was "aware of no plausible alternative hypothesis that might explain away the observed pattern of racial discrimination in capital sentencing

in North Carolina". This shows a lack of imagination and I believe that his conclusions were grossly incorrect.

A second study by Barry Nakell has not received a great deal of attention. Methodologically it is probably the best death penalty study that has ever been done. His staff started out with the files of the Chief Medical Examiner and then did extensive interviews with prosecutors and defense attorneys as well as looking at court records and police reports. As a result he had a great deal of information that could not be obtained from records alone. I spent a great deal of time consulting on the data analysis and this has influenced my thinking about the utility of statistics in this area. It is extraordinarily difficult to take into account the many factors that are involved in death penalty cases.

The data in this study are almost 30 years old and are for only one year. While I cannot support the statistical analyses that were published, I do agree with one conclusion. In the Nakell study there is clear evidence that district attorneys differ in their willingness to indict for first degree murder. Because of the small numbers in judicial districts, it is impossible to adequately account for this factor. This alone introduces a level of unpredictability which makes it impossible to adequately take into account other relevant factors, even if it were possible to quantify them. (See page two of handout)

The Boger-Unah study

The third study which you may be familiar with was introduced on April 16, 2001 with a press release and news conference.

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Press Release: LANDMARK NORTH CAROLINA DEATH PENALTY STUDY FINDS DRAMATIC RACIAL BIAS

Raleigh, N.C. -- The most in-depth and detailed study of race and the death penalty in North Carolina's history shows clearly that race infects and undermines the capital punishment system in the state. The study, released today by the Common Sense Foundation and the North Carolina Council of Churches, finds that defendants whose victims are white are 3.5 times more likely to be sentenced to death than defendants whose victims are non-white.

"Sadly, this study shows that skin color still plays a major role in deciding who lives and who dies in our criminal justice system," said Jack Boger, Professor at the University of North Carolina School of Law and principal director of the study. "Despite a generation of legal and cultural efforts to eliminate discrimination, these results show that racial bias still dramatically affects the most final of judgments - who gets the death penalty."

Dr. Isaac Unah of UNC-Chapel Hill was the principal investigator in the study and came to one inescapable conclusion. "No matter how the data was analyzed, the race of the victim always emerged as an important factor in who received the death penalty," Unah said.

The study's findings will be presented to the North Carolina

General Assembly, where bills calling for a moratorium on executions have been introduced in the House and Senate.

"This study is clear. Our death penalty system values black lives less than white lives," said Chris Fitzsimon, Executive Director of the Common Sense Foundation. "Our policymakers should halt all executions until we can be sure we have addressed these deeply troubling findings."

Jack Boger, our new dean, is a fine lawyer and a fine person but he just doesn't appreciate the limitations of the statistical art. His associate who is the primary author of the study is not a statistician, has not done research in statistics, and has never published an article on statistics. His study design is seriously flawed and one cannot draw any valid conclusions from this study.

The "3.5 times" statement has been conceded to be incorrect by Dean Boger but just yesterday the North Carolina Coalition for a Moratorium cited it again.

In the raw data the murderer of a white is 1.5 times as likely to get the death penalty and I believe that this is due to differences in aggravation circumstances. The data show that only 6% of the murderers of non-whites were white. If the theory is correct that black life is undervalued, executing more murderers of African-Americans would result in executing more African-Americans.

It has been suggested (though it is not a conclusion in this study) that Blacks who murder Whites are substantially more likely to get the death penalty than Whites who murder Blacks. In this study, only 3% of the homicides involved non-whites murdering Whites. In general cross-race homicides tend to be particularly aggravated.

The study doesn't deal with executions; 64 of 99 sentenced to death are still on death row. Most of the others have probably been removed from death row.

It was stated at the news conference that the data were available to interested parties. This report is still on the internet and it now says

"After our analysis is accepted for publication in a refereed journal, we will make the data available to interested parties."

It is almost six years since the Press conference and I am still waiting. I expect that the data show a substantial difference in the aggravating conditions for African-American victims.

Over five years later no article based on these data has been accepted of publication by any journal. At the time I noted many inconsistencies in the data. I have since seen three different papers, all using the same data, using different methods of analysis, and drawing somewhat different conclusions. None have been published.

For example

April 20, 2001 New York Times

Professor Boger said the new study had found that the discrimination in death penalty cases was by prosecutors rather than jurys. In fact, he said, what seems to have occurred is not that prosecutors sought the death penalty more often for black defendants but that they were more willing to let defendants plead guilty in exchange for a lesser sentence if the victim was black.

In a 2002 paper based on the same data Unah and Boger wrote

Due to political empowerment of nonwhites, local prosecutors in the South who once made race-conscious decisions concerning whom to prosecute for the death penalty now appear race neutral. Our findings point to unelected jurors rather than to elected prosecutors as the actors most culpable for racial bias in capital sentencing.

The basic statistical problem
In no study that has ever been done has it been possible to accurately predict who will be sentenced to death and possibly executed and who will not. This alone places a serious limit of one to accurately assert discrimination in the death penalty. There are many considerations that might lead a jury to sentence a criminal to death and they may not readily be quantifiable. One might think that the more variables one measures the better and the unsophisticated investigator will try to obtains measurements of everything he can. What is true is that the more relevant variables the better, but it usually is not possible to know a priori which are relevant. The experienced statistician knows that the more irrelevant variables included in an analysis, the more uncertain your statistical conclusions. It has been common in death penalty analyses to use hundreds of variables

Given the large number of possible relevant variables and the small numbers of homicides in each judicial district, I do not see the possibility of any statistical study being able to adequately draw conclusions about racial disparities in administration of the death penalty.

Conclusion

Jack Boger has been an articulate and committed opponent of the death penalty and I'm sure that he can offer a number of good arguments as to why the death penalty should be abolished. I am agnostic on the issue. I am committed to the proper use of statistical methodology and I do not believe there is any statistical support for the view that the Death Penalty discriminates against African-Americans or anyone else. I do not think that the science of statistics has anything to contribute to the debate and death penalty opponents would do better to focus on the morality of the death penalty and the remote possibility of executing an innocent person.

I agree with Mark Twain who wrote

There is something fascinating about science. One gets such wholesale returns of conjecture out of such a trifling

talk

investment of fact.

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Whites kill 9-WF 11-WM 1-BF 4-WM+WF 2-WF+WF 1-WM+WM+WM

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Data in handout

THE DEVIL'S ADVOCATE

THE INDEPENDENT STUDENT NEWSPAPER OF THE DUKE UNIVERSITY SCHOOL OF LAW

Faculty Member Fired After Disclosing In-Class Discussion

Death Penalty Clinic Loses Opportunitues

By DANIEL HARPOLE AND JENNIFER SCHAUM
The Devil's Advocate

Senior Lecturing Fellow Gretchen Engel was recently dismissed from her position at Duke Law after she reported conversations from a class session of the Death Penalty Clinic to defense attorneys in a capital murder case. Following this incident, the Clinic has severed its ties with the Center for Death Penalty Litigation, Engel's full-time employer, potentially leaving students without a clinical component to the course for the remainder of the semester.

At the Clinic's Sept. 9 meeting, 3L Jeremy Eicher recounted his summer experience working for the New Haven County District Attorney's office in Wilmington, N.C. Eicher spoke about a capital case in which the defendant had been convicted and given the death sentence just the day before on Sept. 8. On the following day of Sept. 10, Engel and two students from the class signed affidavits regarding their recollection of Eicher's statements. The statements were subsequently filed in support of a motion to overturn the conviction and death sentence in the case about which Eicher spoke.

The Capital Case

The case in question involves the state's decision to pursue the death penalty after the conviction of Paul Cummings, 24, for first-degree murder in the October 2002 stabbing death of a Wilmington woman. A Motion for Appropriate Relief filed on Sept. 13 alleges that the decision to seek the death penalty was racially motivated and therefore unconstitutional.

In class, Eicher recounted a conversation with Assistant District Attorney Ben David. According to the affidavits, David told Eicher that he felt compelled to seek the death penalty for the light-skinned Cummings, who is an American Indian, because he wanted to seek the death penalty for another, more-heinous crime involving a black defendant. David is currently running for District Attorney for North Carolina's Fifth District, and the motion alleges that he did not want to have to explain during an election why he sought the death penalty for a black defendant but not for one who appears white.

Not everyone present at the Sept. 9 class agrees about the contents of Eicher's statements. Eicher himself declined to comment for this story. However, Senior Associate Dean for Academic Affairs Jim Coleman, who runs the Death Penalty Clinic, stated that Engel and the two students who signed the affidavits, 3Ls Noah Clements and Stephanie Bradford, misunderstood Eicher.

While David was not available for comment, Interim District Attorney John Sherrill told the Wilmington Star-News that David was not directly involved in the decision to seek the death penalty in the Cummings case. "The very premise that it's built on – that Ben David decided whether it was going to be a death penalty case – is wrong," he said.

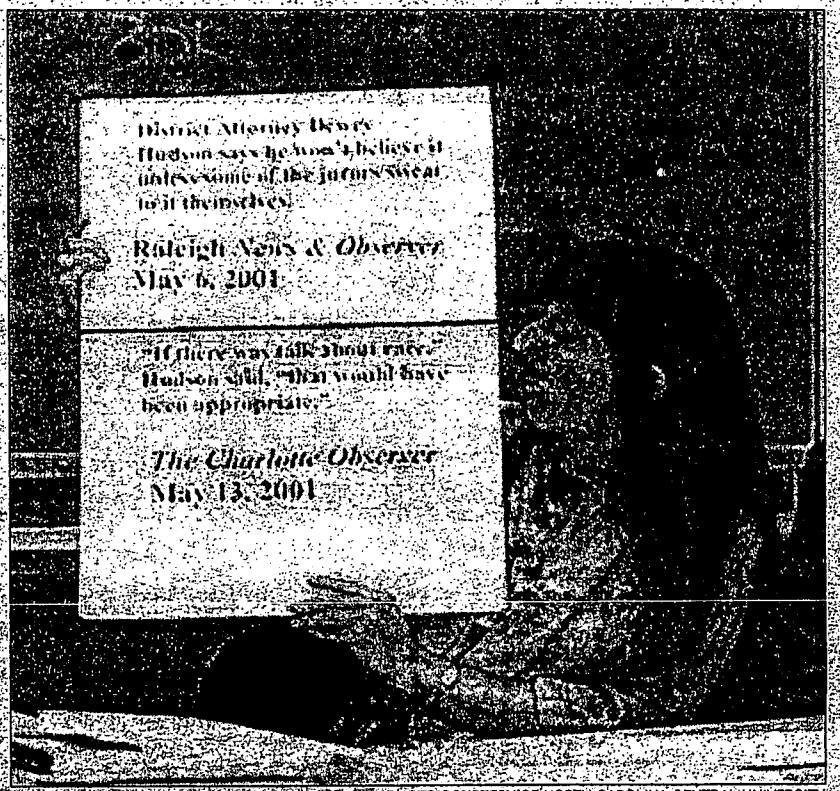


PHOTO COURTESY OF NORTH CAROLINA CENTRAL UNIVERSITY

Gretchen Engel in 2001 at a North Carolina Central University seminar examining racial disparity and the death penalty.

Instead, according to Sherrill, a committee consisting of himself, then-District Attorney John Carriker and Assistant District Attorney Phyllis Gorham made the decision to seek the death penalty.

An Ethical Obligation to Report

According to Engel, she felt that she had an ethical

DEATH PENALTY from page 1

obligation to report Eicher's statements, so she disclosed the class discussion to the Appellate Defenders Office. Assistant Appellate Defender Barbara Blackman represents Cummings and drafted the motion based on the affidavits.

"I felt that I had a duty to report, and it was not an easy decision," said Engel. Despite the difficulty of the decision, Engel said that she would do it all over again if she had the choice.

Engel emphasized that her focus was on the statements that David made, not Eicher's relaying of those statements to the class. "I mean in no way to impinge [sic] the character or actions of the Duke student, Mr. Eicher," said Engel.

Engel has not reported the statements to the North Carolina State Bar, although she said she could. Rule 8.3 of the North Carolina State Bar Rules of Professional Conduct states, "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the North Carolina State Bar or the court having jurisdiction over the matter." Rule 8.4 states that it is professional misconduct for a lawyer "to engage in conduct that is prejudicial to the administration of justice."

Clements, one of the students who signed an affidavit as to Eicher's statements, stated that he also felt an ethical obligation to disclose them, although he did not seek out Cumming's attorneys to report it. Rather, Appellate Defender Staples Hughes approached Clements at a coffee shop on Sept. 10 while Clements was having his initial meeting with attorneys from the Center to discuss his case for the semester. Hughes asked Clements to come to his office across the street where Clements signed the affidavit.

Clements mistakenly thought that Engel had permission to tell Hughes about Eicher's statements. However, Clements does not feel that he was coerced into signing the affidavit. "I don't think my recollection was unfair," he said.

According to Clements, he weighed the factors surrounding signing the affidavit heavily, but ultimately concluded that he had an ethical obligation to disclose Eicher's statements. He said that the possibility of having a death sentence commuted outweighed any damage that might come to Eicher because of the affidavit. "I knew going in there that I would screw Jeremy, and I'm not happy about that," Clements stated.

Coleman was not aware that Engel, Clements and Bradford were in contact with Cummings's attorneys until after they signed the affidavits. He said he wishes that the process for handling the situation would have been different. While he doesn't necessarily think that Engel and the students should not have signed the affidavits, he wishes that they would have consulted with someone first. "If the process were handled differently, we might not have ended up with affidavits," said Coleman.

"What I think happened is different than Gretchen and the two students," Coleman explained, "but I understand how they misunderstood what was said."

Coleman also stated that he would be providing an affidavit to the Attorney General, who is handling this motion since the attorneys in the DA's office could be called as witnesses. "I'm going to provide an affidavit to the state that sets out what I think happened," he said.

Confidentiality in Class

Clements said he feels that because Eicher made statements openly in a classroom setting, those statements did not need to be kept confidential. "Had it been in a private conversation, I never would have signed an affidavit," said Clements.

Coleman said he likes to have students discuss their cases with each other in the clinical setting. "I like to think of us as a law firm," he said. But he also noted a distinction between discussion of the cases that students handle as participants in the Clinic and the discussion of other experiences students have had.

Coleman feels that students should be able to have discussions in class that are open, but that does not necessarily mean that everything said in a classroom is confidential. "A student must exercise discretion, like any adult, about what to share in a public forum," he said.

"I would rather not have matters classroom discussion be publicly aired said Dean Kate Bartlett. On a general lev students have an expectation that t classroom is a safe place to discuss thing she explained.

Clinic Students Approached

Even after Engel, Clements a Bradford signed the affidavits a Blackman filed the motion, a private inve tigator called or visited the homes of seve al students enrolled in the Clinic over t weekend of Sept. 18 and 19.

The investigator, Ken Johnson American Detective Services, stated that was working with the Appellate Defende Office. Among others, Johnson contact 3Ls Tom McCudden and Melissa Ga Both McCudden and Ganz declined to ta with Johnson about the matter.

Also, McCudden and Ganz are bo unsure of how Johnson found out they we participants in the Clinic. Bartlett stat that the records of course enrollment a kept strictly confidential. "It would n have been possible for a third party to ge class roster," she said. Engel specifica denied giving out the names of the stude enrolled in the clinic. When asked how found the names of the students, Johns indicated that no one gave them to hi "You can find almost anything on the int net," said Johnson.

"Only the faculty member can access to a class roster," Law Sch

See DEATH PENALTY on pag

ATTN: Dean's Advocate

D.A. denies race a factor in case



STAFF PHOTO | GREG WOLF

District Attorney Ben David listens Tuesday to the second day of testimony in a hearing on the first-degree murder conviction and death sentence of Paul Dewayne Cummings.

Defense: Comments show racial motivation

By Ken Little
Staff Writer

District Attorney Ben David denied Wednesday that race or politics played a role in seeking the death penalty for Paul Dewayne Cummings.

Appellate defenders representing Mr. Cummings continued to maintain an opposite view and asked Judge Jerry Cash Martin to overturn their client's first-degree murder conviction and death sentence.

Judge Martin will review information from three days of testimony in New Hanover County Superior Court and issue his judgment today on the defense motion for appropriate relief.

Mr. Cummings, 25, stabbed Jane Truelove Head to death in October 2002 in her Wilmington mobile home. About two months later, a District Attorney's Office Death Penalty Review Team had made the decision to prosecute the case capitally. Mr. David, then an assistant district attorney, was not a member of the team.

Mr. David was lead prosecutor and also running for district attorney during Mr. Cummings' eight-week-long trial last summer. Mr. David was elected district attorney in November. The defense motion maintains Mr. David "deliberately employed the unconstitutional

SEE COURT | 7B

"At no time have I ever suggested that race ... should have any role in this prosecution.

Ben David
District attorney

COURT

CONTINUED FROM 1B

classification of race" in deciding to prosecute Mr. Cummings and further claimed that obtaining a death sentence would "bolster his election chances."

"Absolutely not," Mr. David said repeatedly in answer to defense allegations detailed by Special Deputy Attorney General G. Patrick Murphy.

"At no time have I ever suggested that race or politics or community perception should have any role in this prosecution," Mr. David said.

Statements by Duke University law student and former District Attorney's Office intern Jeremy Eicher attributed to Mr. David simply did not occur, Mr. David testified.

Ms. Head, 62, was stabbed 16 times by Mr. Cummings, who lived next door. Defense testimony implied that Mr. David suggested Mr. Cummings' racial background had a role in the decision to seek the death penalty.

Mr. Cummings is a Lumbee Indian. Ms. Head was white. Law student Stephanie Bradford, who attended a death penalty clinic at Duke in September with Mr. Eicher, testified earlier this week that Mr. Eicher told her Mr. David related that if he didn't seek the death penalty for someone who looked white then he couldn't pursue the death penalty for someone who wasn't white.

The reference was to Curtis Dixon, a black man charged with first-degree murder in connection with the May 2004 strangulation of fellow University of North Carolina Wilmington student Jessica Faulkner. The District Attorney's Office planned to seek the death penalty, but Mr. Dixon died while in custody last month in an apparent suicide.

At least three others besides Ms. Bradford heard Mr. Eicher discuss Mr. David's alleged statements, Assistant Appellate Defender Barbara Blackman argued.

"I guess we would have to believe they all had the same identical aural hallucination," she said.

Mr. Eicher testified Tuesday that none of the comments he made could be attributed to Mr. David.

"Their evidence does not support their claim," Mr. Murphy told Judge Martin.

The state took exception to the timing of the release of the defense motion to the media. The material was made public Sept. 13, the day before the special primary in which Mr. David was a candidate.

State evidence also was presented that implied death penalty opponents were trying to link Mr. David to Jerry Spivey, the district attorney for New Hanover and Pender counties removed from office in 1995 after uttering a racial slur in public. Mr. David didn't join the District Attorney's Office until 1999.

The motion's release to the media was timed "to sabotage his election," Mr. Murphy said.

Testimony was presented by appellate defenders concerning how other capital cases were resolved by the District Attorney's Office in New Hanover and Pender counties. The information was not allowed into evidence but could be used in future appeals, court officials said.

Ken Little: 343-2389
ken.little@starnewsonline.com

Unknown

From: Gerda Stein [Gerda@CDPL.ORG]
Sent: Monday, September 13, 2004 1:56 PM
To: ratkinson@wwaytv3.com
Subject: death penalty case/Ben David

Dear Mr. Atkinson:

Attached is a copy of an emergency motion that was filed today in New Hanover Superior Court on behalf of Paul Cummings, who received a death sentence last week.

The motion concerns comments made by Ben David, the Assistant District Attorney who prosecuted the case. (Note that in 1995, New Hanover County DA Jerry Spivey was removed from office for making a racial slur in public.)

For more information, you can contact the lawyer who filed the motion, Staples Hughes, the Appellate Defender for the state of North Carolina (based in Durham). His office number is 919-560-3334.

Thank you very much,
Gerda Stein
Center for Death Penalty Litigation
201 West Main Street, Suite 301
Durham, NC 27701
919-956-9545

STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
03CRS20547-20549

STATE OF NORTH CAROLINA)
)
v.)
)
PAUL DEWAYNE CUMMINGS)

AFFIDAVIT

BEFORE ME, the duly assigned authority, came and appeared JAMES E. COLEMAN, JR., who, upon being duly sworn, did depose and say:

1. I am the Senior Associate Dean for Academic Affairs and a Professor of the Practice of Law at the Duke University School of Law. Among other things, I am the principal teacher in the Duke Death Penalty Clinic. At all relevant times, Gretchen Engel was an adjunct teacher in the Clinic.

2. On September 9, 2004, students in the Death Penalty Clinic discussed materials relating to the penalty phase of capital trials. Among other things, this discussion touched upon the constitutional rules governing mitigating evidence; the importance of investigating a capital defendant's record and background; and what constitutes an effective presentation of mitigating evidence. Prior to the class, Jeremy Eicher, a third year student enrolled in the Clinic, sent to the class an email message concerning the death sentence that had been imposed the previous day in a case involving Paul Cummings. Mr. Eicher worked last summer as an intern in the District Attorney's office in Wilmington NC; he said he "spent the summer working on this case."

3. As class was convening on September 9, I asked Mr. Eicher if he would like to discuss the Cummings' case at the end of class. He said he would. With about ten or fifteen minutes remaining in class, I called upon Mr. Eicher to share with the class his experience working on the Cummings case, focusing on the penalty phase of the trial.

4. In the course of his discussion, Mr. Eicher expressed the opinion that the mitigating evidence produced by Mr. Cummings was strong. He identified some of the evidence that he thought was especially compelling. In light of what he considered these strong mitigating factors, Mr. Eicher said he asked Ben David, the Assistant District Attorney, why the Office didn't just let Mr. Cummngs plead guilty to murder and be sentenced to life without parole. According to Mr. Eicher, Mr. David responded that the Office had a policy for determining when to accept a plea and that once the decision was made to proceed as a capital case, the Office thereafter let the jury decide whether to sentence the defendant to death. As described by Mr. Eicher, this decision was made on a case by case basis.

5. According to Mr. Eicher, Mr. David said the policy that governed when to accept a guilty plea in exchange for a sentence of life without parole was intended to be race-neutral. By this, he said Mr. David meant that the decision in a particular case would not later be subject to attack as having been racially motivated. Mr. Eicher said Mr. David then used the Cummings case to illustrate how a decision to accept a plea in that case could be attacked as racially motivated, if the Office did not adhere to its policy. Thus, according to Mr. Eicher, Mr. David said that if he now permitted a plea in the Cummings case, some politically motivated individuals subsequently would attack him as being racist for seeking the death penalty in the pending case of an African American defendant who is charged with raping and killing a white female student at the University of North Carolina – Wilmington. Such an attack likely would be made because Mr. Cummings, who is Native American, "looks white." The policy used by the Office to decide when to accept a plea was intended to insulate the Office from such a "political" attack.

6. Several students in the Clinic reacted strongly to Mr. Eicher's comments. Their focus appeared to be that Mr. David seemed more concerned about a potential challenge to his decision to accept a guilty plea than he was about doing what was right in each case. One student suggested that the District Attorney could respond to any such challenge simply by pointing out that the case of the African American defendant was more aggravated than Mr. Cummings' case. During this discussion, it did not occur to me that any of the students were under the impression that Mr. Eicher was saying that Mr. David had actually decided not to permit Mr. Cummings to plead guilty to avoid having his decision to pursue the death penalty against the African American defendant challenged on the grounds of race. In retrospect, I can see how that impression may have been created, given the focus of the discussion. Nevertheless, I believe that Mr. Eicher spoke about the Cummings case and the case of the African American defendant only to illustrate what could happen in the absence of a race-neutral policy. Mr. Eicher was not explaining what in fact had happened in the Cummings case.

Further affiant sayeth not.

This the 1st day of October, 2004.

JAMES E. COLEMAN, JR.

STATE OF NORTH CAROLINA)
) S.S.
COUNTY OF DURHAM)

Sworn to and subscribed to me, this the 1st day of ~~September~~ October, 2004.
My Commission expires on 9/24/2005.

NOTARY PUBLIC

DAWN S. BLALOCK NOTARY PUBLIC PERSON COUNTY, NC

Death sentence stands

Judge: Politics, race played no part in decision to seek death penalty

By Ken Little
Staff Writer

A judge ruled Thursday there is "no credible, convincing evidence" that District Attorney Ben David used racial or political considerations in the death penalty case of Paul Dewayne Cummings.

Superior Court Judge Jerry Cash Martin denied a defense motion to vacate the first-degree murder conviction and death sentence of Mr. Cummings.

"I feel fully vindicated by this proceeding," Mr. David said.

After the four-day New Hanover County Superior Court hearing ended, Mr. David reacted with forceful disdain at the case presented by appellate defenders and what he said were the actions of Gretchen Engel of the Center for Death Penalty Litigation, who played a central role in the defense case. The Durham-based organization is opposed to capital punishment.

"They are not tethered to the truth," Mr. David said. "This was a blatant attempt by Gretchen Engel to advance their political agenda."

Ms. Engel attended the previous three days of the hearing and offered defense testimony, but was not in the courtroom Thursday. She did not return several calls seeking comment.

Mr. Cummings, 25, was convicted in August after a trial lasting nearly eight weeks of murdering neighbor Jane

DEATH

CONTINUED FROM 1B

Wilmington mobile home. Ms. Head, 62, was stabbed 16 times.

Mr. David was an assistant district attorney when he served as lead prosecutor in the case. The motion filed by the Office of the Appellate Defender contained a series of allegations, including one that stated Mr. David "deliberately employed the unconstitutional classification of race" in the decision to try Mr. Cummings for capital murder. It made reference to the fact Mr. David was a candidate for district attorney at the time of the Cummings trial and suggested a death penalty was sought for political gain.

The defense case centered on claims made by Ms. Engel and two Duke University students who attended a death penalty clinic held in September at the school. All three testified that Jeremy Eicher, a law student who was a summer intern with the New Hanover County District Attorney's Office, made statements at the clinic reflecting comments made by Mr. David implying that Mr. Cummings' race factored into the decision to seek the death penalty.

Mr. Cummings is a Lumbee Indian. Law student Stephanie Bradford testified that Mr. Eicher said Mr. David related that if he didn't seek the death penalty for someone who looked white then he couldn't pursue the death penalty for someone who wasn't white.

The reference was to Curtis Dixon, a black man charged with first-degree murder in connection with the May 2004 strangulation of fellow University of North Carolina Wilmington student Jessica Faulkner. The District Attorney's Office planned to seek the death penalty against Mr. Dixon, but he died in an apparent suicide last month before he could be tried.

Mr. Eicher affirmed that Mr. David never made any statements to him about race-based considerations in the Cummings case. Mr. David testified he never told Mr. Eicher that race had any bearing on capitally prosecuting Mr. Cummings or any other defendant. Hearing testimony showed that a three-member Death Penalty Review Team that did not include Mr. David decided to pursue the death penalty in December 2002, more than a year before he became lead prosecutor in the Cummings case.

Ms. Engel was an assistant to Duke University law professor James Coleman at the death penalty clinic, and initially alerted appellate defenders about Mr. Eicher's comments. Students in the class were contacted and several gave statements without Mr. Coleman's knowledge. Ms. Engel was dismissed soon afterward from her assistant position at the college, which severed its ties to the Center for Death Penalty Litigation.

Mr. David said the release of the motion to local media on Sept. 13, the day before a special Democratic district attorney primary, was timed to "sabotage" his campaign. Media outlets received e-mail communications from an employee of the Center for Death Penalty Litigation.

"The court finds that this was a blatant attempt to obtain political gain from the motion for appropriate relief and to sabotage Ben David's campaign by playing 'the race card' on the eve of the election," Judge Martin wrote.

Mr. David plans to send a copy of Judge Martin's decision to other district attorneys in the state, in part to alert them about what he said are the tactics used by Ms. Engel and the Center for Death Penalty Litigation.

Mr. David said his ordeal was a learning experience and gave him a better understanding of what some defendants go through. "Your district attorney now knows what it's like to be wrongfully accused with double hearsay," he said.

Mr. Cummings showed no emotion as Judge Martin made his ruling. He was taken back to Central Prison, where he will await the results of the appeal filed Thursday by appellate defenders. He is likely to spend many years in prison before the appeals are exhausted, court officials said.

The victim's relatives were also in the courtroom. Joni Carson had 2-year-old son Jake on her lap. She was more than eight months pregnant and on her way to a baby shower when she discovered her mother's blood-covered body.

Mrs. Carson said Mr. David "restored my faith in the judicial system."

Ken Little: 343-2389

ATTACHMENT IX

District Attorney's Death Penalty Decision

Defendant _____

Case Number _____

_____

_____

Offense Charged _____

_____

_____

The District Attorney made this decision after members of the Death Penalty Review Team examined the facts and factors set out to be considered and made recommendations to the District Attorney. The three member Review Team consists of the District Attorney, First Assistant District Attorney, and the assigned prosecuting attorney and an attorney who has prosecuted death penalty cases.

Statutorily Qualifies for Death Penalty___Yes_____NO_____

Accepted a Plea of _____

Elected to or not to seek the death penalty_____

Date_____Decision by_____

Attachment A Incorporated by Reference_____

Race & Gender of Defendant _____

Race & Gender of Victim _____

Race & Gender of Defense Attorney_____ _____

Race & Gender of Judge _____

Race & Gender of District Attorneys _____

Race & Gender of Death Penalty Review Team_____

Attachment A
Death Penalty Cases

In determining whether to seek the death penalty in a capital case the following factors should be kept in mind:

Do Not Consider:
Race of Parties
Religion of Parties
Gender of Parties
Nationality of Parties
Ethnicity of Parties
Economic status of Parties
Any arbitrary factors not set out by Statute.

Do Consider:
Strength of Aggravating factors set out by Statute
Strength of Mitigating factors set out by Statute
Facts of specific case
Strength of case
Weakness of law in case
Weakness of fact in case
Calendar
Whether there are co-defendants
Whether or not case is based on co-defendant testimony
Criminal record of defendant – how many prior convictions & what crimes
Danger posed by the defendant to the community
Likely-hood of jury recommending the death penalty
Is evidence admissible?
Credibility of witnesses
Level of involvement of defendant
Does the defendant have other pending charges?
What is the mental health of the defendant?
Discovery provided for consideration by defendant
Past jury action in similar cases
Was victim engaged in illegal or immoral conduct?
Defendant's relationship to the victim

TESTIMONY OF JOHN CHARLES BOGER
BEFORE NORTH CAROLINA HOUSE
SELECT STUDY COMMITTEE ON CAPITAL PUNISHMENT
December 13, 2006
Room 643, Legislative Office Building, Raleigh, North Carolina

Representative Hackney, Representative Earle, distinguished members of this Select Study Commission. I am John Charles Boger, presently the dean and Wade Edwards Distinguished Professor at the School of Law of the University of North Carolina at Chapel Hill.[1] This is my second appearance before this body. You were kind enough to invite me to testify on December 19, 2005. At that time, my remarks addressed the broader investigative task then before you. The burden of my testimony was to urge you, in your consideration of capital punishment, to work toward the creation of a strong factual record. I suggested, with utmost respect, that your most important contribution to the citizens of the State might not be less final judgments you will render than the depth and quality of the new evidence that you might bring to light: evidence on the actual effectiveness and utility of North Carolina's extremely broad first degree murder statute; evidence of the circumstances under which defendants actually innocent of murder might be sentenced to death; and evidence on the impact of various procedural reforms that might be considered.

I also invited you to gather fresh, solid, reliable evidence on the issue that we are considering today, the possibility that capital sentencing in North Carolina is tainted by considerations of race — the race of the homicide victim. I am here today to press that suggestion once again.

If possible racial bias was but an idle charge, it would not justify the considerable legislative energy necessary to give it full consideration. Yet, allow me to suggest that concern over possible racial bias is neither idle nor without a substantial historical foundation. More than 30 social scientific studies have been conducted to examine patterns of capital sentencing in various states during the past thirty years. Most of these studies, all carried out during the post *Furman v. Georgia* era,[2] found that the likelihood of receiving a death sentence differs sharply for defendants, based upon the various racial combinations of defendants and victims. African American defendants who kill white victims often find themselves several times more likely to receive a death sentences than African Americans who kills other blacks, or whites who kill whites.

Many public officials or citizens are skeptical of these alleged racial biases in capital sentencing. They sometimes point to higher murder rates among nonwhite defendants, or suggest that it is other factors associated with race, and not race itself, that explain any apparent disparities. Do African Americans commit more aggravated homicides, or more multiple victim cases, than do whites? Are whites more likely to be the victims of rape-murders or robbery-murders than are nonwhites? Could it be that

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[1] I am appearing here solely in my personal capacity, not as a representative of the School of Law or the University of North Carolina.

[2] Furman v. Georgia, 408 U.S. 238 (1972).

those factors, and not race itself, actually impels prosecutors and juries toward different death-sentencing rates?

These are highly plausible alternative explanations, and they deserve to be thoroughly explored. Modern statistical methods are especially well-suited to test just such alternative explanations, to see where the truth lies. What the very best capital sentencing studies of the past generation of studies have done, in fact, is first to gather information on dozens or even hundreds of alternative factors that ought to make a difference in capital sentencing decisions, including the prior criminal records of the defendants, the aggravating and mitigating circumstances of each crime, the background of each victim, and then to inquire whether, with all of those factors properly accounted for, race still plays a role.

In many of these studies, the clear answer has been 'yes, race does matter.' [3] Disturbed by these findings, Congress wrote a statute in 1988 requiring the General Accounting Office to "study capital sentencing procedures to determine if the race of either the victim or the defendant influences the likelihood that defendants will be sentenced to death." GAO Report, at 1).[4] The GAO responded to the Congress by carrying out an "evaluation synthesis" that looked at the findings from all existing research efforts, assessed their soundness, and considered the strength of the conclusions reached. Two years later, in 1990, the GAO reported to Congress on 53 studies it had located, 28 of which were non-duplicative and contained empirical findings, noting that "almost half of the[28] studies [were of] high or medium quality." *Id.* At 2-3. The GAO then concluded:

> Our synthesis of the 28 studies shows a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty after the Furman decision.
>
> In 82 percent of the studies, race of victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks. This finding was remarkably consistent across data sets, states, data collection methods, and

---

[3] In 1998, Professor David Baldus conducted a comprehensive study of capital sentencing in Philadelphia, Pennsylvania, which he reported in a law review article, David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-*Furman *Era: An Empirical and Legal Overview, With Recent Findings from Philadelphia*, 83 **Cornell L. Rev.** 1638 (1998). In his review of the literature, Baldus reported that studies of racial discrimination had been undertaken in 29 states with the death penalty in the post-1972 period. In 90% of those states (26 of 29), some evidence of race-of-victim discrimination was uncovered; in 55%, some evidence of race-of-defendant discrimination was uncovered. *Id.* At 1661 (see also *id.*, Appendix B, identifying all 29 studies by date and by state).

Since that time, a number of additional states, including Maryland and Nebraska, have completed studies, many with similar findings.

[4] United States General Accounting Office, Report to Senate and House Committees on the Judiciary: Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities at 1 (GAO/GGD-90-57; February, 1990). (A copy of the GAO report is annexed as Appendix A to this testimony).

analytic techniques. The finding held for high, medium, and low quality studies.

> . . . Legally relevant variables, such as aggravating circumstances, were influential but did not explain fully the racial disparities researchers found. In the high or medium quality studies, researchers used appropriate statistical techniques to control for legally relevant factors, e.g., prior criminal record, culpability level, heinousness of the crime, and number of victims. The analyses show that after controlling statistically for legally relevant variables and other factors thought to influence the death penalty. . . differences remain in the likelihood of receiving the death penalty based on race of victim. . . .
>
> To summarize, the synthesis supports a strong race of victim influence. The race of offender influence is not as clear cut and varies across a number of dimensions. Although there are limitations to the studies' methodologies, they are of sufficient quality to support the synthesis findings.

GAO Report, 5-7.

I have been personally involved in two such studies (which doubtless explains my presence here this afternoon). In neither study was I the principal social scientist. That is neither my professional training nor my acquired expertise. Rather, I am a lawyer. During some fifteen years between 1976 and 1990, however, I worked regularly, and for eight years full-time, in the representation of capital clients in post-conviction hearings and appeals. I have appeared as counsel of record before the Supreme Court of the United States in four cases. I have also taught courses on capital punishment at the New York and Harvard Law Schools, and have lectured on capital punishment at the University of Iowa, Florida State, the University of North Carolina, and Yale Law School.

During the 1980-1986 period, I worked closely with Professor David Baldus and his colleagues, all of them nationally distinguished social scientists and statisticians, on a study of capital sentencing patterns in the State of Georgia. That study, which later became the object both of a decision by the Supreme Court of the United States, *McCleskey v. Kemp*,[5] and a comprehensive book by Baldus and his colleagues,[6] found strong race-of-victim effects.

My presence here has less to do with that study, I suspect, than with a subsequent study in which I assisted Professor Isaac Unah of the Department of Political Science at the University of North Carolina at Chapel Hill. In the year 2000, Professor Unah and I received some funding from the North Carolina Council of Churches, the Soros

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[5] McCleskey v. Kemp, 481 U.S. 279 (1989).

[6] David C. Baldus, George G. Woodworth & Charles A. Pulaski, Jr., Equal Justice and the Death Penalty: A Legal and Empirical Analysis (Boston: Northeastern University Press, 1990).

Foundation, and the Common Sense Foundation, to carry out a study of North Carolina's imposition of punishment under its homicide statutes. Professor Unah is an expert in social scientific methods and a student of the American political and legal systems. He became the principal investigator in this study. I brought to the table my experience as an attorney in the criminal justice system, and my familiarity with the methods used by Professor Baldus and other researchers in Georgia and other states.

We chose the five-year period in North Carolina from 1993-1997, which brought us as near to the present as was possible while still addressing crimes all which would have, by 2000, have been prosecuted through to a verdict and sentence. Professor Unah was eventually able to secure data on all of the 99 homicides committed during that period which had resulted in a capital sentence, as well as the 303 homicides that received a life sentence after first degree murder convictions. To that group, he added data on a 10% random sample of the 181 cases in which life sentences had been imposed after second-degree convictions. We also chose a random sample of 100 cases from the 1921 cases in which sentences of less than life imprisonment had been imposed, yielding a total population of 520 cases.[7]

To gather data, we developed a 32-page questionnaire in consultation with Professor Baldus and with North Carolina legal authorities from the UNC Institute of Government, the Administrative Office of the Court, and other public bodies. We used our questionnaire to record extensive data about every single one of the 520 cases. The principal sources for these data were official records of various state agencies: the North Carolina Supreme Court, the North Carolina Court of Appeals, the Office of the Chief Medical Examiner, the Department of Corrections, and files in county clerks' offices. The data were carefully entered into a UNC data base under the supervision of Professor Unah, and they were thereafter subject to a wide and searching set of statistical analyses.

On April 23, 2001, Professor Unah and I wrote Senator Frank Ballance, Jr. and Representative Ronnie N. Sutton, Co-Chairs of a Joint Legislative Study Commission, presenting to them a copy of a skeletal report with some preliminary findings drawn from the study. We told these two co-chairs f the Joint Legislative Study Committee that while Dr. Unah thought it might take several additional years to complete his report, we were providing this report to fulfill an earlier promised we had made to the Commission to provide them with our preliminary findings, whatever they might be, in the spring of 2001.[8]

Our preliminary report indicated that, during the five years from 1993 through 1997, North Carolina homicide defendants who murdered white victims faced elevated

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[7] Ideally, of course, we would have collected data on every single homicide case that came into the judicial system within this period, but such an effort was well beyond our $50,000 budget. Instead, Professor Unah employed well-accepted stratified sampling techniques which gave us a reliable sample population from which to draw conclusions.

[8] Letter from John Charles Boger to Senator Frank Ballance, Jr., Co-Chair, et al., dated April 23, 2001, at 1. (A copy of this letter, and a follow-up letter, dated May 8, 2000, are annexed as Appendices B and C to this testimony).

odds of receiving death sentences, even after controlling for other legitimate sentencing considerations. Our preliminary findings were appended to our letter.[9]

Since that time, Professor Unah has worked to refine his research. His findings were presented to the annual meeting of the American Political Science Association in Boston in October of 2002. Unah presently has a manuscript[10] under submission to a prestigious social scientific journal, and he is awaiting the final outcome of peer review. We hope for publication next spring.

The manuscript first reports the gross results in North Carolina cases, grouped by the racial characteristics of both defendant and victim. The results are quite consistent with social scientific findings from Georgia and many other states in recent decades:

> [T]here is a stark difference in death-sentencing rates between white and nonwhite victim cases. The death-sentencing rate for white victim cases is 3.4% regardless of the rate of the defendant, and this is more than twice the death-sentencing rate for nonwhite victim cases (1.6%), also regardless of defendant race ($p<.01$). . . . The most striking result . . . is in the treatment of victims who are killed by nonwhite defendants. When a nonwhite defendant kills a white victim, the death-sentencing rate is 5.1%. However, when a nonwhite defendant kills a nonwhite victim, the death-sentencing rate is only 1.5%. . . . The highest death-sentencing rate occurs where a nonwhite kills a white; the lowest occurs where a nonwhite kills another nonwhite.

Report, at 17.

The report goes on to subject the data to more rigorous examination, asking whether other legitimate factors associated with the crime, the defendant, or the victim might explain these apparent racial disparities. It finds, contrary to much of the earlier literature, that North Carolina prosecutors in the 1990s appear *not* to have been making charging and prosecutorial decisions that were tainted by racial biases. However, the report finds that North Carolina juries did allow racial considerations to play a key role in their decisions:

> While elected prosecutors have become race-neutral in their decision to seek the death penalty, sentencing jurors remain race-conscious in determining which convicts would live and which would die for their crimes. Nonwhite defendants who are convicted of killing white victims are significantly more likely to face the execution chamber than white defendants who similarly kill white victims.

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[9] Dr. Isaac Unah and Jack Boger, Race and the Death Penalty in North Carolina, An Empirical Analysis: 1993-1997 (Principal Investigator; April 16, 2001). (A copy of that preliminary report is annexed as Appendix D to this testimony).

[10] Isaac Unah & John Charles Boger, Race, Politics, and the Process of Capital Punishment in North Carolina (forthcoming).

Report, at 29. Indeed, the data reveal that North Carolina defendants who had killed white victims were more likely to receive a death sentence in the 1993-1997 period than were defendants who had committed murders accompanied by another felony such as armed robbery or arson, or those whose crimes had been proven to be the product of willful premeditation. (Table 3, at 2).

These new data, while striking, are far from the only studies finding that racial biases have marred the integrity of North Carolina's capital sentencing practices. Indeed, two of the very earliest studies of capital sentencing in the United States focused on North Carolina counties during the 1930s and early 1940s. Both studies found that death sentences were imposed more frequently in white-victim cases, especially when defendants were African American.[11] In the 1970s, Professor Barry Nakell and Kenneth Hardy of UNC-Chapel Hill looked at the experience under the first year of North Carolina's current capital statute. Their study found both race-of-defendant and race-of-victim effects at various stages of the capital charging and sentencing system.[12] A latter study in the 1980s, relying on data submitted by North Carolina law enforcement agencies to the Federal Bureau of Investigation, found that during the years 1976-1980, "the race of the victim had sizable and statistically significant effects on the likelihood that a defendant would receive the death penalty."[13]

Do I suggest that the 1990 GAO study, or the Baldus/Georgia study, or the 1977 Nakell/Hardy study, or the 1984 Gross & Mauro study, or our own 2001Unah/Boger study, should be decisive for your purposes? Not at all. Although ours is the most recent study carried out on North Carolina, the capital sentencing patterns it examines are now 10 to 14 years old. It was completed on a financial shoe string. You might even doubt our competence to conduct the study, or our impartiality in doing so, although we stand fully ready to demonstrate the integrity of our methods and findings.

Respectfully, the five previously studies of North Carolina's capital sentencing patterns — all of which have found some disturbing race-of-victim biases — should persuade you that your own, independently commissioned examination of this serious question is justified and necessary. To draw a legal parallel, this prior body of work provides at least a "reasonable suspicion," and perhaps even "probable cause" to believe that racial factors may be at work as North Carolina imposes its most severe penal sanction. None of us, whatever our views on the wisdom of the death penalty, want punishment to turn on considerations of race rather than a defendant's just deserts.

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[11] Guy Johnson, The Negro and Crime, 217 **Annals** 92-116 (1941); Herbert Garfinkel, Research Notes on Inter- and Intraracial Homicides, 27 **Social Forces** 369 (1949).

[12] Barry Nakell & Kenneth Hardy, The Arbitrariness of the Death Penalty 158-59 (Philadelphia: Temple University Press, 1987).

[13] Samuel R. Gross & Robert Mauro, Death & Discrimination: Racial Disparities in Capital Sentencing 91 (Boston: Northeastern University Press, 1989). However, since only a small number of defendants had received capital sentences by the date of the study, the race of victim effects became smaller and statistically insignificant when the race-of-defendant factor was added to the Gross & Mauro analysis.

APPENDIX A

U.S. General Accounting Office

Death Penalty Sentencing

February 1990

United States General Accounting Office
Report to Senate and House Committees
on the Judiciary

GAO

February 1990

DEATH PENALTY SENTENCING

Research Indicates Pattern of Racial Disparities



GAO/GGD-90-57

Printed copies of this document will be available shortly.

GAO United States
General Accounting Office
Washington, D.C. 20548

General Government Division

B-236876

February 26, 1990

The Honorable Joseph R. Biden, Jr.
Chairman, Committee on the Judiciary
United States Senate

The Honorable Strom Thurmond
Ranking Minority Member, Committee
on the Judiciary
United States Senate

The Honorable Edward M. Kennedy
Chairman, Subcommittee on Immigration
and Refugee Affairs
Committee on the Judiciary
United States Senate

The Honorable Jack Brooks
Chairman, Committee on the Judiciary
House of Representatives

The Honorable Hamilton Fish, Jr.
Ranking Minority Member, Committee
on the Judiciary
House of Representatives

The Anti-Drug Abuse Act of 1988 (Public Law 100-690) requires us to study capital sentencing procedures to determine if the race of either the victim or the defendant influences the likelihood that defendants will be sentenced to death. We did an evaluation synthesis--a review and critique of existing research--on this subject to fulfill the mandate. This report provides a summary of our findings and a discussion of our approach and data limitations.

APPROACH

An evaluation synthesis is a critical integration of findings from existing empirical research on a given topic--in this case death penalty sentencing after the Furman decision.[1] First, we identified and collected all potentially relevant studies done at national, state, and local levels from both published and unpublished sources. Computer-generated

[1]In Furman v. Georgia, 408 U.S. 238 (1972), the Supreme Court found unconstitutional death sentences imposed under state statutes which allowed juries to impose these sentences in an arbitrary or capricious manner. In response to this decision, states adopted new statues that addressed the concerns raised by the Court.

bibliographic searches and manual reviews of the bibliographies of studies that we obtained contributed to our list of potentially relevant material. We also surveyed 21 criminal justice researchers and directors of relevant organizations whose work relates to death penalty sentencing to identify additional research. We screened more than 200 annotated citations and references to determine relevance to our review. We excluded studies that (1) were based primarily on data collected prior to the Furman decision and (2) did not examine race as a factor that might influence death penalty sentencing. From this initial screening we obtained 53 studies that we determined to be relevant.

We then reviewed each of the 53 studies to determine both appropriateness and overall quality of the research. We excluded studies that did not contain empirical data or were duplicative (a few researchers published several articles, with the most current including data and findings cited in earlier versions). Twenty-eight studies remained after this assessment. The information included in these studies forms the basis for our findings.

Next, we rated the 28 studies according to research quality. Two social science analysts independently rated each study in five dimensions: (1) study design, (2) sampling, (3) measurement, (4) data collection, and (5) analysis techniques. A rating for overall quality was also given. A third analyst reviewed the raters' assessments to ensure consistency. In addition, a statistician reviewed the studies that used specialized analytic techniques to assess whether the techniques were applied correctly and whether the analyses fully supported the researchers' conclusions.

Finally, we extracted all relevant information on the relationship of race to death penalty sentencing from each of the studies. This information was compared and contrasted across studies to identify similarities and differences in the findings.

Evaluation synthesis has benefits and limitations. The major benefit is that evidence from multiple studies can provide greater support for a finding than evidence from an individual study. The major limitation is that this approach depends on the quantity and quality of the design and methodology of available studies and the comprehensiveness of their reporting. In this case, the body of research concerning discrimination in death penalty sentencing is both

of sufficient quality and quantity to warrant the evaluation synthesis approach.

DESCRIPTION OF THE STUDIES

We evaluated 28 studies which were done by 21 sets of researchers.[2] The studies covered homicide cases for different time periods through 1988, many states that have the death penalty, and different geographic regions of the country. In three instances, two or more articles were generated from a single database, with each article focusing on a different aspect of the sentencing process. A few researchers used data from other studies in their analyses. Overall, the 28 studies constitute 23 different data sets.

We rated almost half of the studies as high or medium quality; the remainder were rated as low. It is important to evaluate research quality for two reasons: (1) the results of the synthesis should be based on a sufficient number of medium or high quality studies; and (2) it is important to note differences in studies' findings, if any, by the quality of the studies. By quality we mean the strength of the design and the rigor of the analytic technique that leads to a level of confidence we have in the study findings. We judged a study to be high quality if it

-- was characterized by a sound design that analyzed homicide cases throughout the sentencing process;

-- included legally relevant variables (aggravating and mitigating circumstances); and

-- used statistical analysis techniques to control for variables that correlate with race and/or capital sentencing.

We judged a study as medium quality if we found it to be lacking in one or more of the above characteristics. However, the medium quality studies generally were more similar to high quality studies than to low quality studies. Low quality studies typically had weak or flawed designs, relied on less reliable statistical analysis, and were simplistic in interpretation of the data. Studies published before 1985 comprised a larger proportion of lower quality

[2]Appendix I includes a list of the studies we used in the synthesis.

studies than those published subsequently. This coincides with the relatively recent development and use of a more sophisticated statistical technique appropriate for use with data such as those in death penalty studies.

LIMITATIONS OF THE STUDIES

We critiqued all of the studies to identify methodological limitations in the design and analysis of the research. We identified three major limitations among these studies: (1) the threat of sample selection bias, (2) the problem of omitted variables, and (3) the small sample sizes.

Sample selection bias implies that the cases under consideration are not representative of all the cases of interest. The criminal justice system is characterized by discretionary processes of selection at different points in the system. Racial factors may influence decisions at different stages of the process. A study that considered only whether persons convicted were sentenced to death was especially prone to the biasing effect of sample selection. Racial factors may have influenced decisions earlier in the process, such as whether the prosecutor requested that an offender be charged with capital murder. This discretion exercised early in the process may have the effect of concealing (masking) race effects if analysis is limited only to the later stages.

We found sample selection bias in more than half of the low quality studies; these studies typically analyzed only those cases in which the defendant was convicted of capital murder or received the death penalty. Studies that included all reported homicides and followed the disposition of these defendants from initial charge through subsequent stages of the judicial process are not likely to have been affected by this bias. More than two-thirds of the studies we rated high or medium quality picked up cases prior to conviction and followed these cases through the judicial process.

Another limitation is the problem of omitted variables. This limitation is especially important in studies examining racial discrimination. This is because the effect of race is considered the residual--after all relevant and important variables have been controlled, the effect that remains, the residual, is interpreted to be racial disparity. Omitting relevant variables can affect results by failing to reduce the residual appropriately, thus enhancing the perceived

racial disparity. Omitted variables in death penalty research are potentially of two types: (1) variables that were known and were believed to be correlated with race or the death penalty and (2) variables that were not known and may be correlated with race or the death penalty outcome.

Several of the higher quality studies controlled for many variables. For example, one high quality study controlled for more than 200 variables. Only a few variables are shown to be highly explanatory. Most of these are controlled for in the better quality studies. However, there are variables such as strength of evidence or socioeconomic status of the victim and defendant which are difficult to measure or obtain. If there are important omitted variables (either because they are difficult to measure or because they are unknown), other explanations for the differences in death penalty outcomes cannot be excluded. But for another variable to influence the existing disparity it would have to (1) be jointly correlated with both race and the death penalty outcome and (2) operate independently of the factors already included in the analysis.

A third limitation relates to the consequences of the small sample sizes in the analyses of death penalty imposition. The imposition of the death penalty is a relatively rare event. As such, in most studies there were very few cases at the end of the process--the sentencing and imposition stages. The small sample size places limits on the usefulness of statistical techniques for analysis at these final stages and thus limits the rigor of analyses at these stages.

While the severity of the limitations varied, as reflected in the studies' ratings, these limitations do not preclude a meaningful analysis of the studies. We have considered quality in evaluating the studies and arriving at our findings.

FINDINGS

Our synthesis of the 28 studies shows a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty after the Furman decision.

In 82 percent of the studies, race of victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered

whites were found to be more likely to be sentenced to death than those who murdered blacks.[3] This finding was remarkably consistent across data sets, states, data collection methods, and analytic techniques. The finding held for high, medium, and low quality studies.

The race of victim influence was found at all stages of the criminal justice system process, although there were variations among studies as to whether there was a race of victim influence at specific stages. The evidence for the race of victim influence was stronger for the earlier stages of the judicial process (e.g., prosecutorial decision to charge defendant with a capital offense, decision to proceed to trial rather than plea bargain) than in later stages. This was because the earlier stages were comprised of larger samples allowing for more rigorous analyses. However, decisions made at every stage of the process necessarily affect an individual's likelihood of being sentenced to death.

Legally relevant variables, such as aggravating circumstances, were influential but did not explain fully the racial disparities researchers found. In the high or medium quality studies, researchers used appropriate statistical techniques to control for legally relevant factors, e.g., prior criminal record, culpability level, heinousness of the crime, and number of victims. The analyses show that after controlling statistically for legally relevant variables and other factors thought to influence death penalty sentencing (e.g., region, jurisdiction), differences remain in the likelihood of receiving the death penalty based on race of victim.

The evidence for the influence of the race of defendant on death penalty outcomes was equivocal. Although more than half of the studies found that race of defendant influenced the likelihood of being charged with a capital crime or receiving the death penalty,[4] the relationship between race

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[3]When we refer to a finding of racial disparities at the sentencing and imposition stages we are, in fact, including disparities that occurred in earlier stages of the judicial process, e.g., charging and decision to proceed to trial.

[4]About two-thirds of these studies were of high or medium quality.

of defendant and outcome varied across studies. For example, sometimes the race of defendant interacted with another factor. In one study researchers found that in rural areas black defendants were more likely to receive death sentences, and in urban areas white defendants were more likely to receive death sentences. In a few studies, analyses revealed that the black defendant/white victim combination was the most likely to receive the death penalty. However, the extent to which the finding was influenced by race of victim rather than race of defendant was unclear.

Finally, more than three-fourths of the studies that identified a race of defendant effect found that black defendants were more likely to receive the death penalty. However, the remaining studies found that white defendants were more likely to be sentenced to death.

To summarize, the synthesis supports a strong race of victim influence. The race of offender influence is not as clear cut and varies across a number of dimensions. Although there are limitations to the studies' methodologies, they are of sufficient quality to support the synthesis findings.

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We are sending copies of this report to cognizant congressional committees, the Attorney General, and other interested parties.

Major contributors to this report are listed in appendix II. Please call me at 275-8389 if you have any questions.

Lowell Dodge

Lowell Dodge
Director, Administration
of Justice Issues

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LIST OF STUDIES

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APPENDIX II

MAJOR CONTRIBUTORS TO THIS REPORT

GENERAL GOVERNMENT DIVISION, WASHINGTON, D.C.

Laurie E. Ekstrand, Chief Social Scientist
Harriet C. Ganson, Analyst-in-Charge
Lisa Cassady, Social Science Analyst
James L. Fremming, Consultant
Douglas M. Sloane, Statistical Consultant

(181910)

APPENDIX B

Letter from John Charles Boger to

Senator Frank Ballance, Jr., Co-Chair

Dated April 23, 2001

The University of North Carolina at Chapel Hill
School of Law
CB# 3380, Van Hecke-Wettach Hall
Chapel Hill, North Carolina 27599-3380
919 962-0354
fax: 919 962-1277

April 23, 2001

Senator Frank Ballance, Jr., Co-Chair
Representative Ronnie N. Sutton, Co-Chair
Joint Legislative Study Commission
523 Legislative Office Building
Raleigh, North Carolina 27601

Dear Senator Ballance and Representative Sutton:

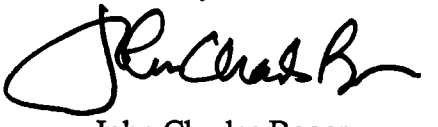
I am writing to present a copy of a report on some preliminary findings that my colleague Dr. Isaac Unah and I have reached in the North Carolina Death Penalty Study 2000-2001. You may recall that I made reference to that study when I testified before your Commission on September 15, 2000, informing the Commission that "an important new study [was] currently underway," sponsored by the North Carolina Council of Churches and the Common Sense Foundation, to examine capital punishment cases in the 1993-1997 period. (Transcription of Joint Legislative Session, at 2-3) (unofficial copy available from Professor Daniel H. Pollitt). I explained to the Commission that while Dr. Unah thought it might take several years to complete his report, we nonetheless hoped to provide the Commission with a preliminary report by early February of 2001. (*Id.* at 4). We added that we "thought it was important to let you know" about the study, even though, in September, "we had [no] idea of what the results [might be]." (*Id.* at 5-6). My closing promise, after some questions from other Commission members about the relation between our ongoing research and the Commission's deadlines for reporting to the General Assembly was as follows: "I will deliver to you as much as we can and stay in touch with your staff." (*Id.* at 12).

The enclosed report was announced last Monday, April 16, 2001, at a conference attended by your legislative aide, Senator Ballance. Although he received a full copy of the report at that time, we thought it appropriate to present our report copy formally both to you and to Representative Sutton. As you will see, the report finds "that racial disparities continue to plague North Carolina's capital punishment system in the 1990s—especially discrimination against defendants (of whatever race) whose murder victims are white." (Unah & Boger, *Preliminary Report on the Findings of the North Carolina Death*

Penalty Study 2001, at 1). We include a number of statistical tables that are described in the written report, as well as a summary table, entitled "Table 2. Summary of Findings with Regard to the Importance of the Race of the Victim, Based on a Thirty Six Variable Model Explaining the Application of Capital Punishment in North Carolina (1993-1997)." That table reveals that the odds of receiving a sentence of death, on average, are elevated by 2.8 to 4.3 times if a defendant has murdered a white victim, even after controlling for 35 other legitimate sentencing considerations. These analyses suffice, in our judgment, to demonstrate reliably that "[a] defendant is significantly more likely to get the death penalty if the victim is white rather than non-white, even after taking into account the statutory aggravating and mitigating factors approved by the North Carolina General Assembly for determining death worthiness." (Unah, *Research Design and Analytical Methodology*, at 6).

We hope these preliminary findings will be of assistance to the Commission and to the General Assembly as it considers the future of capital punishment in the State of North Carolina. Best regards.

Sincerely,



John Charles Boger
Professor of Law
For myself and Dr. Isaac Unah

APPENDIX C

Follow-up letter from

John Charles Boger to

Senator Frank Ballance, Jr., Co-Chair

Dated May 8, 2000

The University of North Carolina at Chapel Hill
School of Law
CB# 3380, Van Hecke-Wettach Hall
Chapel Hill, North Carolina 27599-3380
919 962-0354
fax: 919 962-1277

May 8, 2000

Senator Frank Ballance, Jr., Co-Chair
Representative Ronnie N. Sutton, Co-Chair
Joint Legislative Commission on Capital Punishment
523 Legislative Office Building
Raleigh, North Carolina 27601

Dear Senator Ballance and Representative Sutton:

I very much appreciated the opportunity to address the Joint Legislative Commission on Thursday, April 20, 2000 at the North Carolina Legislative Office Building. As indicated during the hearing, I fully support the Racial Justice Act you are considering, Senate DRS1691-LH021B(1.22). It is a worthy bill.

In addition, however, allow me to reiterate my suggestion that the Commission seriously consider amending the bill to require that state law enforcement officials collect data on all voluntary homicide cases. Such legislation could be modeled after the traffic law enforcement legislation enacted in the 1999 Legislative Session as Senate Bill 76, **N.C. Gen. Stat.** § 114-10 (1999), with specific adaptations to the special factors that may be relevant to capital sentencing. The justifications that support North Carolina's "driving while-black" statute seem at least as compelling in capital cases as in traffic cases. If North Carolina's capital statutes are, as we all hope, operating in a fair and evenhanded fashion, the people of the State deserve to be reassured on the question. If data reveal, on the other hand, that racial biases infect the capital sentencing system, those biases should be identified and eliminated. Just as North Carolina's private businesses, banks, and public agencies conduct regular financial audits to ensure against fraud or embezzlement, so the State should collect data that would permit a regular audit for racial fairness.

At present, to undertake a serious review is very expensive, since North Carolina has no central repository of capital punishment data. Instead, any investigator interested in capital sentencing must either rely on more limited data available from the Federal Bureau of Investigation's Uniform Crime Reports or go to each of the State's 100 counties to collect year-by-year data on all individual case files as part of any thorough analysis. Since North Carolina solicitors already collect and keep information on their

homicide cases, it would be easy to require that some portions of those data be forwarded to the Division of Criminal Statistics of the Department of Justice in Raleigh on a standardized form. If such data were collected centrally and kept in "machine-readable" form, responsible agencies or members of the general public could readily use widely acceptable statistical techniques to examine questions of racial fairness without jeopardizing either privacy concerns or the integrity of ongoing cases.

It is just such studies that I mentioned during my testimony to the Commission. Among the most important studies, I mentioned what are actually two overlapping studies conducted by Professor David Baldus and his colleagues in the State of Georgia, examining all non-negligent homicides in that state between 1973 and 1979, some 2,484 cases. The results of these two massive studies are reported in full in a 698-page volume, **David C. Baldus, George Woodworth, & Charles A. Pulaski, Jr., Equal Justice and the Death Penalty: A Legal and Empirical Analysis** (Boston: Northeastern University Press, 1990). (I am attaching some pertinent portions of that book as Appendix A to this letter). The results—which demonstrate that, during that period, Georgia capital defendants whose victims were white were over 4.3 times more likely to receive death sentences than were those whose victims were black—were introduced into evidence in the case of a Georgia, death-sentenced inmate, Warren McCleskey. Mr. McCleskey's case eventually worked its way to the Supreme Court of the United States. In a 5-to-4 decision in *McCleskey v. Kemp*, 481 U.S. 279 (1987), Justice Powell rejected Mr. McCleskey's claim, suggesting that

> McCleskey's arguments are best presented to the legislative bodies. It is not the responsibility—or indeed even the right—of this Court to determine the appropriate punishment for particular crimes. It is the legislatures, the elected representatives of the people, that are "constituted to respond to the will and consequently the moral values of the people." *Furman v. Georgia*, 408 U.S., at 383 (Burger, C.J., dissenting). Legislatures also are better qualified to weigh and "evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts," *Gregg v. Georgia*, [428 U.S.] at 186.

I also mentioned to the Commission a more recent study conducted by Professor Baldus in the City of Philadelphia, Pennsylvania that likewise uncovered racial bias in the death sentencing system there. Professor Baldus's findings are reported in full in a comprehensive article, David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-*Furman *Era: An Empirical and Legal Overview, With Recent Findings from Philadelphia*, 83 **Cornell Law Review** 1638 (1998), which I am attaching to this letter as Appendix B. In his article, Baldus noted that studies of racial discrimination had been undertaken in 29 states with death penalty statutes in the post-1972 period. He reports that in 90% of those states (26 of 29), some evidence of race-of-victim discrimination was uncovered; in 55% of those states (16 of 29), some evidence of race-of-defendant discrimination was uncovered. *See* Baldus, 83 **Cornell L. Rev.** at 1661. In his Appendix B to the Philadelphia article, Professor Baldus identifies all such

post-1972 studies by researcher and by state; his is the most thorough list of studies of which I am aware. It may be of some use to your Commission.

I made reference in my testimony to another major study of racial discrimination in capital sentencing that was commissioned by the United States Congress and was carried out by the General Accounting Office. The resulting study (which I am attaching as Appendix C to this letter) is entitled **United States General Accounting Office, Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities** (1990). It evaluated 28 earlier empirical studies using an "evaluative synthesis" method that critically examined both the research methods and the results reported in each of the 28 studies. The GAO's conclusion was striking:

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

GAO Report, at 5.

In addition to these studies from other states, I mentioned two studies that looked at capital sentencing in North Carolina. The first, by Professors Gross and Mauro, is reported in their book **Samuel R. Gross & Robert Mauro, Death & Discrimination: Racial Disparities in Capital Sentencing** (Boston: Northeastern University Press, 1989). (I am forwarding pertinent portions of this book as Appendix D). Drawing upon Supplementary Homicide Reports prepared for the Federal Bureau of Investigation by local law enforcement agencies in North Carolina, Gross & Mauro found that in the 1976-1980 period, "the race of the victim had sizable and statistically significant effects on the likelihood that a defendant would receive the death penalty in Oklahoma, North Carolina, and Mississippi," although given the small number of capitally sentenced cases in the state, when the race of the defendant was added to the analysis, "[i]n North Carolina the race-of-victim effect became smaller and statistically insignificant." **Gross & Mauro**, at 91.

I also called the Commission's attention to a comprehensive study of all potentially capital cases that arose in 1977 in North Carolina. That study by Professors Nakell and Hardy, is reported in their book **Barry Nakell & Kenneth A. Hardy, The Arbitrariness of the Death Penalty** (Philadelphia: Temple University Press, 1987). Among their many findings was that

> [a]t the verdict stage, the race of the defendant did not have a significant effect, but a new factor did: the race of the victim. Controlling for all factors except the race of the victim, a defendant charged with murder of a white was six times more likely to be convicted than a defendant charged with murdering a nonwhite.

Nakell & Hardy, at 159. (I have included excerpts from this book as Appendix E to this letter).

In sum, there is significant evidence from other states, as well as significant older evidence from North Carolina, suggesting that racial factors may be playing an illegitimate role in capital sentencing. I trust that if North Carolina does indeed have a problem, Commission members believe that the General Assembly should know about it and take appropriate steps to stop it. The Racial Justice Act, if amended to require local law enforcement officials to send data to the Criminal Statistics Division of the Department of Justice and to give citizens access to this data, would be an appropriate step, one that would go a long way toward achieving that important end.

Let me add that I fully support the suggestion of James Ferguson, Esq., who urged the Commission to support a moratorium on executions in North Carolina until evidence on racial bias could be gathered and analyzed. The troubling statistics of possible racial disparities in North Carolina that Mr. Ferguson discussed—revealing that North Carolina's death row is presently 55% African American, several times higher than the percentage of African Americans in the state's population—seems enough to warrant a moratorium until more comprehensive evidence can be obtained.

Again, let me thank you for the opportunity to address the Commission. Please let me know if I can be of further assistance.

Sincerely,

John Charles Boger
Professor of Law

CC: Commission Members
(w/o attachments)

Two Postscripts

Postscript One:

Representative Eddins asked during the hearing whether I had evidence to substantiate my hypothesis that some fraction of the racial disparity in the treatment of white-victim and black-victim cases in Georgia was the result of a propensity of Georgia prosecutors to reserve their limited financial and human resources for cases in which whites were victims and to acquiesce in guilty pleas to lesser charges (thereby foregoing the need to prepare for expensive and time-consuming capital trials) when the crime victims were black.

One source of authority is Professor Baldus, who addressed the possible causes for such disparities in his Philadelphia article. *See* **Baldus**, 83 **Cornell L. Rev.** at 1722-1724. He identifies four possible explanations: (1) "overt, conscious racial discrimination" by prosecutors; (2) "community outrage," which is likely to be higher in majority-white communities when a white person is the homicide victim; (3) "the perceived unimportance of Black-on-Black murder cases;" and (4) "the predominance of white control of the criminal justice system." It is the third of these hypotheses that I relied upon. In explaining it, Professor Baldus wrote:

> The prevailing view in many communities, particularly in the South and large cities, is that black-on-black homicides do not warrant the resources required for capital trials, and therefore, plea bargains with relatively light sentences are appropriate. These perceptions may result in perfunctory investigations by law enforcement officials in black-victim cases, which in turn may lead some prosecutors to believe that the prospects of obtaining a death sentence are too low to justify the cost. In addition, some prosecutors may believe that the black community will provide a low level of cooperation in the investigation of these cases, significantly reducing the chance of obtaining a capital murder conviction at trial.

Baldus, at 1724.

I should add that when statistical evidence reveals a strong racial bias in capital sentencing, none of the alternative explanations for it is attractive. Of the four hypotheses Baldus considers, the disinclination of police or prosecutors to expend unusual effort is probably one of the *least* racially offensive explanations, since it does not attribute overt and deliberate racism either to the prosecutor or to the community.

The other resource I mentioned to the Commission was an article by Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 **Santa Clara Law Review** 433 (1995). In that article, Mr. Bright reviews various factors that might contribute to racial disparities in capital sentencing. One prominent factor, he suggested, is the discretion afforded to the district attorney or solicitor in various districts. Bright observed:

> From among the many cases where death could be sought, the local district attorney decides which few will actually be prosecuted as capital cases. For the white men who usually make these decisions in judicial districts all over the country, the crime may seem more heinous or horrible if the victim is a prominent white citizen. As one scholar has observed: "The life-and-death decision is made on trivial grounds, and tends to reflect the community's prejudices."
>
> Race may also influence the decision to seek the death sentence in more subtle ways. Prosecutors make the decision whether to seek the death penalty based in part on the strength of the evidence brought to them by law enforcement in each case. Often, the amount of available evidence differs because the local sheriffs and police departments investigate crime in the white community much more aggressively than crime in the black community. While massive searches involving the police, army units, and even the Boy Scouts may occur when there is a crime against a white person, nothing more than a missing person report may be completed when a black person disappears. This disparity in the investigative treatment of cases results in a disparity of evidence available to prosecute the cases. . . .
>
> As a result of these influences, many cases in which prosecutors decide to seek the death penalty are indistinguishable from hundreds of other murder cases in which the death penalty is not sought.

Bright, at 451-452.

Bright went on to cite a hearing conducted in Muscogee County, Georgia, that examined the behavior of prosecutors in potentially capital cases between 1973 and 1990. It produced evidence to prove that prosecutors regularly consulted with the families of white homicide victims about their preferences and desires before proceeding with the prosecution of offenders. By marked contrast, prosecutors rarely consulted with the families of black victims, and many black families were never informed by the prosecutor even concerning the ultimate outcome in the cases. *Id.* at 453-454.

Postscript Two:

Senator Horton and I engaged in an interesting discussion about the racial cast of statutes enacted by North Carolina during the post-Civil War period. I largely agree with his general observation that the politics of North Carolina in that period do not share the harsh and relentless racial hostility that characterized Mississippi, Florida, or certain other Southern states. However, North Carolina did enact post-Civil War statutes that made just the sort of racial distinctions we were discussing in the Commission hearing. For example, in 1866, North Carolina's General Assembly enacted "Act Concerning Negroes and Persons of Color or of Mixed Blood," Chapter 40 of the Public Laws of the State of North Carolina. Section 11 of that Act expressly provided:

> That any person of color convicted by due course of law, of an assault with an intent to commit rape upon the body of a white female, shall suffer death.

By its terms, this section defined the crime of attempted rape both by the race of the defendant and by the race of the victim, with death as punishment reserved solely for black defendants who had assaulted white women.

In section 12, the same statute did liberalize the State's penal laws along racial lines, providing:

> That the criminal laws of the State, embracing and affecting a white person, are hereby extended to persons of color, *except where it is otherwise provided in this act,* and whenever they shall be convicted of any act made criminal, if committed by a white person, they shall be punished in like manner, *except in such cases when other and different punishment may be prescribed or allowed by this act.*

On the other hand, the same statute retained the pre-War rule that African Americans could not give testimony against a white person in court in civil or criminal matters, with the proviso that if the Freedmen's Bureau courts would cede judicial jurisdiction back to the North Carolina state courts, blacks would thereafter be able to give testimony in serious criminal matters (though the statute retained the exclusion for testimony against whites in civil matters "unless by consent of the parties thereto") Section 9.

The best discussion of the post-War legal situation in North Carolina that I know can be found in **Paul D. Escott, Many Excellent People: Power and Privilege in North Carolina, 1850-1900** (Chapel Hill: University of North Carolina Press, 1985). Professor Escott describes the motivations and actions of the first post-War General Assembly, suggesting that the prospects for newly freed North Carolina slaves were

> not very bright when the first postwar legislature . . . assembled. Prominent men who had been wartime Conservatives like Jonathan Worth [who was elected Governor in 1866, defeating William Holden, the more moderate wartime governor] and William A. Graham, were discussing ways to tighten control over black people. Worth was adamant against Negro suffrage, of course, and he was working on tactics to forestall federal intervention in favor of the freedmen.
>
> . . .
>
> The legislature did the minimum that it felt would be required by the North. The basic principle of its "Act concerning negroes and persons of color" was that blacks "shall be entitled to the same privileges and subject to the same. . . disabilities as . . . were conferred on . . . free persons of color prior to the ordinance of emancipation," no more. This meant that the freedmen could not testify against whites, serve on juries, intermarry with whites, or execute a

contract concerning ten dollars or more unless it was "witnessed by a white person who can read and write." . . .

These provisions, which . . . were a first step, maintained a markedly inferior status for black people and testified to the inability of most North Carolinians to imagine legal equality between the races.

Escott, at 130-131.

APPENDIX D

Dr. Isaac Unah and John Charles Boger

Race and the Death Penalty

in North Carolina

An Empirical Analysis: 1993-1997

Race and the Death Penalty in North Carolina

An Empirical Analysis: 1993-1997

Principal Investigator
Dr. Isaac Unah
Principal Collaborator
Jack Boger

Presented by
The Common Sense Foundation
North Carolina Council of Churches
April 16, 2001

PRELIMINARY REPORT ON THE FINDINGS OF THE NORTH CAROLINA DEATH PENALTY STUDY 2001

By Dr. Isaac Unah and Professor John Charles Boger

April 16, 2001

1. The NC Death Penalty Study 2001

This is a preliminary report concerning a new study of capital punishment in the State of North Carolina that has been undertaken during the past nine months – the North Carolina Death Penalty Study 2001. It is the first major social scientific study of the death penalty conducted in North Carolina in over 20 years, and the first systematic look for patterns of racial discrimination in capital sentencing in the South employing data more recent than 1984. The report has been prepared by Dr. Robert Unah of the Department of Political Science of the University of North Carolina at Chapel Hill ("UNC"), with the assistance of Professor John Charles Boger of the UNC School of Law.

As we will elaborate below, the preliminary findings present clear and disturbing evidence that North Carolina's capital system in the 1990s continues to exhibit patterns of racial discrimination that cannot be explained by any of the legitimate sentencing considerations that have been sanctioned by North Carolina's legislative and judicial branches.

2. The Preliminary Findings of the New Study

Our principal finding to date is that racial disparities continues to plague North Carolina's capital punishment system in the 1990s—especially discrimination against defendants (of whatever race) whose murder victims are white. This finding is confirmed by numerous individual analyses we have conducted, employing different methods, and looking at various decision points throughout the capital charging and sentencing system.

Race matters in the initial decision whether to charge a defendant with first degree murder, second degree murder, or manslaughter; it matters in the decision whether to go forward to trial; it matters in the decision whether to seek a death sentence; it matters in the jury's life-or-death decision at the penalty phase of a capital trial.

Our first analysis looks at the frequency at which death sentences were imposed among all of the homicide cases that occurred in North Carolina during the 1993-1997 period. The overall death-sentencing rate in these cases is quite low—only 2.8%. Yet the death-sentencing rate among white-victim cases is nearly twice as high as among non-white victim cases (3.7% versus 1.9%). Moreover, looking beyond the race of the victim to that of the defendant, further racial disparities appear. When non-whites defendants murder white victims, the death sentencing rate is 6.4%; however, when white defendants murder white victims, the death sentencing rate falls by half, to 2.6%. When non-whites are both the defendant and the victim, death sentences dips even more, to only 1.7% of the cases.

Even when we refined our analysis, looking only at those cases that are "death eligible"— that is, those containing one or more factors designated by North Carolina law as "statutory aggravating circumstances that warrant imposition of a sentence of death, if the jury so chooses" (for example, the murder of a police officer, or a murder during an escape from prison)—we find that race continues to make a substantial difference in whether capital punishment is actually imposed. Capital punishment is imposed in 8% of all "death-eligible" white-victim cases, but the capital rate plummets to 4.7% in non-white victim cases. Moreover, just as in our earlier analysis, a wide disparity appears

when comparing the sentencing rate for non-white defendants who murder whites (11.6%) with that of white defendants who murder whites (6.1%).

These findings, however, do not constitute the heart of our analysis, since they do not take into consideration other legitimate considerations that might possibly work in these cases to explain the apparent racial outcomes. For example, it is possible that more defendants in white-victim cases have serious criminal records than do defendants in non-white-victim cases, or that homicides committed against white victims are more frequently accompanied by rape, armed robbery, torture, or other serious crimes. To consider these factors, we turned to multiple regression analysis—a widely accepted statistical technique regularly employed in research in a variety of scientific fields. We conduct a series of regression analyses, using the "logistic regression" method that the research literature recommends for such studies. The advantage of such analyses is that their ability to detect whether a particular factor—such as race—is having an independent effect on a decision—such as a death sentence—*even when other factors*, such as the presence of a prior criminal record, or an accompanying rape or robbery, *are simultaneously taken into account.*

Our regression analyses confirm that the race of the homicide victim is indeed playing a real, substantial, and statistically significant role in North Carolina's capital sentencing system, one that simply cannot be attributed to any legitimate sentencing factors. For example, our analysis of "death-eligible" cases reveals that the race of the victim was statistically significant in predicting who will receive a death sentence, and that the "death odds multiplier" is 3.5, indicating that, on average, the odds of receiving a death sentence are increased by a factor of 3.5 when the murder victim is white. Similar

analyses at different stages of the system—whether among all cases, only those cases that proceed to trial, cases where the prosecutor actively seeks a death sentence, or cases in which a jury must decide whether to impose a death sentence—all reaffirm this basic finding.

In sum, no matter what analyses we have performed, and no matter what stage of the process we have examined, the fact that the homicide victim is a white person turns out to operate as a "silent aggravating circumstance" that makes death significantly more likely to be imposed. While our study is not yet complete, we have confidence that these results do not represent a statistical construct or a fluke. Instead, they demonstrate that racial bias is a real and deeply troubling feature of North Carolina's capital punishment system in the 1993-1997 period.

3. The Design and Focus of the New Study

The NC Death Penalty Study examined homicides that occurred in the State of North Carolina during the five-year period between 1993 and 1997.[1]. We included within our study: (1) every case prosecuted by the State for a homicide committed during this period that eventually led to a death sentence; (2) every case that led to a life sentence after a penalty trial on the issue of life vs. death; (3) cases that led to a life sentence without a life-or-death penalty trial; and (4) a random sample of intentional homicide cases that were not prosecuted as first degree or capital murder cases. This comprehensive look at the universe of potentially capital cases allows us to make highly accurate analyses of exactly what patterns exist in these cases.

[1] We chose this period to obtain the most recent information available about North Carolina's sentencing patterns. Had we extended the study past the year 1997, the trials of many defendants would still have been incomplete at the time we began our data collection effort.

Working in consultation with Dr. David Baldus of the University of Iowa College of Law (the nation's leading expert on capital sentencing systems) during the spring and summer of 2000, we created an elaborate data collection instrument ("DCI"), for every case examined. The DCI is designed to collect data on over one hundred and thirteen (113) separate factors about each crime, including the charges brought by the State, the defendant's background and character, the circumstances of the crime (including whether it occurred during the commission of another felony or misdemeanor), the presence or absence of statutory aggravating factors or mitigating factors specified as important by the General Assembly, the presence or absence of *non*-statutory factors, the motives of the crime, the background and character of the victim, and the strength of the evidence. The DCI also includes a section for a narrative description of each case, permitting our data collectors to include unique factors about each case that could not by captured by the specific questions included in the DCI.

The data was collected in the fall and winter of 2000-2001 by UNC Law School graduates working under the direct supervision of a full-time project manager, a licensed attorney and member of the North Carolina bar. All of the data collectors underwent extensive training to assure that uniform methods were followed, and all questions about coding were relayed to the project manager, who consulted frequently with Unah and Boger to assure a consistent, conservative approach in data collection. The project manager regularly reviewed the DCI entries to ensure that data collectors were making impartial, uniform decisions as they entered the data.

Most of the data entered in the DCI's came directly from public records on file with the State of North Carolina –court records found in the Supreme Court of North

Carolina, the North Carolina Court of Appeals, or the state's trial courts, as well as the Office of the Chief Medical Examiner and the Department of Corrections. Advice and guidance on the use of these data sources came from public officials connected with North Carolina's Institute of Government, the Administrative Office of the Courts, the Department of Corrections, and other state criminal justice agencies.

4. The Historical Context of The New Study

Research conducted in North Carolina during the era of Jim Crow segregation in the 1940s indicated that racial discrimination was playing a regular, illegitimate role in two different respects: black defendants were more likely to receive death sentences for similar crimes than were white defendants, and those defendants (of whatever race) who murdered white victims were also more likely to receive death sentences.[2] Similar racial disparities were identified by careful researchers in other states,[3] and these features become one of the features condemned by several Justices who joined in striking all capital punishment statutes in 1972 in the *Furman v. Georgia* decision.[4]

After *Furman*, states such as North Carolina that reenacted capital sentencing statutes were on clear notice that it was unconstitutional for race to play any role in determining the appropriate punishment. Those who defended the new statutes assured the federal courts that the combined effects of the desegregation of formerly segregated

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[2] See Guy Johnson, *The Negro and Crime*, 217 **Annals** 92 (1941) (finding that, among 330 murder cases in five North Carolina counties between 1930 and 1940, 32 percent of all black defendants, but only 13 percent of white defendants, received death sentences when the victims were white; moreover, death sentences were imposed in 17.5 percent of all white victim cases, but only four-tenths of one percent of black victim cases); Harold Garfinkel, *Research Notes on Inter- and Intra-racial Homicides*, 27 **Social Forces** 369 (1949) (finding similar disparities among 821 cases in ten North Carolina counties between 1930 and 1941).

[3] *See, e.g.*, Marvin Wolfgang and Mark Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 **Annals** 119 (1973) (reporting on racial disparities observed in a study of over three thousand rape cases in eleven Southern jurisdictions from 1945 to 1965).

courtrooms, the coming of African Americans to capital juries, and the gradual desegregation of police, prosecutorial, and judicial ranks would lead to an end of racial bias in capital sentencing. The Supreme Court, in upholding several of the new, post-*Furman* capital statues in 1976, accepted these state assurances. It declined to conclude that the state's new, post-*Furman* sentencing procedures—including separate guilt and penalty phases to death penalty trials and lists of statutory "aggravating" and "mitigating" circumstances to guide the jurors' deliberations on the question of the appropriate punishment—would be insufficient to curb racial discrimination and other forms of arbitrariness that had characterized earlier capital punishment statutes.[5]

Soon thereafter, social scientists began to examine the actual operation of death sentences in the post-*Gregg* era to see whether the new statutes had successfully eliminated racial bias. Many reported that racial factors, especially discrimination based upon the race of the homicide victim, continued to play an impermissible role. Perhaps the most prominent of these research efforts involved two overlapping studies conducted by Professor David Baldus and his colleagues on the capital system of the State of Georgia from 1973 through 1979.[6] The results of these studies were introduced as part of a constitutional challenge, brought by Georgia death row inmate Warren McCleskey, an African American prisoner who alleged that his own race and that of his homicide victim (a white police officer) had been factors in his receipt of a death sentence, in violation of

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[4] 408 U.S. 238 (1972)(per curiam); *see, e.g., id.* at 249-57 (Douglas, J., concurring) (expressing concern that race may be playing an impermissible role in capital sentencing); *id.* at 293-95 (Brennan, J., concurring) (same); *id.* at 364-66, 388 (Marshall, J., concurring) (same).

[5] *See* Gregg v. Georgia, 428 U.S. 123, 255 (White, J., concurring).

[6] **David C. Baldus, George G. Woodworth, & Charles A. Pulaski, Jr., Equal Justice and the Death Penalty: A Legal and Empirical Analysis** (Boston: Northeastern University Press, 1990).

the Eighth Amendment's bar against "cruel and unusual punishment" and the Fourteenth Amendment's promise of the "equal protection of the laws."

After an extensive hearings in the lower federal courts, McCleskey's claims were reviewed by the Supreme Court of the United States, which rejected them in a sharply divided, 5-to-4 decision.[7] Justice Lewis Powell, writing for a majority of the Court, held that purposeful discrimination in capital sentencing—whether on the basis of the defendant's race or the victim's race—would violate the Equal Protection Clause, and likely the Eighth Amendment as well.[8] However, Justice Powell found that the Baldus study relied upon by Warren McCleskey did not offer sufficiently clear evidence that *his* capital jury had been influenced by racial considerations, and the Court suggested that statistical arguments about patterns of capital sentencing "are best presented to the legislative bodies" that "are better qualified to weigh and 'evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.'"[9] Since the *McCleskey* decision in 1987, federal courts have been closed to virtually all systemwide claims of racial discrimination.

During the post-*McCleskey* period, however, a substantial body of empirical social scientific studies has emerged to examine death sentencing patterns in several dozen states. In 1990, at the request of the United States Congress, the General Accounting Office, after evaluating this body of studies,[10] concluded:

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[7] McCleskey v. Kemp, 481 U.S. 279 (1987).
[8] *Id.* at 292; *id.* at 306-13.
[9] *Id.* at 319 (quoting *Gregg v. Georgia*, 428 U.S. 153, 186 (1976)).
[10] **United States General Accounting Office, Report to Senate and House Committees on the Judiciary: Death Penalty Sentencing** (February 1990).

> Our synthesis of the 28 studies shows a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty after the *Furman* decision.
>
> In 82 percent of the studies, race of victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks. This finding was remarkably consistent across data sets, states, data collection methods, and analytic techniques. The finding held for high, medium, and low quality studies.[11]

5. The Unique Look Afforded by the New North Carolina Study

As Professor David Baldus has recently noted, most of the earlier studies focused on sentencing patterns either in the immediate post-*Furman v. Georgia* period after 1972 or in the early-to-middle 1980s.[12] The two leading modern studies of North Carolina's capital system that pattern. The first was an exemplary look at the first year (1977-78) of North Carolina's experience under its current statute, conducted by Professors Barry Nakell and Kenneth Hardy of UNC-Chapel Hill. That study found both race-of-defendant and race-of-victim effects at various stages of the capital charging and sentencing system during the new law's first year of implementation.[13]

A later study that relied upon data submitted by North Carolina law enforcement personnel to the Federal Bureau of Investigation in the years 1976 through 1980, found that "the race of the victim had sizable and statistically significant effects on the likelihood that a defendant would receive the death penalty." However, because only a

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[11] *Id.* at 5-6.

[12] *See* David Baldus et al., *Racial Discrimination and the Death Penalty in the Post-*Furman *Era: An Empirical and Legal Overview, With Recent Findings from Philadelphia*, 83 **Cornell Law Review** 1638, 1742-44 (listing all such studies by state and by dates of study).

[13] **Barry Nakell & Kenneth A. Hardy, The Arbitrariness of the Death Penalty** 158-59 (Philadelphia: Temple University Press, 1987) (finding that the race of the homicide defendant in North Carolina "had a significant effect when the seriousness of the case was controlled for" in determining the likelihood that a case would be charged and submitted to the jury as a death-eligible case, and that "[a]t the verdict stage,"

small number of defendants had received capital sentences at that time, "the race-of-victim effect became smaller and statistically insignificant" when the race of the defendant was added to the analysis.[14]

Since 1980, no thorough examination of North Carolina's capital sentencing system has been undertaken at all. Indeed, only five substantial studies have examined data in *any* state that includes sentencing decisions in the 1990s, and all five are from non-Southern states: California (1990-1994); Connecticut (1973-1994); Kentucky (1976-1991); New Jersey (1982-1996); and Pennsylvania (1983-1993).[15] None have examined data from cases as recent as those covered by the three latter years of the new North Carolina study (which spans the years from 1993-1997).

In September of 2000, the Charlotte *Observer* released an important, suggestive analysis noting that North Carolina's death row population varied substantially, in its racial composition, from what one might expect had the race of defendants and their homicide victims played no part in the capital sentencing determinations.[16] Yet the *Observer* study had no systematic access to crucial information about other, legitimate factors in North Carolina cases. Therefore, its analysis could ask, but could not fully answer, the critical question: whether it is racial bias, or other, legitimate sentencing considerations, that explain the apparent racial disparities on North Carolina's Death Row.

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the race of the victim emerged as a serious factor, since "a defendant charged with murder of a white was six times more likely to be convicted than a defendant charged with murdering a nonwhite").

[14] **Samuel R. Gross & Robert Mauro, Death & Discrimination: Racial Disparities in Capital Sentencing** 91 (Boston: Northeastern University Press, 1989).

[15] *Id.*

[16] *See* Ames Alexander & Liz Chandler, *Errors, inequities often cloud capital cases in the Carolinas*, Charlotte *Observer*, Sept. 9, 2000 (http://www.charlotte.com/observer/special/deathpenalty/day1/death.htm) (visited March 3, 2001).

The new North Carolina study gives us, at last, tools to answer specific questions about the racial justice of North Carolina's capital sentencing system, and more broadly, to reflect on whether Southern states, during the 1990s—many now boasting multi-racial juries and prosecution teams, and some significant fraction of African American judges—have finally shed their age-old tendency to employ racial considerations in imposing the penalty of death. The regrettable answer that emerges from this new study, as we noted in Part 2 above, appears to be that race remains important. Though condemned by federal and state constitutions and widely acknowledged to be illegitimate and shameful, racial considerations seem alive and well in recent capital sentencing decisions made in the Old North State.

Research Design and Analytical Methodology (Dr. Isaac Unah)

In this section of the report, we give details about the methodology used in generating the data and the analytical techniques on which we derived our research findings and conclusions. From the outset, it is important to emphasize that we were careful to employ sound methodological techniques; the use of sound techniques is the hallmark of a good social scientific study, especially one that tries to tease out various complex influences that contribute to the application of an important legal and political issue such as capital punishment. Our study is detailed and wide-ranging, with data covering most of the 100 counties of North Carolina. The methodological account given here is sufficiently detailed so that individuals interested in replicating or extending our study can do so.[1] We shall skip the unnecessary micro details and focus instead on providing information that will facilitate replication.

1. Developing A Data Collection Instrument (DCI)

The first major task was to develop a detailed data collection instrument (DCI) that contains information about various aspects of the homicide and about the individuals directly involved in or affected by the homicide. In doing so, we sought the advice of death penalty experts from the Institute of Government, and from defense counsel and prosecuting attorneys in North Carolina and around the country. We obtained the most extensive assistance from Professor David Baldus of the University of Iowa, the premiere national expert on the scientific analysis of the death penalty in the United States. With Professor Baldus' sage counsel, we generated questions that would allow us to obtain identifying and procedural information about each case, including the date of the offense, the charges brought, the status of the defense counsel and the judge, and whether the prosecutor sought the death penalty in the case. We also generated questions on the personal background characteristics of the defendant, including race, gender, age, employment status, and educational level, as well as the defendant's criminal history. Due to some institutional barriers, we were unable to obtain exhaustive information on the criminal background of most defendants. Two primary reasons accounted for this difficulty. First, many of the defendants had criminal records in other states to which we have no access. Second, many of the defendants had juvenile criminal records which are sealed and therefore not introduced at the criminal trial.

The DCI also contains extensive information about the victim(s). In addition to data on the demographic characteristics of the victim such as race, gender, employment status, and educational level, we obtained information about the relationship the victims had with the defendants that may inform the nature and circumstance of the homicide. For example, were the defendant and victim friends, acquaintances, intimates, family members, or strangers? The North Carolina Office of the Medical Examiner provided records that were particularly useful in

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[1] After our analysis is accepted for publication in a refereed journal, we will make the data available to interested parties. We also plan to deposit the data with the Inter-University Consortium for Political and Social Research (ICPSR) for full public access.

obtaining information about homicide victims.

In order to analyze the impact of race in the imposition of the death penalty, we needed to examine the characteristics of the homicide itself. Therefore, we sought descriptive information about the crime scene and the manner of death. We were also interested in taking note of the extent to which special non-statutory circumstances surrounding the victim may aggravate the offense and thus make it more likely to receive a death sentence. For example, was the victim defenseless due to advanced age or pregnancy or handicap? In addition to these non-statutory aggravating circumstances of the victim, we were also interested in accounting for the non-statutory aggravating features of the offense itself, including whether the offense involved multiple gunshot wounds, multiple victims, sniper killing etc. We also added questions to allow us to assess whether the offense was especially heinous, atrocious or cruel. Under North Carolina law, there are eleven statutory aggravating factors, one or more of which must be found before an individual may be given the death penalty. An example would be the murder of a police officer. Moreover, there are several mitigating factors that, when found, might render the crime less aggravated and thus less likely to merit a death sentence. An example would be that the defendant had no significant history of prior criminal activity. These statutory aggravating and mitigating factors played a prominent role in our analysis.

We were also interested in investigating the perceived role of ideology and electoral politics in the prosecution of criminal homicides. Therefore, we sought to obtain information on the temporal proximity of the criminal trial or plea to the district attorney's next reelection. Finally, the DCI contains hand-written descriptions of the facts of the case. These descriptions are particularly useful in forming opinion about various dimensions of the crime.

2. Universe of Cases and Inclusive Years of Coverage

Once the data collection instrument was constructed, the second important task was to decide upon a universe of cases to examine. Because of financial constraints, we decided to focus solely on homicides that resulted in a charge of murder, first degree murder, or second degree murder. We examined only homicides that occurred from January 1, 1993 to December 31, 1997. We chose this time period for three simple reasons. First, we wanted to provide reasonable continuity to studies conducted during the 1970s and 1980s on North Carolina capital sentencing system, by examining whether, in light of reforms undertaken by State officials to enhance racial inclusiveness (e.g., the individual efforts of prosecutors to be impartial and the inclusion of nonwhites in juries), the impact of race in death penalty prosecutions is but a memory. Secondly, we wanted a period of at least five years to allow us to capture any inter-temporal trends in the incidence of homicides in the state. Secondly, we chose a period five-year period as near to the present as possible so that all homicides that occurred during this period would have reached final trial resolution.

3. Criminal Justice Data from the Administrative Office of the Courts

We obtained our list of homicide cases from the North Carolina Administrative Office of the Courts (AOC) in Raleigh. One of the most methodologically challenging aspects of the project was working with AOC data. Due to problems associated with software incompatibility and AOC data archiving system, we needed to convert the AOC data into usable format. The AOC sent us a CD-ROM containing eleven data files. Working with the assistance of technicians at the Odom Institute for Research in the Social Sciences at UNC-Chapel Hill, we converted and merged these data files. From these we generated our statistical data.

4. Case Selection

We employed a multistage sampling technique to generate a portion of the cases analyzed. We were interested in examining the treatment of those cases that received the death penalty as well as those that did not. In short, we are interested in homicide case outcomes. But in this report, we focus primarily on cases that have the potential to receive the death penalty.

We included the entire population of first degree homicide cases in which the defendant received a sentence of either life or death in North Carolina between 1993 and 1997 in the analysis. We relied upon multi-stage sampling technique to select the rest of the cases, including second degree murder cases that received a life sentence and all other cases that received a term of years.

What is the logic of multi-stage sampling and how was it implemented? Under multistage statistical sampling, cases are selected in stages to arrive at an overall nonzero probability that any given case in a predefined population or sub-population will be selected for analysis. We want to be very clear about our case selection method. As already noted, all cases that received a death sentence and all those that received a life sentence based upon a charge of murder or first-degree murder were included in the analysis. The rest were generated through multi-stage sampling. First, we selected a random sample of judicial districts based upon the suggestion of Professor David Baldus (the reason for sampling judicial districts will become clear shortly). Second, from the judicial districts thus selected, we randomly selected the remaining cases included in the study. We now discuss these two stages.

Stage 1. There are 44 judicial districts in North Carolina representing a total of 100 counties. Each judicial district is headed by a single district attorney who oversees the prosecution of cases and the exercise of prosecutorial discretion within the counties that comprise the judicial district. This is why we selected counties via judicial districts. While most judicial districts contain only one or two counties, several districts contain five or more counties. For example, the second judicial district is composed of five counties: Beaufort, Hyde, Martin, Tyrell, and Washington counties. Similarly, the 24th judicial district is composed of Avery, Madison, Mitchell, Watauga and Yancey counties. Only the first judicial district contains seven counties, the highest number on record: Camden, Chowan, Currituck, Dare, Gates, Pasquotank, and Perquimans.

Because we aimed to obtain a broad geographic representation of the state, we randomly selected 26 judicial districts. These contained a total of 57 counties. The original AOC data contained several hundred duplicated records. While we were mostly interested in the final outcome of the case, the AOC inputs its data on each defendant at several stages of the criminal trial process, not necessarily the final disposition of the case alone. For example, decisions made at the district and superior court levels are recorded separately into the AOC data archive, thus creating the duplicates. These duplicates were expunged so that only a single record (i.e., case) remains for each defendant.

Stage 2. Overall, there were 3990 homicides charged during the study period. Our sample was based upon 1921 cases after separating all cases where the defendant was acquitted and all term of years cases from the unselected counties (n=1486). There were 99 cases where a defendant was sentenced to death and 303 cases were the defendant received a life sentence (based upon a first-degree murder charge). There were 181 second-degree murder cases that also received a life sentence. Using the internal random sampling procedure in SPSS (Statistical Package for Social Sciences), we selected an additional 100 cases (5.2%) from the 1921 cases and added these to the murder or first-degree murder cases that received a death and life sentence. We also randomly sampled 10% of the 181 second-degree murder cases that received a sentence of life; we are finalizing data-gathering on these 18 cases and they will be included in subsequent analyses. Our current core analysis is therefore based upon 502 cases, representing 502 individual defendants. We created sample weights to reflect the differing sampling probabilities in the two sampling stages. Generally speaking, when the geographic source of each cases is considered, our individual cases came from 80 out of 100 counties of North Carolina. The distribution of the cases is given below.

Distribution of Cases (Unweighted)

Sentenced to death	=	99 (all cases included in analysis)
~~Sentenced to life~~	~~=~~	~~303 (first-degree murder charge only; all cases included)~~
Sentenced to life	=	181 (second-degree murder charge; 10% will be included)
Term of years & acquittals	=	1921 (100 cases randomly selected for analysis, 5.2%)
Other	=	1486 (removed through random selection of districts)
TOTAL	=	**3990**

5. Training Coders (UNC Law School Graduates)

We were fortunate to have the assistance of several bright and highly motivated recent graduates of the UNC-Law School. The principal investigator (Dr. Unah) has extensive experience in training coders in other projects he has undertaken. This, along with Professor Boger's extensive experience in capital punishment cases and the coders' own educational background and interest in the project greatly facilitated the training. We hired another UNC Law School graduate as

project manager and devoted one to two weeks to training the coders and evaluating the data collection instrument. Following the training sessions, the coders were dispatched across the state to code cases and, where necessary, to speak with district attorneys and defense counsel that had handled death penalty cases to gather additional information. Coders were also instructed to keep inter-coder communication about coding protocols to a minimum but instead to direct questions to the project manager who in turn consulted regularly with the principal investigator.

6. Data Sources

The information gathered for this project came from numerous sources. We list those sources here:

1) Office of the Chief Medical Examiner in Chapel Hill and Charlotte NC. Files from these offices contain considerable initial information about the victim, including demographic factors such as race, sex, age and information about the probable cause of death, and a narrative summary of the circumstances surrounding the death and the nature of the wounds sustained by the victim. Each victim has an OCME case number, which makes it relatively easy to track the information.
2) County court records. We examined court records, including indictments sheets; records on appeal; superior court files; jury instructions and verdict sheets for both guilt and penalty phases; defendants' briefs; State's briefs; issues and recommendations forms; and opinions from the North Carolina Court of Appeals and the North Carolina Supreme Court.
3) Police reports and arrest warrants
4) Police information network records of previous arrests and convictions
5) Interviews with prosecuting and defense attorneys
6) Newspaper/journalistic accounts of the homicide
7) Department of Corrections website. Used for verifying defendant's demographic ~~characteristics and prior criminal record data.~~

Data Analysis

The analysis was performed in SPSS. The dependent variable, i.e., what we are interested in explaining is whether a defendant got the death penalty or not. Therefore, we want to account for the factors that might explain the imposition of capital punishment. Given the dichotomous nature of the dependent variable, we used maximum likelihood estimation technique (logistic regression) to derive our estimates of what is happening in the real world of murder prosecutions.

The selection of variables included in the models was guided by legal theory, common sense, and the empirical literature on the death penalty. For example, legal theory suggests that homicides that contain any one of the eleven aggravating factors listed on the North Carolina death penalty statute can result in the application of that ultimate sentence. Therefore, we included in our analysis disaggregated measures that capture the presence of these statutory aggravating factors.

Legal theory would also suggest that mitigating conditions listed in the North Carolina statute that make an offense less aggravated and thus less likely to result in a death sentence should be included in the analysis as well. In theory, only these aggravating and mitigating factors as well as other legally sanctioned conditions would explain or help us to predict whether a defendant accused of a homicide will receive the death penalty.

Unfortunately, this is not what is happening in the practical world of death penalty prosecutions. We have noticed in our study that beyond the legal factors discussed above, several other influences that should not play a role in the application of the death penalty ***do*** indeed influence the decision to apply the death penalty. These illegitimate factors include the race of the victim. A defendant is significantly more likely to get the death penalty if the victim is white rather than non-white, even after taking into account the statutory aggravating and mitigating factors approved by the North Carolina General Assembly for determining death worthiness.

NORTH CAROLINA'S HOMICIDE STATUTES

4/16/01

DEGREES OF HOMICIDE:

FIRST DEGREE MURDER: (Alternative Bases)

(1) Death by Poison, Lying in Wait, Imprisonment, Starvation
(2) Willful, Deliberate, and Premeditated Killing
(3) Homicide During the Perpetration of Arson, Rape, Robbery, Kidnapping, etc.—N.C.G.S.§ 14-17

PERMISSIBLE PUNISHMENTS: Death or Life Imprisonment Without Parole

(ONLY Defendants Convicted of First Degree Murder May Be Sentenced to Death)

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SECOND DEGREE MURDER:

All Other Murders; "Common Law" Murder, i.e. Unlawful and Malicious, But Without Premeditation or Deliberation—G.S.§ 14-17

PERMISSIBLE PUNISHMENTS: Class B2 Felony; Life, or Term of Years

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VOLUNTARY MANSLAUGHTER:

Unlawful Killing Without Malice, Without Premeditation or Deliberation, & Without the Intent to Kill or to Inflict Serious Bodily Injury —G.S.§ 14-18

PERMISSIBLE PUNISHMENTS: Class D Felony; Term of Years

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INVOLUNTARY MANSLAUGHTER:

Unlawful Killing, Unintentional, Without Malice, Resulting From an Unlawful But Non-Felonious Act, Or From Culpable Negligence— G.S.§ 14-18

PERMISSIBLE PUNISHMENTS: Class F Felony; Term of Years

NORTH CAROLINA'S DEATH SENTENCING SYSTEM

4/16/01

The General Assembly Has Provided That ONLY Defendants:

(1) Convicted of First Degree Murder;

(2) With A Separate Finding of At Least ONE "Statutory Aggravating Circumstance"

Are ELIGIBLE for Capital Punishment—*N.C.G.S.§ 15A-2000(a)(1)*

Any One of Eleven "STATUORY AGGRAVATING CIRCUMSTANCES" Can Make a Homicide Sufficiently Serious To Warrant A Death Sentence, If A Jury So Finds. They are:

(1) That the Defendant Was "Lawfully Incarcerated" When the Homicide Occurred;

(2) That the Defendant Had Previously Been Convicted of Another Capital Felony;

(3) That the Defendant Had Previously Been Convicted of A Violent Felony;

(4) That the Homicide Was Committed to Avoid or Prevent an Arrest, or to Escape From Custody;

(5) That the Homicide Was Committed During Another Homicide, Robbery, Rape, Arson, Burglary, Kidnapping, etc.

(6) That The Homicide Was Committed "For Pecuniary Gain"

(7) That The Homicide Was Committed To Disrupt or Hinder Government or Law Enforcement;

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(8) That the Homicide Victim was a Law Enforcement Officer, Judge, Prosecutor, Etc.;

(9) That the Homicide Was "Heinous, Atrocious, or Cruel;

(10) That The Defendant "Knowingly Created A Great Risk of Death To More Than One Person By Use of a Hazardous Weapon or Devise;

(11) That The Homicide Was Part of a Course of Conduct Involving A Crime of Violence Against Another Person.

N.C.G.S.§15A-2000(e)(10)-(11)

Before It Can Impose A Death Sentence, A Jury Must Also Consider and Weigh, Against the Aggravating Circumstances, Any MITIGATING CIRCUMSTANCES, Including Both Those Specified in North Carolina's Statutes and Any Others Suggested by the Defendant. The STATUTORY MITIGATING CIRCUMSTANCES are:

(1) That the Defendant Had No Significant History Of Prior Criminal Activity;

(2) That the Homicide Was Committed While the Defendant Was Under The Influence of Mental or Emotional Disturbance;

(3) That the Victim Voluntarily Participated in the Defendant's Homicide;

(4) That the Defendant Was Only An Accomplice And His Participation Was Relatively Minor;

(5) That the Defendant Acted Under Duress or the Domination of Another Person;

(6) That the Defendant's Capacity to Appreciate That His Conduct Was Criminal, or to Conform His Conduct to the Law, Was Impaired;

(7) The Age of the Defendant;

(8) That the Defendant Aided the Prosecution in Apprehending Another Capital Felon, or Testified Truthfully to Assist the Prosecution at Trial;

~~(9) That the Defendant Shows Any Other Circumstances That the Jury~~ Deems to be of Mitigating Value.

N.C.G.S.§15A-2000(f)(1-(9)

04/16/01

TABLE 1
DEATH-SENTENCING RATE AMONG ALL CASES
(North Carolina – Defendants in Offenses Committed from 1993 through 1997)

Defendant-Victim Comb.	Death Sentences		All Cases		Percentage
Non-White Def./White Vic	33	÷	515	=	6.41%
White Def./White Vic.	33	÷	1291	=	2.56%
Non-White Def./Non-White Vic.	29	÷	1670	=	1.74%
White Def./Non-White Vic.	4	÷	116	=	3.45%
Total	99	÷	3592	**Overall Rate:**	2.76%

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Victim Combinations	Death Sentences		All Cases		Percentage
White Victims	66	÷	1806	=	3.65%
Non-White Victims	33	÷	1786	=	1.85%
Total	99	÷	3592	**Overall Rate:**	2.58%

Difference	(White Victim – Non-White Victim)	1.80
Ratio	(White Victim ÷Non-White Victim)	1.97

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Defendant Combinations	Death Sentences		All Cases		Percentage
White Defendants	37	÷	1407	=	2.63%
Non-White Defendants	62	÷	2185	=	2.84%
Total	99	÷	3592	**Overall Rate:**	2.76%

Difference	(White Defendant – Non-White Defendant)	-0.21
Ratio	(White Defendant ÷ Non-White Defendant)	0.93

04/16/01

TABLE 2
DEATH-SENTENCING RATE AMONG DEATH-ELIGIBLE CASES
(North Carolina – Defendants in Offenses Committed from 1993 through 1997)

Defendant-Victim Comb.	Death Sentences		Death-Eligible Cases		Percentage
Non-White Def./White Vic	33	÷	284		=11.62 %
White Def./White Vic.	33	÷	541		= 6.10 %
Non-White Def./Non-White Vic.	29	÷	616		= 4.71 %
White Def./Non-White Vic.	4	÷	80		= 5.00 %
Total	99	÷	1521	**Overall Rate:**	6.51 %

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Victim Combinations	Death Sentences		Death-Eligible Cases		Percentage
White Victims	66	÷	825		= 8.00 %
Non-White Victims	33	÷	696		= 4.74 %
Total	99	÷	1521	**Overall Rate:**	6.51 %

Difference	(White Victim – Non-White Victim)	3.26
Ratio	(White Victim ÷ Non-White Victim)	1.69

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Defendant Combinations	Death Sentences		Death-Eligible Cases		Percentage
White Defendants	37	÷	621		= 5.96 %
Non-White Defendants	62	÷	900		= 6.89 %
Total	99	÷	1521	**Overall Rate:**	6.51 %

Difference	(White Defendant – Non-White Defendant)	-0.93
Ratio	(White Defendant ÷ Non-White Defendant)	0.87

Thirty Six Variable Model Explaining the Application of Capital Punishment in North Carolina (*All Cases*, 1993–1997)		
Description of Independent Variable	Coefficient	Death Odds Multiplier
Race of defendant (nonwhite)	.706	2.027
Race of victim (white)	1.215**	3.371
Chronological age of defendant	.048**	1.049
Hate as motive for homicide	.137	1.147
Money as motive for homicide	.102	1.107
Rage as motive for homicide	.226	1.254
Multiple victims	.753**	2.123
Chronological Age of victim	-.007	.993
Female victim	.315	1.370
Percent white in county of conviction	-2.178	.113
Nonstatutory mitigating factors	-.049	.953
Nonstatutory agg. circumstance of victim	-.868	.420
Defendant and victim are family members/intimates	-.316	.729
Prior homicide conviction record	2.963***	19.349
Poisoning, lying in wait, imprisonment, torture, starvation	1.660**	5.260
~~Willful, deliberate, and premeditated killing~~	~~1.622***~~	~~5.062~~
Felony Murder	.499	1.646
Time from trial to district attorney's next reelection	-.015	.985
District attorney party affiliation	.336	1.399
Statutory Aggravating Factors		
Felony committed by a lawfully incarcerated person	1.713	5.546
Defendant previously convicted of another capital felony	-1.683	.186
Previously convicted of violent felony	2.473***	11.854
Capital felony to avoid arrest	1.139	3.124

Contemporary felony homicide	1.655***	5.231
Pecuniary gain	.718	2.051
Killing of law enforcement/judicial /fire official	2.692**	14.764
Heinous, atrocious, or cruel	2.789***	16.260
Great risk of death to more than one person	1.613**	5.017
Violence against another victim	1.020**	2.772
Statutory Mitigating Factors		
No prior history of criminal activity	.558	1.747
Under the influence of emotional disturbance	1.231**	3.426
Accomplice to felony committed by another person	-9.668	.000
Under domination of another person	-.638	.528
Capacity to appreciate criminality impaired	-1.735***	.176
Assessment of defendant's age at time of homicide	-1.004	.367
Defendant aided in apprehension of another capital felon	.976	2.655
Constant	-7.926***	.000

Number of cases = 451
-2xLog Likelihood = 198.02***
Predicted correctly = 90.5%
Reduction in error = 88%

** p < .05; *** p<.01 (Levels of statistical significance; all two-tailed tests)

Thirty-Six Variable Model Explaining the Application of Capital Punishment in North Carolina (*Death Eligible Cases only*, 1993–1997)		
Description of Independent Variables	Coefficient	Death Odds Multiplier
Race of defendant (nonwhite)	.697	2.008
Race of victim (white)	1.243**	3.465
Chronological Age of defendant	.054**	1.055
Hate as motive for homicide	.242	1.274
Money as motive for homicide	.036	1.037
Rage as motive for homicide	.251	1.285
Multiple victims	.665*	1.944
Chronological Age of victim	-.006	.995
Female victim	370	1.448
Percent white in county of conviction	-1.752	.252
Nonstatutory mitigating factors	-.048	.954
Nonstatutory aggravating circumstance of victim	-.913	.401
Defendant and victim are family members/intimates	-.378	.685
Prior homicide conviction record	2.965***	19.404
Poisoning, lying in wait, imprisonment, torture, starvation	1.961***	7.104
Willful, deliberate, and premeditated killing	1.685***	5.394
~~Felony murder~~	~~.527~~	~~1.694~~
Time from trial to district attorney's next reelection	-.052	.949
District attorney's party affiliation	.234	1.264
Statutory Aggravating Factors		
Felony committed by a lawfully incarcerated person	1.715	.441
Defendant previously convicted of another capital felony	-1.828	.161
Previously convicted of violent felony	2.098***	8.153
Capital felony to avoid arrest	1.069	2.913
Contemporary felony homicide	1.413***	4.110

Pecuniary gain	.558	1.746
Killing of law enforcement/judicial officer/fireman	2.229**	9.286
Heinous, atrocious, or cruel	2.534***	12.604
Great risk of death to more than one person	1.469*	4.345
Violence against another victim	.981**	2.668
Statutory Mitigating Factors		
No prior history of criminal activity	.348	1.417
Under the influence of emotional disturbance	.988**	2.686
Accomplice to felony committed by another person	-9.806	.000
Under domination of another person	-.511	.600
Capacity to appreciate criminality impaired	-1.723***	.179
Consideration of defendant's at time of homicide	-1.023	.360
Aided in apprehension of another capital felon	.724	2.062
Constant	-7.668***	.000

Number of cases = 294
-2xLog Likelihood = 187.31***
Predicted correctly = 86%
Reduction in error = 79%

* p <.10; ** p <.05; ***p<.01 (Levels of statistical significance; all two-tailed tests)

Thirty Six Variable Model Explaining the Application of Capital Punishment in North Carolina (*Cases where prosecutor sought death penalty*, 1993–1997)		
Description of Independent Variables	Coefficient	Death Odds Multiplier
Race of defendant (nonwhite)	.578	1.783
Race of victim (white)	1.104**	3.016
Chronological Age of defendant	.035	1.036
Hate as motive for homicide	.267	1.307
Money as motive for homicide	.078	1.081
Rage as motive for homicide	.340*	1.405
Multiple victims	.564	1.758
Age of victim	-.005	.995
Female victim	.358	1.431
Percent white in county of conviction	-1.346	.260
Nonstatutory mitigating factors	-.057	.945
Nonstatutory agg. circumstance of victim	-1.784	.168
Defendant and victim are family members/intimates	-.152	.859
Prior homicide conviction record	2.996***	20.001
Poisoning, lying in wait, imprisonment, torture, starvation	2.037**	7.671
Willful, deliberate, and premeditated killing	1.427**	4.168
~~Felony Murder~~	~~.237~~	~~1.268~~
Time from trial to district attorney's next reelection	-.001	.999
District attorney party affiliation	.020	1.021
Statutory Aggravating Factors		
Felony committed by a lawfully incarcerated person	2.091	8.090
Defendant previously convicted of another capital felony	-2.218	.109
Previously convicted of violent felony	1.811***	6.116
Capital felony to avoid arrest	1.069	2.911
Contemporary felony homicide	1.425**	4.159
Pecuniary gain	.779	2.178

Killing of law enforcement/judicial /fire official	4.341**	76.781
Heinous, atrocious, or cruel	2.567***	13.028
Great risk of death to more than one person	1.692**	5.432
Violence against another victim	.996*	2.707
Statutory Mitigating Factors		
No prior history of criminal activity	.107	1.113
Under the influence of emotional disturbance	.630	1.877
Accomplice to felony committed by another person	-9.882	.000
Under domination of another person	-.920	.399
Capacity to appreciate criminality impaired	-1.654**	.191
Consideration of defendant age at time of homicide	-1.339	.262
Defendant aided in apprehension of another capital felon	.457	1.579
Constant	-6.239***	.002

Number of cases = 262
-2xLog Likelihood = 169.36***
Predicted correctly = 85.5%
Reduction in error = 77%

* $p < .10$; ** $p < .05$; *** $p < .01$ (Levels of statistical significance; all two-tailed tests)

Thirty Six Variable Model Explaining the Application of Capital Punishment in North Carolina (*Cases at penalty phase,* 1993–1997)		
Description of Independent Variables	Coefficient	Death Odds Multiplier
Race of defendant (nonwhite)	.360	1.434
Race of victim (white)	1.025*	2.787
Chronological Age of defendant	.037	1.038
Hate as motive for homicide	.317	1.372
Money as motive for homicide	.007	1.007
Rage as motive for homicide	.326	1.385
Multiple victims	.525	1.690
Chronological Age of victim	-.004	.997
Female victim	.374	1.454
Percent white in county of conviction	-1.401	.246
Nonstatutory mitigating factors	-.061**	.941
Nonstatutory agg. circumstance of victim	-1.835*	.160
Defendant and victim are family members/intimates	-.440	.644
Prior homicide conviction record	2.971***	19.510
Poisoning, lying in wait, imprisonment, torture, starvation	1.711	5.536
Willful, deliberate, and premeditated killing	.669	1.952
~~Felony Murder~~	~~-.268~~	~~.765~~
Time from trial to district attorney's next reelection	-.044	.957
District attorney party affiliation	-.048	.953
Statutory Aggravating Factors		
Felony committed by a lawfully incarcerated person	1.776	5.907
Defendant previously convicted of another capital felony	-2.169	.114
Previously convicted of violent felony	1.427***	4.167
Capital felony to avoid arrest	1.024	2.783
Contemporary felony homicide	1.528***	4.607
Pecuniary gain	.742	2.100

Killing of law enforcement/judicial /fire official	4.175**	65.066
Heinous, atrocious, or cruel	2.364***	10.630
Great risk of death to more than one person	1.547*	4.696
Violence against another victim	.872*	2.393
Statutory Mitigating Factors		
No prior history of criminal activity	-.066	.936
Under the influence of emotional disturbance	.445	1.560
Accomplice to felony committed by another person	-9.272	.000
Under domination of another person	-.889	.411
Capacity to appreciate criminality impaired	-1.753***	.173
Consideration of defendant's age at time of homicide	-1.400*	.246
Defendant aided in apprehension of another capital felon	.412	1.510
Constant	-4.278**	.014

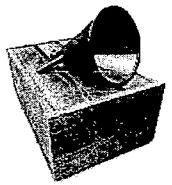
Number of cases = 226
-2xLog Likelihood = 160.92***
Predicted correctly = 83%
Reduction in error = 71%

*p<.10; ** p < .05; *** p<.01 (Levels of statistical significance; all two-tailed tests)

Table 2. Summary of Findings with Regard to the Importance of the Race of the Victim, Based upon a Thirty Six Variable Model Explaining the Application of Capital Punishment in North Carolina (1993-1997)

Stage of Prosecutorial Process	*Description*	*Number of Cases*	*Odds of Receiving Death Sentence**	*Level of Statistical Significance*
All homicide cases	Race of victim (white)	451	3.4	.02
All homicide cases that came to trial	Race of victim (white)	338	4.3	.01
All homicide cases in which defendant was eligible for death penalty	Race of victim (white)	294	3.5	.02
All homicide cases in which prosecutor asked for the death penalty	Race of victim (white)	262	3.0	.05
All homicide cases that came to trial and reached penalty phase	Race of victim (white)	226	2.8	.07

* These numbers represent the odds of receiving a sentence of death if the victim was white as compared with the odds of receiving a death sentence if the victim was nonwhite. Thus in the all homicide category the odds are, on average, 3.4 times greater that a defendant would receive the death sentence if the homicide victim was white rather than nonwhite, even after controlling for 35 other factors.



The Death Penalty: No Evidence for Deterrence

JOHN J. DONOHUE AND JUSTIN WOLFERS

Despite continuing controversy, executions continue apace in the United States. Late last year, we witnessed the 1000th U.S. execution since the Supreme Court reinstated capital punishment in 1977. The United States trails only China, Iran, and Vietnam in the number of executions according to Amnesty International.

The debate over the death penalty has hung on several major issues. Here, we'll concentrate on one: Does it act as a deterrent?

The claim that it does, is for many people the main reason to support it. George W. Bush stated in the 2000 Presidential debates, "I think the reason to support the death penalty is because it saves other people's lives," and further that "It's the only reason to be for it." By contrast, earlier that year, Attorney General Janet Reno stated, "I have inquired for most of my adult life about studies that might show that the death penalty is a deterrent, and I have not seen any research that would substantiate that point."

Gary Becker and Richard Posner have recently taken George Bush's side, but our own comprehensive evaluation of the econometric evidence supports Janet Reno.

John J. Donohue is a professor at Yale Law School and a Research Associate at the National Bureau of Economic Research. Justin Wolfers is a professor at the Wharton School of Business and a Research Affiliate at the National Bureau of Economic Research

The Academic Case for the Death Penalty

Over the last few years, a number of highly technical papers have purported to show that the death penalty is indeed a deterrent. Cass Sunstein and Adrian Vermeule initially argued, based on studies like these, that "capital punishment is morally required" given the "significant body of recent evidence that capital punishment may well have a deterrent effect, possibly a quite powerful one." In a reply paper subsequent to our review of the evidence, they have adopted a more agnostic tone, however, stating that "[w]e do not know whether deterrence has been shown... Nor do we conclude that the evidence of deterrence has reached some threshold of reliability that permits or requires government action."

More recently, in the *Economists' Voice*, Posner and Becker have adopted the position vacated by Sunstein and Vermeule. Posner claims that "the recent evidence concerning the

ATTACHMENT XI

deterrent effect of capital punishment provides strong support for resisting the abolition movement." Becker adds, "I support the use of capital punishment for persons convicted of murder because, and only because, I believe it deters murders."

The empirical research relied on by both Becker and Posner, however, is a skewed sample of available evidence: early research by Isaac Ehrlich, and more recent research by Hashem Dezhbakhsh, Paul Rubin, and Joanna Shepherd.

As we show in a recent Stanford Law Review article and describe below, when one considers all the evidence the empirical support for the proposition that the death penalty deters is *at best* weak and inconclusive.

The Flawed-Statistical Evidence in Support of Deterrence from Executions

Isaac Ehrlich's 1975 *American Economic Review* paper analyzed U.S. time series data on homicides and execution from 1933-1969, finding that each execution yielded 8 fewer homicides. This result was somewhat puzzling in light of the fact that an 80 percent drop in the execution rate from the late 1930s until 1960 had been accompanied by falling murder rates. A subsequent re-analysis by Peter Passell and John Taylor showed that Ehrlich's estimates were entirely driven by attributing a sharp jump in murders from 1963-69 to the post-1962 drop in executions.

But the mid-1960s decline in homicide occurred across all states—including those that had never had the death penalty. Moreover, Ehrlich's own model showed no correlation between executions and murder if one simply lopped off the last seven years of his data.

No wonder, then, that a National Academy panel savaged Ehrlich's analysis. Its modern-day impact beyond the University of Chicago campus is extremely limited.

But Posner does cite one recent study (by Dezhbakhsh, Rubin, and Shepherd, hereafter DRS) that finds that each execution saves on balance 18 lives. As we show in our recently published piece in the Stanford Law Review, however, these estimates are simply not credible.

An immediate problem is that DRS do not actually run the regression that they claim to run. The regression they claim to run actually yields the *opposite* result: each execution is associated with 18 *more* executions! (The different results turn on how they measure the key variable defined as "the percent Republican vote in the most recent Presidential election"). We do not suggest, though, that this specific result should be seriously entertained either, as the paper is far more fundamentally flawed.

Like Ehrlich's early work, the DRS study mis-uses a sophisticated econometric technique—instrumental variables estimation. Statistically, the cleanest way to estimate the effect of the death penalty would be to run an (unethical and impossible) experiment, executing convicts more vigorously in randomly selected states, and then comparing the changes in homicide rates across states. DRS attempt to create econometrically a quasi-experiment by identifying a set of variables, "instruments," that might cause changes in the execution rate but not otherwise affect the homicide rate.

Unfortunately, small mis-specifications in this technique can yield extremely misleading results. Instrumental variables estimation requires a valid instrument. However the

instruments that DRS use are not valid, and it stretches plausibility to believe that they generate quasi-experiments in capital punishment policy, rather than simply reflecting changes in crime markets or social trends.

Their instruments are: 1) the statewide aggregate number of prison admissions; 2) total statewide aggregate police payrolls; 3) judicial expenditures (albeit not adjusted for inflation or state size) and 4) the statewide percent Republican vote in the most recent Presidential election. To be valid, they would have to influence executions *and there would have to be no other link between these variables and the homicide rate*.

This is not the case. For example, DRS tell us that Republicans tend to be tougher on crime. If true, that would imply that not only does the percent Republican vote correspond with executions (as DRS posit) but it is likely also related to other get-tough measures that might cause crime to fall (say, tougher sentencing laws or more vigilant policing.)

Indeed, all three authors of the DRS study have used these very same instruments in assessing the impact of other anti-crime measures, *indicating that their own work is premised on the belief that there are other pathways from these instruments to the crime rate*. If these alternative pathways are important then their estimates of the deterrent effects of capital punishment will be severely overstated.

We show that with the most minor tweaking of the DRS instruments, one can get estimates ranging from 429 lives saved per execution to 86 lives lost. These numbers are outside the bounds of credibility. With 1000 executions over the last 25 years, if we had saved 429,000 lives (against an actual murder toll of roughly 500,000 over that period), the impact of the death penalty would leap out of the data. Murders would have plummeted in death penalty states compared to non-death penalty states, or in the United States, compared with non-executing Canada.

In fact, when we make precisely these comparisons, the murder rates across treatment and control states seem to follow virtually identical paths.

A further important problem with the DRS study is that they analyze county-level panel data, but make no adjustment for either the correlation across counties within a state[1], or the correlation of the relevant variables through time. Following standard adjustments (clustering the standard errors by state to take account of these correlations) yields vastly higher standard errors, and a confidence interval around their preferred point estimate that extends from 119 lives saved per execution to 82 lives lost! We are prepared to believe that this interval captures the true effect of each execution, but this provides little guidance to policymakers.

Why price theory doesn't fill the gaps in the statistical evidence

Other studies also claim to draw strong conclusions from noisy data. But they are also rife with coding errors and overstatements of statistical significance, or are not robust to small changes in sample, functional form, or control variables. The problem is simply that execution rates have varied too little over the last 30 years to admit any robust inference from data collected over this period.

Becker thus rightly admits that "the evidence is decidedly mixed", and that "the

weight of the positive evidence should not be overstated," and hence founds his presumption in favor of deterrence on a belief "that most people have a powerful fear of death." Thus, Becker suggests that price theory can fill in where empirical evidence is lacking: capital punishment is akin to a rise in the price of murder and hence might be expected to lessen the number of murders.

But if the price rises, by how much? Is capital punishment a poor bargain, from a consequentialist's viewpoint? After all, the cost of capital trials often run into several millions of dollars.

That can only be determined empirically, and the issue is complex: one needs to evaluate both how much the "price" rises when capital punishment is used instead of other punishments, and the marginal response of potential murderers to this increase.

The penalty for committing a capital murder (if one is caught) is already extraordinarily high—being locked in a cage for the rest of one's life without possibility of parole. So what is the marginal deterrence of an infrequently administered additional sanction of death, many years later? Indeed, executions are so rare and appeals so lengthy that it is not even clear that being sentenced to death reduces the life expectancy of a criminal (especially given the high risks of death on the street). For instance, in 2004 there were 16,137 homicides, and only 125 death sentences were handed out; of the 3,314 prisoners on death row, only 59 were executed.

Finally, other factors (some of which Becker and Posner mention) may weaken or even entirely undercut any deterrent effect. For instance, state-sanctioned executions may lower the social sanctions regarding taking the lives of others, thereby *reducing* the price of murder.

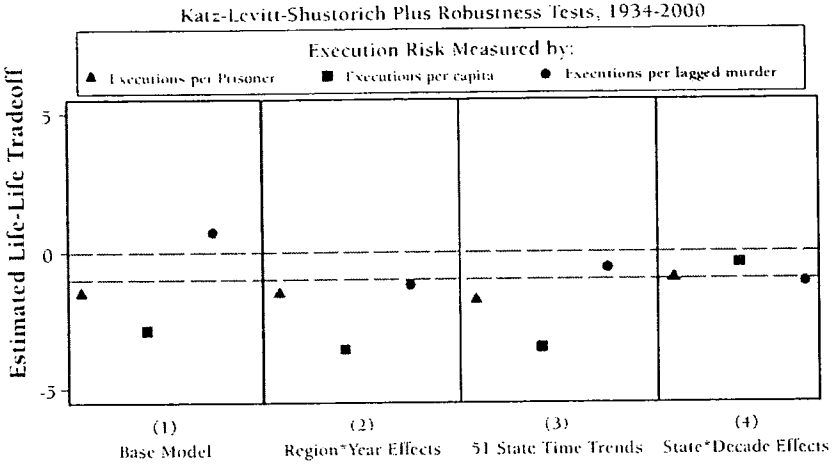
Model dependence in estimating the deterrent effect of executions

Posner omits to mention a key paper by Lawrence Katz, Steven Levitt and Ellen Shustorovich's (hereafter, KLS), which appeared in the same issue as DRS. KLS analyzed annual state homicide execution data from 1950-1990, publishing four models with a full set of controls. These models yielded the following alternatives estimates of net lives saved per execution: 0.6, 0.4, -0.8, and -0.5 (with the negative numbers suggesting net lives *lost* per execution).

We have updated KLS' data to include a longer time period, extending it to cover 1934-2000. Reliance on the death penalty was far greater 70 years ago than it has been in the past two decades and this greater variation is necessary to obtain reasonably precise estimates. The resulting four estimates for the longer data period: -1.5, -1.5, -1.7, -1.0, now uniformly suggesting no benefit from executions (an estimate of -1 implies that no murders were deterred and one life was lost by virtue of the execution). These results are shown in Figure 1 as the solid triangles.

We also tried two further specifications, coding the execution variable as executions per capita (shown as squares), and executions per (lagged) homicide (shown with circles). In other respects, we followed the KLS specifications and include a rich set of controls, including the (non-execution) prison death rate, prisoners per crime (lagged once), prisoners per capita (lagged once), real income per capita, the proportion of the state population that is black,

Figure 1
Estimated Lives Saved per Execution
Katz-Levitt-Shustorich Plus Robustness Tests, 1934-2000



All models include state and year fixed effects and control for state economic and demographic variables

living in urban areas, aged 0-24 and 25-44 and state and year fixed effects. In each case, we converted the estimated coefficients into the implied number of lives saved per execution

Across each of these quite reasonable specifications, we find considerable variation in the estimated relationship between execution and murder rates. Our reading of these results suggests (weakly) that the preponderance of the evidence supports the view that increases in executions are associated with *increases* in lives lost, although further permutations of the full array of plausible models would be needed before strong conclusions could be reached.

One reason to believe that the KLS methodology yields unbiased estimates is that the focus of their paper is not on the deterrence effect: for them, capital punishment is only a control variable. Why is this better? Because it makes it less likely that they would be tempted to tailor their specification to generate a particular result concerning the impact of the death penalty. Our re-analysis of the existing literature suggested a tendency of many authors to only report results that were favorable to a particular political position.

Our guess is that estimating more models will only reinforce the lack of robustness of any particular finding, confirming the high degree of model-dependence in the estimated effects of the death penalty. Moreover, we should emphasize that these regressions merely highlight an association between executions and homicides, and the direction of the causal arrow remains an open question.

The bottom line

The view that the death penalty deters is still the product of belief, not evidence. The reason for this is simple: over the past half century the U.S. has not experimented enough with capital punishment policy to permit strong conclusions. Even complex econometrics cannot sidestep this basic fact. The data are simply too noisy, and the conclusions from any study are too fragile. On balance, the evidence suggests that the death penalty may increase the murder rate although it remains possible that the death penalty may decrease it. If capital punishment does decrease the murder rate, any decrease is likely small. In light of this evidence, is it wise to spend millions on a process with no demonstrated

value that creates at least some risk of executing innocents when other proven crime-fighting measures exist? Even consequentialists ought to balk.

Letters commenting on this piece or others may be submitted at http://www.bepress.com/cgi/submit.cgi?context=ev

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[1] Recall that DRS are trying to estimate the effect of executions on county murder rates, while they only have data on executions by *state*, which is less than ideal.

USES AND ABUSES OF EMPIRICAL EVIDENCE IN THE DEATH PENALTY DEBATE

John J. Donohue* and Justin Wolfers**

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INTRODUCTION

Over much of the last half-century, the legal and political history of the

* Leighton Homer Surbeck Professor of Law, Yale Law School.

** Assistant Professor of Business and Public Policy, The Wharton School, University of Pennsylvania, and CEPR, IZA, and NBER. The authors wish to thank Sascha Becker, Chris Griffin, and Joe Masters for extremely valuable research assistance, and Dale Cloninger, Larry Katz, Naci Mocan, Joanna Shepherd, and Paul Zimmerman for generously sharing their data and code with us. We are grateful to Gerald Faulhaber, Andrew Leigh, David Rosen, Peter Siegelman, Carol Steiker, Betsey Stevenson, Joel Waldfogel, and Matthew White for useful discussions.

death penalty in the United States has closely paralleled the debate within social science about its efficacy as a deterrent. Sociologist Thorsten Sellin's careful comparisons of the evolution of homicide rates in contiguous states from 1920 to 1963 led to doubts about the existence of a deterrent effect caused by the imposition of the death penalty.[1] This work likely contributed to the waning reliance on capital punishment, and executions virtually ceased in the late 1960s. In the 1972 *Furman* decision, the Supreme Court ruled that existing death penalty statutes were unconstitutional.[2] In 1975, Isaac Ehrlich's analysis of national time-series data led him to claim that each execution saved eight lives.[3] Solicitor General Robert Bork cited Ehrlich's work to the Supreme Court a year later, and the Court, while claiming not to have relied on the empirical evidence, ended the death penalty moratorium when it upheld various capital punishment statutes in *Gregg v. Georgia* and related cases.[4] The injection of Ehrlich's conclusions into the legal and public policy arenas, coupled with the academic debate over Ehrlich's methods, led the National Academy of Sciences to issue a 1978 report which argued that the existing evidence in support of a deterrent effect of capital punishment was unpersuasive.[5] Over the next two decades, as a series of academic papers continued to debate the deterrence question, the number of executions gradually increased, albeit to levels much lower than those seen in the first half of the twentieth century.

The current state of the political debate over capital punishment is one of disagreement, controversy, and division. Governor George Ryan of Illinois suspended executions in that state in 2000 and commuted the death sentences of all Illinois death row inmates in 2003.[6] As a number of other jurisdictions were considering similar moratoria, New York's highest court ruled in 2004

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1. Thorsten Sellin, *Homicides in Retentionist and Abolitionist States*, *in* CAPITAL PUNISHMENT 135 (Thorsten Sellin ed., 1967) [hereinafter Sellin, *Homicides*]; *see also* Thorsten Sellin, *Experiments with Abolition*, *in* CAPITAL PUNISHMENT, *supra*, at 122.

2. Furman v. Georgia, 408 U.S. 238 (1972).

3. Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Matter of Life and Death*, 65 AM. ECON. REV. 397 (1975).

4. *See* Gregg v. Georgia, 428 U.S. 153 (1976). In *Gregg*, Justice Stewart stated, "Although some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, there is no convincing empirical evidence either supporting or refuting this view." *Id.* at 185. Yet, he then asserted: "We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent." *Id.* Justice Stewart did not clarify whether he believed that murders would increase if convicted murderers who might otherwise be executed instead received sentences of life without parole and, if so, on what basis this might be safely assumed.

5. NAT'L ACADEMY OF SCIENCES, DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES (Alfred Blumstein et al. eds., 1978) [hereinafter DETERRENCE AND INCAPACITATION].

6. John Biemer, *Death Penalty Reforms Lauded*, CHI. TRIB., Nov. 24, 2003, at M1.

that the state's death penalty statute was unconstitutional.[7] Executions in California are virtually nonexistent, although the state continues to add prisoners to death row at a rapid pace.[8] Meanwhile, executions continue apace in Texas, which accounts for over one-third of all post-*Gregg* executions.[9]

A host of more recent academic studies has examined the death penalty over the last decade, with mixed results. While Lawrence Katz, Steven Levitt, and Ellen Shustorovich found no robust evidence of deterrence,[10] several researchers claim to have uncovered compelling evidence to the contrary.[11] This latter research appears to have found favor with Cass Sunstein and Adrian Vermeule, who describe it as "powerful"[12] and "impressive,"[13] and they refer to "many decades' worth of data about [capital punishment's] deterrent effects."[14] While Sunstein and Vermeule claim not to endorse any specific analysis, these "sophisticated multiple regression studies"[15] are "[t]he foundation for [their] argument,"[16] and they specifically rely on many of the recent studies that we will reexamine as buttressing their premise that "capital

7. William Glaberson, *4-3 Ruling Effectively Halts Death Penalty in New York*, N.Y. TIMES, June 25, 2004, at A1.

8. By the end of 2004, California's death row population was the highest in the country (637 inmates). *See* THOMAS P. BONCZAR & TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT, 2004, at 1 (2005).

9. *See id.* at 9.

10. Lawrence Katz, Steven D. Levitt & Ellen Shustorovich, *Prison Conditions, Capital Punishment, and Deterrence*, 5 AM. L. & ECON. REV. 318 (2003).

11. *See* Hashem Dezhbakhsh, Paul H. Rubin & Joanna M. Shepherd, *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 AM. L. & ECON. REV. 344 (2003); H. Naci Mocan & R. Kaj Gittings, *Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J.L. & ECON. 453, 453 (2003); Paul R. Zimmerman, *State Executions, Deterrence, and the Incidence of Murder*, 7 J. APPLIED ECON. 163, 163 (2004).

Joanna Shepherd, an author of several studies finding a deterrent effect, has recently argued before Congress that recent research has created a "strong consensus among economists that capital punishment deters crime," going so far as to claim that "[t]he studies are unanimous." *Terrorist Penalties Enhancement Act of 2003: Hearing on H.R. 2934 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 108th Cong. 10-11 (2004), *available at* http://judiciary.house.gov/media/pdfs/printers/108th/93224.pdf. Upon further probing from the committee chairman about "the findings of anti-death penalty advocates that are 180 degrees from your conclusions," *id.* at 24, Shepherd responded:

> There may be people on the other side that rely on older papers and studies that use outdated statistical techniques or older data, but all of the modern economic studies in the past decade have found a deterrent effect. So I am not sure what the other people are relying on.

Id.

12. Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 706 (2005) (in this Issue).

13. *Id.* at 713.

14. *Id.* at 737.

15. *Id.* at 711.

16. *Id.* at 706.

punishment powerfully deters killings."[17] This empirical evidence leads to the heart of their claim that it would be irresponsible for government to fail to act upon the studies and vigorously prosecute the death penalty. Carol Steiker has offered a considered response to this claim based on moral theory;[18] by contrast, we are interested in exploring its empirical premise.

Thus, our aim in this Article is to provide a thorough assessment of the statistical evidence on this important public policy issue and to understand better the conflicting evidence. We test the sensitivity of existing studies in a number of intuitively plausible ways—testing their robustness to alternative sample periods, comparison groups, control variables, functional forms, and estimators. We find that the existing evidence for deterrence is surprisingly fragile, and even small changes in specifications yield dramatically different results. Our key insight is that the death penalty—at least as it has been implemented in the United States since *Gregg* ended the moratorium on executions—is applied so rarely that the number of homicides it can plausibly have caused or deterred cannot be reliably disentangled from the large year-to-year changes in the homicide rate caused by other factors. Our estimates suggest not just "reasonable doubt" about whether there is any deterrent effect of the death penalty, but profound uncertainty. We are confident that the effects are not large, but we remain unsure even of whether they are positive or negative. The difficulty is not just one of statistical significance: whether one measures positive or negative effects of the death penalty is extremely sensitive to very small changes in econometric specifications. Moreover, we are pessimistic that existing data can resolve this uncertainty.

We begin in the next Part by sketching the relevant economic theories of crime and the difficulties in identifying their effects. We then begin our tour of the statistical evidence. Part II analyzes aggregate time-series evidence. Part III analyzes first differences—the change in homicide rates that occurs following death penalty reforms. In Part IV, we turn to panel data analysis, and Part V analyzes the key instrumental variables estimates. Part VI contains our attempt at reconciling the conflicting evidence, assessing the limited precision with which we might be able to pin down the deterrent effect of the death penalty with existing data. Our organizing theme involves an attempt to examine the evidence compiled by previous scholars with the aim of highlighting the ways in which this evidence can both provide insight but also potentially mislead policy analysts.

17. *Id.* at 738.

18. Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751 (2005) (in this Issue).

I. THEORY: WHAT ARE THE IMPLICATIONS OF THE DEATH PENALTY FOR HOMICIDE RATES?

The theoretical premise underlying the deterrence argument is simple: raise the price of murder for criminals, and you will get less of it. In general, the death penalty raises the price of homicide as long as execution is worse than life imprisonment for most potential murderers.[19]

While this argument is qualitatively reasonable, its quantitative significance may be minor. In 2003, there were 16,503 homicides (including nonnegligent manslaughter), but only 144 inmates were sentenced to death.[20] Moreover, of the 3374 inmates on death row at the beginning of the year, only 65 were executed.[21] Thus, not only did very few homicides lead to a death sentence, but the prospect of execution did not greatly affect the life expectancy of death row inmates. Indeed, Katz, Levitt, and Shustorovich have made this point quite directly, arguing that "the execution rate on death row is only twice the death rate from accidents and violence among all American men" and that the death rate on death row is plausibly lower than the death rate of violent criminals not on death row.[22] As such they conclude that "it is hard to believe that in modern America the fear of execution would be a driving force in a rational criminal's calculus."[23] Moreover, even if there were a deterrent effect, capital punishment is sufficiently expensive[24] that it may potentially divert

19. The general rule is subject to a caveat. Once a criminal has already committed enough murders to get the maximum penalty, marginal deterrence is lost by a death penalty regime. At that point, the cost of killing to avoid capture goes to zero, and the death penalty may increase incentives to kill to avoid execution.

20. FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 15 (2003), *available at* http://www.fbi.gov/ucr/03cius.htm; *see also* BONCZAR & SNELL, *supra* note 8, at 1.

21. BONCZAR & SNELL, *supra* note 8, at 1.

22. Katz, Levitt & Shustorovich, *supra* note 10, at 318-19.

23. *Id.* at 320. On the other hand, even if criminals are not effective calculators, the vivid character of the death penalty might give criminals pause to a greater degree than its likely risk of implementation alone would warrant. The recent literature suggests two possibilities: (1) many individuals treat events with small likelihoods of occurrence as having zero probability, which would mean that the highly unlikely event of execution would essentially have a zero possibility of deterring instead of just a very small likelihood of deterring; and (2) certain catastrophic events that occur with low frequency are given greater prominence in decisionmaking than their likelihood warrants if individuals are given frequent vivid reminders of these events, which could conceivably make the death penalty more of a deterrent than a rational calculation of the risk such as that offered by Katz, Levitt, and Shustorovich would suggest. *See* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 351 (4th ed. 2004). Again, only empirical investigation can answer the question of which effect would be more dominant on potential murderers.

24. *Public Policy Choices and Deterrence and the Death Penalty: A Critical Review of New Evidence: Hearing on H. B. 3834 Before the Joint Comm. on Judiciary of Mass. Leg.* (July 14, 2005) (statement of Jeffrey Fagan) [hereinafter Fagan Statement] (citing an array of studies documenting the high cost of capital cases compared to a sentence of life without parole), *available at* http://www.deathpenaltyinfo.org/MassTestimonyFagan.pdf.

resources away from more effective crime prevention strategies.

A more sociological approach notes that there may be social spillovers as state-sanctioned executions cheapen the value of life, potentially demonstrating that deadly retribution is socially acceptable. Thus, executions may actually stimulate more homicide through the so-called "brutalization effect."[25] With theory inconclusive, we now turn to examining the data.

II. A CENTURY OF MURDERS AND EXECUTIONS

Several of the early studies of the death penalty were based on analysis of the aggregate U.S. time-series data. Figure 1 depicts the homicide and execution rates for the United States over the last century.[26] Because data issues can be a concern with crime data, we present two series for homicides—one from the Uniform Crime Reports and the other compiled from Vital Statistics sources, based on death certificates.[27]

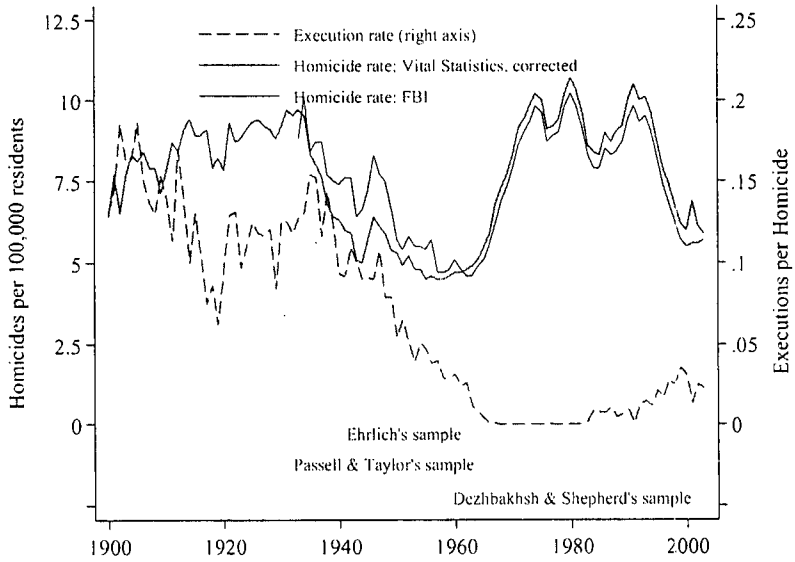
No clear correlation between homicides and executions emerges from this long time series. In the first decade of the twentieth century, execution and homicide rates seemed roughly uncorrelated, followed by a decade of divergence as executions fell sharply and homicides trended up. Then for the next forty years, execution and homicide rates again tended to move together—first rising together during the 1920s and 1930s, and then falling together in the 1940s and 1950s. As the death penalty fell into disuse in the 1960s, the homicide rate rose sharply. The death penalty moratorium that began with *Furman* in 1972 and ended with *Gregg* in 1976 appears to have been a period in which the homicide rate rose. The homicide rate then remained high and variable through the 1980s while the rate of executions rose. Finally, homicides dropped dramatically during the 1990s. By any measure, the resumption of the death penalty in recent decades has been fairly minor, and both the level of the execution rate and its year-to-year changes are tiny: since 1960 the proportion of homicides resulting in execution ranged from 0% to 3%. By contrast, there was much greater variation in execution rates over the previous sixty years, when the execution rate ranged from 2.5% to 18%. This immediately hints that—even with modern econometric methods—it is unlikely that the last few

25. William J. Bowers & Glenn L. Pierce, *Deterrence or Brutalization? What Is the Effect of Executions?*, 26 CRIME & DELINQ. 453 (1980); *see also* Steiker, *supra* note 18, at 786-89 (discussing the "brutalization effect" as initially brought up in Sunstein and Vermeule's article (Sunstein & Vermeule, *supra* note 12, at 713 n.37, 745 & n.125)).

26. The execution data come from the Espy file. *See* M. WATT ESPY & JOHN ORTIZ SMYKLA, ICPSR STUDY NO. 8451, EXECUTIONS IN THE UNITED STATES, 1608-2002: THE ESPY FILE (2004) [hereinafter ESPY FILE], *available at* http://webapp.icpsr.umich.edu/cocoon/NACJD-STUDY/08451.xml.

27. Given the incomplete nature of Vital Statistics reporting in the first half of the century, we rely on Douglas Eckberg's estimates of the homicide rate. *See* Douglas Lee Eckberg, *Estimates of Early Twentieth-Century U.S. Homicide Rates: An Econometric Forecasting Approach*, 32 DEMOGRAPHY 1 (1995).

Figure 1. Homicides and Execution in the United States



decades generated enough variation in execution rates to overturn earlier conclusions about the deterrent effect of capital punishment.

This simple chart reconciles many of the conflicting results from the death penalty literature. Ehrlich's provocative 1975 paper argued that he could isolate the movements in the homicide rate caused by changing execution policies, concluding that each execution deterred an average of eight homicides.[28] Passell and Taylor showed that Ehrlich's result relied heavily on movements from 1963 to 1969.[29] When they limited the Ehrlich model to the period from 1935 to 1962, they found no deterrent effect.[30] Indeed, this led the subsequent National Academy of Sciences report to argue that "the real contribution to the strength of Ehrlich's statistical findings lies in the simple graph of the upsurge of the homicide rate after 1962, coupled with the fall in the execution rate in the same period."[31] While Ehrlich's contribution involved a sophisticated econometric technique, the National Academy report went on to note that his "whole statistical story lies in this simple pairing of these observations and not in the theoretical utility model, the econometric type specification, or the use of best econometric method. Everything else is relatively superficial and

28. Ehrlich, *supra* note 3, at 414.

29. Peter Passell & John B. Taylor, *The Deterrent Effect of Capital Punishment: Another View*, 67 AM. ECON. REV. 445 (1977).

30. *Id.* at 447.

31. Lawrence R. Klein et al., *The Deterrent Effect of Capital Punishment: An Assessment of the Estimates*, *in* DETERRENCE AND INCAPACITATION, *supra* note 5, at 336, 344.

dominated by this simple statistical observation."[32]

Most recently, Dezhbakhsh and Shepherd have analyzed national time-series data from 1960 to 2000. In light of Figure 1, it is not surprising that they find a strong negative relationship between executions and the homicide rate.[33] While they do not report their results in terms of lives saved per execution, their estimates suggest that each execution reduces the homicide rate by about 0.05 homicides per 100,000 people, which translates to around 150 (!) fewer homicides per execution.

Why does the correlation between executions and homicides vary so much over time? One possibility is simply that the deterrent effect has truly changed over time and that capital punishment has suddenly become very effective starting in the 1990s. If so, more recent estimates are obviously to be preferred. If anything, however, administration of the death penalty has become both slower and execution methods less vivid, which would lead one to expect that any deterrent effect would be weakened in this period. Alternatively it may be that despite efforts in all of these studies to control for a range of social and economic trends, other omitted factors are preventing the relationship between executions and homicides from being correctly captured. To illustrate that these factors are indeed omitted from national time-series analyses, we introduce comparison groups into the analysis.

III. THE IMPORTANCE OF COMPARISON GROUPS

As economists have come to understand how difficult it is to control convincingly for all relevant factors, many have lost faith in the ability of pure time-series analysis to isolate causal relationships. An alternative approach borrows a page from medical studies, emphasizing the importance of comparing results among those groups or regions receiving the "treatment" of the death penalty with a comparison group that is untreated, but otherwise susceptible to similar influences (a "placebo" or "control group"). If the execution rate is driving the homicide rate, then one should not expect to see a similar pattern in the homicide time series for these comparison groups.

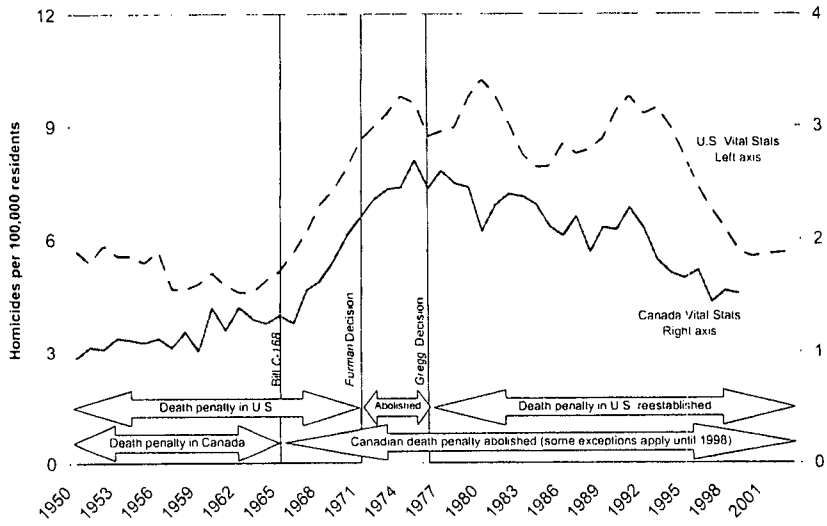
A. *Canada Versus the United States*

Given its proximity and different pattern of reliance on capital punishment, Canada presents an interesting comparison group for the United States, and Figure 2 compares the evolution of their homicide rates through time. The

32. *Id.*

33. Hashem Dezhbakhsh & Joanna M. Shepherd, *The Deterrent Effect of Capital Punishment: Evidence from a "Judicial Experiment"* tbls.3 & 4 (Am. Law & Econ. Ass'n Working Paper No. 18, 2004), *available at* http://law.bepress.com/cgi/viewcontent.cgi?article=1017&context=alea (last visited Dec. 4, 2005).

Figure 2. Homicide Rates and the Death Penalty in the United States and Canada



Canadian homicide rate (right axis) is roughly one-third as high and one-third as variable as the rate in the United States (left axis).

The most striking finding is that the homicide rate in Canada has moved in virtual lockstep with the rate in the United States, while approaches to the death penalty have diverged sharply. Both countries employed the death penalty in the 1950s, and the homicide trends were largely similar. However, in 1961, Canada severely restricted its application of the death penalty (to those who committed premeditated murder and murder of a police officer only); in 1967, capital punishment was further restricted to apply only to the murder of on-duty law enforcement personnel.[34] As a result of these restrictions, no executions have occurred in Canada since 1962. Nonetheless, homicide rates in both the United States and Canada continued to move in lockstep. The *Furman* case in 1972 led to a death penalty moratorium in the United States. While many death penalty advocates attribute the subsequent sharp rise in homicides to this moratorium, a similar rise is equally evident in Canada, which was obviously unaffected by this U.S. Supreme Court decision. In 1976, the capital punishment policies of the two countries diverged even more sharply: the *Gregg* decision led to the reinstatement of the death penalty in the United States, while the death penalty was dropped from the Canadian criminal code.[35] Over the subsequent two decades, homicide rates remained high in the United

34. *See* DEP'T OF JUSTICE OF CANADA, FACT SHEET: CAPITAL PUNISHMENT IN CANADA (providing information on the history of the death penalty in Canada), *available at* http://canada.justice.gc.ca/en/news/fs/2003/doc_30896.html (last visited Nov. 21, 2005).

35. JOHN W. EKSTEDT & CURT T. GRIFFITHS, CORRECTIONS IN CANADA: POLICY AND PRACTICE 402 (2d ed. 1988).

States while they fell in Canada. It is only over the last decade that homicide rates have started to decline in the United States, a fact that is difficult to attribute to reforms occurring decades earlier.

The Canadian move towards abolition is also interesting because it represented a major policy shock: prior to abolition, the proportion of murderers executed in Canada was considerably higher than that in the United States.[36] Of course, one might still be concerned that Canada is not quite an appropriate comparison group—perhaps Canada-specific factors were driving its homicide rate down following the abolition of its death penalty, back up during the U.S. moratorium, and back down over the ensuing period—effectively hiding the effects of execution-related changes. As such, it might be worth considering an alternative comparison group that is more clearly subject to the same set of economic and social trends.

B. *Non-Death Penalty States Versus Other States in the United States*

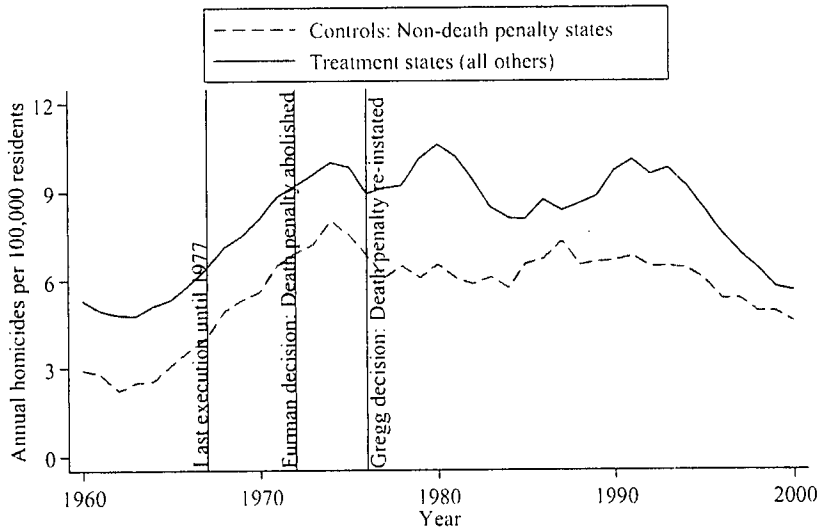
Naturally, those states that have never had the death penalty should be unaffected by changes in death penalty policy throughout the rest of the country. Figure 3 facilitates the comparison of homicide rates across states that should be influenced by changes in death penalty law and practice from those that should not.

We begin by considering the cleanest comparison group: there are six states that have not had the death penalty on the books at any point in our 1960 to 2000 sample. Deterrence in these states was unaffected by either the *Gregg* or *Furman* decisions, and hence homicide rates in these states are a useful baseline for comparing the evolution of the homicide rates in other states. The remaining states are considered "treatment" states because either *Gregg* abolished their existing death penalties or *Furman* enabled their subsequent reinstatement (or, more commonly, both). Again, the most striking finding is

36. A comparison of the Canadian abolition experiment with the post-*Furman* Texas experiment is instructive. Over the two decades prior to abolition, the annual number of homicides in Canada fluctuated from around 150 to 250. *See Homicides*, DAILY, Oct. 1, 2003, *available at* http://www.statcan.ca/Daily/English/031001/d031001a.htm. From the 1970s to the 1990s, the number of murders in Texas was about ten times larger, fluctuating from 1200 to 2500 per year, despite having only half the population of Canada. *See* FED. BUREAU OF INVESTIGATION, *supra* note 20, at 15.

However, the number of executions was fairly similar: roughly seven per year in both Canada and Texas during the respective periods. Specifically, Canada had 148 executions for the years 1943 to 1962 (two decades before the policy change), or an average of 7.4 executions per year. *See* Richard Clark, Executions in Canada from Confederation to Abolition, *available at* http://www.geocities.com/richard.clark32@btinternet.com/canada.html (last visited Nov. 21, 2005). From 1977 to 1996 (two decades after the moratorium), Texas averaged seven executions per year. *See* ESPY FILE, *supra* note 26. As a result, the change in the likelihood that a homicide would result in execution caused by the Canadian death penalty abolition is an order of magnitude larger than that caused by Texas's reinstatement.

Figure 3. Homicide Rates in the United States



Non-death penalty states are those without a death penalty throughout 1960-2000: AK HI ME MI MN WI

the close co-movement of homicide rates in these two groups of states. Both sets of states experienced higher homicide rates during the death penalty moratorium than over the subsequent decade; the gap widened for the subsequent decade and narrowed only in the late 1990s. It is very difficult to find evidence of deterrence in these Supreme Court-mandated natural experiments that the death penalty has any causal effects at all on the homicide rate. Clearly, most of the action in homicide rates in the United States is unrelated to capital punishment.

The lesson from examining these time-series data is that it is crucial to take account of the fact that most of the variation in homicide rates is driven by factors that are common to both death penalty and non-death penalty states, and to both the United States and Canada. The empirical difficulty is that these factors may be spuriously correlated with executions, and hence the plausibility of any attempt to isolate the causal effect of executions rests heavily on either finding useful comparison groups or convincingly controlling for these other factors.

This issue is particularly relevant to Dezhbakhsh and Shepherd's analysis of changes in capital punishment laws. These authors present a series of before-and-after comparisons, focusing *only* on states that abolished the death penalty[37] or *only* on states adopting the death penalty.[38] Unfortunately, by

37. Dezhbakhsh & Shepherd, *supra* note 33, at tbl.5.
38. *Id.* at tbl.6.

focusing only on the states experiencing these reforms, the authors risk confounding the effects of changes in capital punishment laws with broader forces that are equally evident in homicide data in states not experiencing these reforms.

The analysis by Dezhbakhsh and Shepherd is reproduced in Panel A of Table 1. The authors analyze each change in state laws during the sample. For each instance in which the death penalty was abolished, they compare the homicide rate one year prior to and one year after the abolition and report the average and median percentage change across all such abolitions. They also repeat this analysis for two- and three-year windows and for those times in which the death penalty was reinstated. Panel A exactly reproduces the numbers from their study, while Panel B shows our attempt at replicating their analysis.[39] In each case, they find that the *abolition* of the death penalty was associated with *rising* homicide rates, and the *reinstatement* of the death penalty was associated with *falling* homicide rates. Our replication largely succeeds in generating similar estimates: abolition of the death penalty is associated with a 10% to 20% increase in homicide, while reinstatement is associated with a 5% to 10% decrease.

However, these calculations may be confounding the effects of abolition or reinstatement of the death penalty with other broader trends. To test for this, we provide a comparison group for the abolition states in Panels A and B: we collect data on the change in homicide rates in all states that *did not* abolish the death penalty in that year.[40] These states did not experience any reform and so constitute a natural control group. Comparing Panel B with Panel C shows that the measured "effects" in states that changed their death penalty laws are similar to those in states that did not. Indeed, some of the "effects" in the comparison states are larger than those in the treatment states.

Panel D in Table 1 shows this formally, computing the difference between means (or medians) in treatment and control states—effectively a difference-in-differences approach. In no case do the figures in Panel D provide statistically or economically significant evidence for or against the deterrent effect. Half of the six estimates of the effects of abolition are positive and half are negative; the same is true for the effects of reinstating the death penalty. None of the estimates in Panel D are statistically significant. In sum, this analysis provides no evidence that the death penalty affects homicide rates and does not even paint a consistent picture of whether it is more likely to raise or lower rates.

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39. They drop outliers from their calculation of the means, and we follow them in doing so; the medians are obviously more robust to such outliers. We were best able to match their numbers by assuming that North Dakota had capital punishment until *Furman*, although this seems a questionable judgment. Unfortunately, we cannot be confident of their coding because the authors were unwilling to share their data with us.

40. *See infra* Table 1, Panel C (the "control" states). Similarly, we collect the appropriate comparison groups for the states that reinstated the death penalty.

Table 1: Estimating How Changes in Death Penalty Laws Effect Murder: Selected Before and After Comparisons: 1960-2000

Dependent Variable: *% Change in State Murder Rates Around Regime Changes*						
	Death Penalty Abolition			Death Penalty Reinstatement		
	1-Year Window (1)	2-Year Window (2)	3-Year Window (3)	1-Year Window (4)	2-Year Window (5)	3-Year Window (6)
	Panel A: Reproducing Dezhbakhsh and Shepherd Tables 5, 6					
Mean Change	10.1%*** (2.8)	16.3%*** (2.2)	21.9%*** (2.5)	-6.3%** (3.4)	-6.4%** (2.9)	-4.1% (2.9)
Median Change	8.3%	14.9%	18.4%	-9.3%	-6.8%	-7.5%
Number of States Where Homicide Increased	33/45	39/45	41/45	12/41	16/39	13/39
	Panel B: Our Replication: Changes Around Death Penalty Shifts (Treatment)					
Mean Change	10.1%*** (2.9)	16.0%*** (2.3)	21.5%*** (2.6)	-6.3%* (3.4)	-7.0%** (2.9)	-3.8% (2.9)
Median Change	8.5%	13.8%	18.5%	-9.3%	-8.5%	-7.4%
Number of States Where Homicide Increased	35/46	39/46	41/46	12/41	15/39	14/39
	Panel C: Our Innovation: Changes in Comparison States (Control)					
Mean Change	8.7%*** (0.5)	16.0%*** (0.8)	20.6%*** (1.1)	-7.5%*** (1.5)	-6.6%*** (1.5)	-3.7%*** (1.3)
Median Change	8.5%	16.1%	20.9%	-11.5%	-9.8%	-5.2%
Number of States Where Homicide Increased	44/46	44/46	44/46	7/41	8/39	8/39
	Panel D: Difference-in-Difference Estimates (Treatment-Control)					
Mean Change	1.4% (2.9)	-0.1% (2.4)	0.9% (2.8)	1.2% (3.7)	-0.5% (3.2)	-0.1% (3.2)
Median Change	<0.001% (2.7)	-2.3% (2.5)	-2.4% (3.6)	2.2% (3.5)	1.3% (4.5)	-2.2% (2.0)

Notes: Sources, data, and specification are as described in Dezhbakhsh & Shepherd, *supra* note 33, at tbls.5-6. Standard errors are in parentheses, and standard errors on median change are estimated by bootstrap. ***, **, and * denote statistically significant at 1%, 5%, and 10%, respectively. Panel A

estimates are evaluated using a one-tailed test, which makes it easier to find statistically significant evidence of deterrence. The rest of Table 1 follows our more conventional assumption that death penalty effects should be evaluated using a two-tailed test (thereby testing for either deterrence or antideterrence).

Each cell reports the mean or median percentage change in homicide rates in states that either abolished or reinstated the death penalty. The one-year window reports how murder rates changed from one year before abolition or reinstatement to one year after; the two-year window is the change in the homicide rate over the two years subsequent to reform compared to the two years before, with similar calculations for the three-year window. Panel A and our replication in Panel B might seem to suggest that crime rises when the death penalty is abolished and falls when it is reinstated, but Panel C shows that the same changes in murder rates also occur in the states that do not alter their death penalty laws (the control group). Panel D shows no differential change in murder rates between the treatment (change in death penalty law) and control groups (no change in death penalty law).

The estimates in Table 1 involve direct comparison of treatment and control states, but they do not account for other factors that may have affected the homicide rate differently in each state. This suggests that a panel data analysis may provide more reliable estimates. Sunstein and Vermeule argue that "a significant body of recent evidence [shows] that capital punishment may well have a deterrent effect, possibly a quite powerful one" and that "[a] wave of sophisticated multiple regression studies have exploited a newly available form of data, so-called 'panel data,' that uses all information from a set of units (states or counties) and follows that data over an extended period of time."[41] With this motivation, we now turn to expanding the above analysis into a formal panel structure.

IV. PANEL DATA METHODS

The simplest panel data extension to the previous analysis above involves running the regression:

$$\frac{Murders_{s,t}}{(Population_{s,t}/100{,}000)} = \beta_1 Death\ Penalty\ Law_{s,t} + \sum State\ Effects_s + \sum Time\ Effects_t + \lambda Controls_{s,t} + \varepsilon_{s,t}$$

where the dependent variable is the homicide rate in a given state and year, and the variable of interest is an indicator set equal to one when a state has an active death penalty law. As such, β_1 measures the effects on the homicide rate of a state having a death penalty law in place. The inclusion of state fixed effects controls for persistent differences across states, the time fixed effects control for national time trends that are common across states, and control variables include indicators of state economic conditions, demographics, and law enforcement variables. Following Dezhbakhsh and Shepherd, we restrict our

41. Sunstein & Vermeule, *supra* note 12, at 706, 711.

sample to the period from 1960 to 2000 and run a weighted least squares regression, clustering standard errors at the state level.

In Column 1 of Table 2, we report the results from Dezhbakhsh and Shepherd's estimation, in which they estimate the above equation without year fixed effects, but controlling for decade fixed effects.[42] Column 2 shows our replication attempt based on independently collected data (but using the same sources).[43] While our coefficient estimates do not precisely match theirs, the difference is tolerable. The real difference comes in the estimate of the standard error (which speaks to the persuasiveness of the data): we report a standard error nearly three times larger than theirs, and hence our coefficient is statistically insignificant. We do not know for certain the source of this divergence, and the authors provided no useful guidance. Thus, despite their claims that their estimates of "standard errors are further corrected for possible clustering effects—dependence within clusters (groups),"[44] our best guess is that they report simple ordinary least squares (OLS) standard errors. As Marianne Bertrand, Esther Duflo, and Sendhil Mullainathan show, using OLS standard errors in panel estimation involving autocorrelated data may severely understate the standard deviation of the estimators (and hence exaggerate claims of statistical significance).[45]

Given the importance of not confounding overall crime trends in the 1970s with changes in death penalty laws (a lesson illustrated sharply in Table 1), we add controls for year fixed effects in Column 3. Indeed, in failing to control for year fixed effects, Dezhbakhsh and Shepherd's study is a clear outlier in the literature.[46] This is important: as Figure 2 shows, homicide rates were higher during the death penalty moratorium than during the early or late 1970s, and so simply controlling for the average crime rate in the 1970s would lead the

42. It is easy to lose this point: Dezhbakhsh and Shepherd refer only to controlling for "time-specific binary variables," and it was only through corresponding with the authors that we understood this to mean decade rather than year fixed effects. Dezhbakhsh & Shepherd, *supra* note 33, at 18. Indeed, they never use the term "decade" in connection with their econometric specification.

43. While Dezhbakhsh and Shepherd were unwilling to share their data for this Article, we have reconstructed it as closely as possible using the sources noted in their data appendix.

44. Dezhbakhsh & Shepherd, *supra* note 33, at 17.

45. Marianne Bertrand, Esther Duflo & Sendhil Mullainathan, *How Much Should We Trust Differences-in-Differences Estimates?*, 119 Q. J. ECON. 249 (2004).

46. Papers using year fixed effects include: Dezhbakhsh, Rubin & Shepherd, *supra* note 11; Joanna M. Shepherd, *Deterrence Versus Brutalization: Capital Punishment's Differing Impacts Among States*, 104 MICH. L. REV. 203 (2005) [hereinafter Shepherd, *Deterrence Versus Brutalization*]; Joanna M. Shepherd, *Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment*, 33 J. LEGAL STUD. 283 (2004) [hereinafter Shepherd, *Murders of Passion*]; Zimmerman, *supra* note 11. Mocan & Gittings, *supra* note 11, both include year fixed effects and control for state-specific time trends. Katz, Levitt & Shustorovich, *supra* note 10, control for year fixed effects and, in various specifications, also control for state-specific trends, state-decade interactions, and separate time fixed effects by region.

regression to find a deterrent effect, even though the same pattern was observed in states that experienced no change to their death penalty laws. It turns out that controlling for these confounding trends cuts the coefficient on the death penalty in half and makes the coefficient clearly statistically insignificant.

One possible objection to this analysis is that there are many states that are de jure death penalty states but de facto nonexecuting, and hence, the binary legal classification is inadequate. Thus, in Column 4 we make a distinction between those states that actively apply their death penalty statutes and those that do not. We define a death penalty statute as inactive if that state had no executions over the preceding ten years, an admittedly crude approach. In each case, we find no statistically significant effects of the death penalty. Moreover, the data suggest that active death penalty statutes are neither more nor less (in)effective than inactive death penalty statutes.

Table 2: Panel Data Estimates of the Effects of Death Penalty Laws on Murder Rates: 1960-2000

Dependent Variable: ***Annual Homicides Per 100,000 Residents***$_{s,t}$				
	Dezhbakhsh and Shepherd (1)	Our Replication (2)	Controlling for Year Fixed Effects (3)	De Facto Versus De Jure Laws (4)
Death Penalty Law	-0.87***	-0.95	-0.47	
	(.21)	(.57)	(.74)	
Active Death Penalty Law (≥ *1 Execution in Previous Decade*)				-0.57
				(.63)
Inactive Death Penalty Law (*No Executions in Previous Decade*)				-0.45
				(.77)
State Fixed Effects	Yes	Yes	Yes	Yes
Decade Fixed Effects	Yes	Yes	Yes	Yes
Year Fixed Effects	No	No	Yes	Yes
Adjusted R^2	.804	.791	.834	.834
Sample Size (Excludes DC, HI)	(unknown)	2009	2009	2009

Notes: Sources and data are as described in Dezhbakhsh & Shepherd, *supra* note 33, at tbl.7. Population-weighted least squares regression also includes controls for state per capita real income, the unemployment rate, police employment, proportions of the population nonwhite, aged 15-19, and aged 20-24. ***, **, and * denote statistically significant at 1%, 5%, and 10%, respectively.

Dezhbakhsh and Shepherd find that a death penalty law is associated with less crime, but our replication in Column 2, as well as other plausible estimates in Columns 3 and 4, show no significant effect.

The most important finding in Table 2 is simply how difficult it is to isolate

any causal effects with confidence. The standard errors in our preferred estimates suggest that even if death penalty laws deterred 15% of all homicides (or caused 15% more homicides), the data speak so unclearly that they could not rule out the possibility of no effect.

These data also allow us to extend the analysis of the distribution of estimates across death penalty experiments. Specifically, we extend our panel data approach, but rather than analyzing a single variable describing whether a state has a death penalty law, we estimate separate effects for each experiment.[47] That is, for each of the forty-five death penalty abolitions in the sample, we analyze its effects by including a separate dummy variable set equal to one for that state subsequent to the law change. We also include forty-one further dummy variables for each death penalty adoption in the sample. In all other respects, the specification remains the same as in Dezhbakhsh and Shepherd, although we continue to control for year fixed effects. Table 3 reports these results.

Table 3: Estimating the Individual Effects of Death Penalty Reform on the Homicide Rate for 41 Reinstatements and 45 Abolitions: 1960-2000

Dependent Variable: *Annual Homicides per 100,000 Residents*$_{s,t}$						
State	Death Penalty Reinstatement			Death Penalty Abolition		
	Year	Estimated Effect	95% Confidence Interval	Year	Estimated Effect	95% Confidence Interval
Alabama	1976	-3.2	(-4.1, -2.4)	1972	-1.2	(-2.8, 0.5)
Arizona	1976	1.1	(0.2, 1.9)	1972	-1.5	(-3.2, 0.2)
Arkansas	1976	-0.5	(-1.4, 0.3)	1972	-2.4	(-4.1, -0.8)
California	1977	2.3	(1.3, 3.2)	1972	1.1	(-0.8, 2.9)
Colorado	1976	-0.8	(-1.9, 0.3)	1972	-1.7	(-3.7, 0.2)
Connecticut	1976	0.6	(-0.8, 2.0)	1972	-2.5	(-4.4, -0.6)
Delaware	1976	-2.2	(-3.1, -1.4)	1972	-2.7	(-4.6, -0.7)
	1961	-1.6	(-2.2, -1.0)			
Florida	1976	-3.4	(-4.2, -2.6)	1972	-0.2	(-2.0, 1.5)
Georgia	1976	-5.1	(-6.0, -4.3)	1972	1.0	(-0.6, 2.7)
Idaho	1976	0.2	(-0.6, 1.0)	1972	-2.8	(-4.6, -1.0)
Illinois	1976	0.3	(-0.7, 1.2)	1972	-0.3	(-2.2, 1.6)
Indiana	1976	0.2	(-0.5, 1.0)	1972	-0.4	(-2.2, 1.4)
Iowa				1965	-3.2	(-4.7, -1.6)
Kansas	1994	3.1	(1.8, 4.4)	1972	-2.2	(-4.1, -0.3)
Kentucky	1976	-1.6	(-2.5, -0.8)	1972	-1.6	(-3.3, 0.0)
Louisiana	1976	1.4	(0.7, 2.1)	1972	1.5	(-0.2, 3.2)
Maryland	1976	-0.6	(-1.6, 0.4)	1972	-0.1	(-2.1, 1.9)
Massachusetts	1982	-0.3	(-1.2, 0.7)	1972	-2.8	(-4.6, -0.9)
				1984	-0.3	(-1.0, 0.5)
Mississippi	1976	-1.9	(-2.9, -0.9)	1972	0.6	(-1.1, 2.3)

47. As such, this approach is a natural extension of the analysis in Table 1, with the advantage that panel analysis allows for regression-adjusted comparisons and takes account of the full time series, rather than an arbitrary comparison window. Note that while Table 1 included Washington, D.C., missing police data force us to drop it from this analysis.

Missouri	1976	0.3	(-0.5, 1.0)	1972	-1.4	(-3.1, 0.4)
Montana	1976	0.6	(-0.5, 1.8)	1972	-2.6	(-4.5, -0.7)
Nebraska	1976	0.3	(-0.5, 1.1)	1972	-2.9	(-4.8, -0.9)
Nevada	1976	-0.8	(-1.8, 0.3)	1972	1.2	(-0.5, 2.9)
New Hampshire	1991	0.1	(-0.7, 1.0)	1972	-3.5	(-5.4, -1.6)
New Jersey	1982	-1.3	(-2.3, -0.2)	1972	-1.3	(-3.3, 0.7)
New Mexico	1979	0.3	(-0.5, 1.1)	1969	0.5	(-0.9, 1.8)
New York	1995	-2.9	(-4.4, -1.5)	1965	2.9	(1.0, 4.7)
North Carolina	1977	-2.4	(-3.4, -1.5)	1972	-1.3	(-3.0, 0.3)
North Dakota				1972	-3.8	(-5.6, -2.0)
Ohio	1976	-1.2	(-1.9, -0.5)	1972	-0.4	(-2.2, 1.3)
Oklahoma	1976	1.1	(0.3, 1.8)	1972	-1.8	(-3.5, -0.1)
Oregon	1978	-0.6	(-1.6, 0.4)	1964	-1.8	(-2.8, -0.7)
Pennsylvania	1976	-0.1	(-0.9, 0.7)	1972	-0.9	(-2.6, 0.8)
Rhode Island	1977	-1.1	(-2.4, 0.2)	1984	0.6	(0.1, 1.0)
South Carolina	1976	-4.8	(-5.6, -3.8)	1972	-0.5	(-2.2, 1.2)
South Dakota	1979	0.5	(-0.1, 1.1)	1972	-4.4	(-6.3, -2.6)
Tennessee	1976	-2.1	(-2.9, -1.3)	1972	-0.1	(-1.8, 1.7)
Texas	1976	-0.1	(-1.1, 0.9)	1972	-0.1	(-1.7, 1.6)
Utah	1976	0.8	(-0.1, 1.6)	1972	-3.1	(-4.8, -1.4)
Vermont				1965	-2.9	(-4.4, -1.4)
Virginia	1976	-2.7	(-3.6, -1.7)	1972	-2.0	(-3.8, -0.3)
Washington	1976	0.7	(-0.5, 1.9)	1972	-1.8	(-3.6, -0.0)
West Virginia				1965	-2.8	(-4.5, -1.0)
Wyoming	1977	-0.9	(-1.5, -0.2)	1972	-3.4	(-5.3, -1.4)
Simple Average		-0.70			-1.32	
Precision-Weighted Average		-0.67			-0.86	
Population-weighted Average		-0.72			-0.39	

Notes: This table shows the effect on murder rates of forty-one reinstatements of death penalty laws and forty-five abolitions of such laws. It is derived from the same data and models that were used to estimate aggregated effects of such legal changes averaged over all switching states (in Table 2, *infra*). Alaska, Hawaii, Maine Michigan, Minnesota, and Wisconsin are not shown because they never had the death penalty throughout the sample period (and there is some debate over North Dakota). The District of Columbia and Hawaii were dropped from the sample because of missing police data. Sources, data, and specification follow Dezhbakhsh & Shepherd, *supra* note 33, at tbl.7, as described in Table 2, except that we add year fixed effects and include forty-one death penalty reinstatements and forty-five death penalty abolition dummy variables (set equal to zero before the change and one subsequently), rather than a single binary variable covering all eighty-six experiments. Controls include per capita real income; the unemployment rate; police employment; proportions of the population nonwhite, aged 15-19, and aged 20-24; and state and year fixed effects. Standard errors are in parentheses, clustered at the state level. The precision-weighted average is generated by weighting by the inverse of the squared standard error.

For neither death penalty abolitions nor reinstatements do we see a

particularly coherent picture. Estimates of the "effect" of death penalty abolition on the homicide rate (conditional on the control variables) are positive in eight cases and negative in thirty-seven cases. Likewise, reinstatement of the death penalty was subsequently associated with a higher homicide rate in seventeen states and a lower rate in twenty-four states. On average, the homicide rate appears to be lower than otherwise suggested by developments in the control variables following *either* abolition or reinstatement of the death penalty. That said, these differences are not statistically significant, and these comparisons merely point to the difficulty in discerning *any* causal effect of death penalty laws.

Figure 4 shows the distribution of before-and-after comparisons across states, using the data in Table 3. These distributions highlight the problem of getting these data to speak clearly: the variance of individual state homicide rates is so great that it is difficult to discern the average effects of these changes with any precision, even with eighty-six "experiments" to analyze. Shepherd has performed a related reanalysis of three papers that examine the effects of executions (rather than the presence of a death penalty law), and she also finds that there are about as many states whose experiences are consistent with the deterrence hypothesis as with the antideterrence one.[48]

It is worth noting that Mocan and Gittings also include an analysis of the efficacy of death penalty laws over a sample running from 1977 to 1997, although their regressions only include data from 1980 to 1997.[49] Despite their professed confidence in their results, Mocan and Gittings's analysis includes only six policy change experiments. We have reanalyzed their data following a similar design to that above: we follow their data and programs (which they graciously shared) but analyze the death penalty "effects" separately for each state, making sure to control for the same variables as in their main specification. For the four states adopting the death penalty, their specification suggests that homicide rates were subsequently higher in Kansas and New Hampshire and lower in New Jersey and New York. In their sample, only Massachusetts and Rhode Island abolished the death penalty, and in both cases homicide rates fell following the law change (relative to the baseline established by their regression). These facts make it difficult to conclude with any confidence that the death penalty raises or lowers homicide rates.[50]

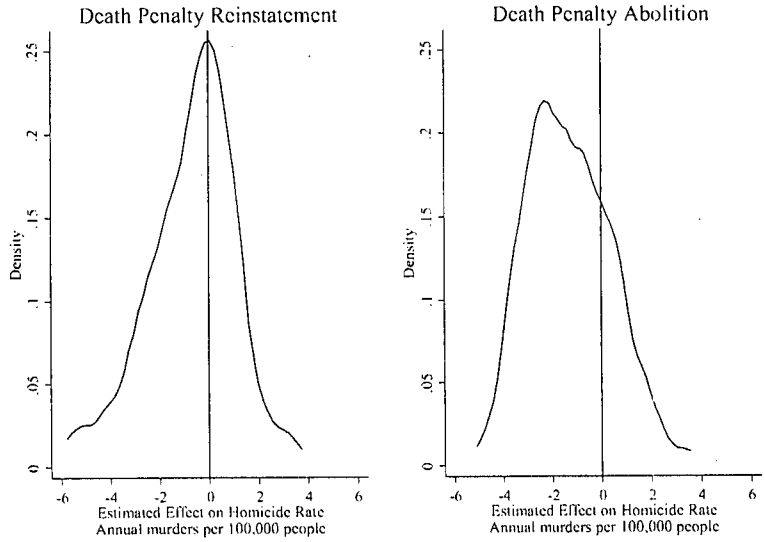
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48. *See* Shepherd, *Deterrence Versus Brutalization*, *supra* note 46 (reanalyzing data from Dezhbakhsh & Shepherd, *supra* note 33, Dezhbakhsh, Rubin & Shepherd, *supra* note 11, and Shepherd, *Murders of Passion*, *supra* note 46). Shepherd argues that antideterrence is evident in some states because they do not execute sufficient convicts to reach a "threshold effect" required for deterrence.

49. Mocan & Gittings, *supra* note 11, at 478.

50. That Mocan and Gittings obtain statistically significant estimates reflects the fact that New York and New Jersey were the two states consistent with deterrence, and their influence in a population-weighted regression dwarfs that of the four states inconsistent with deterrence. *Id.*

Figure 4. Distribution of Regression-Estimated Effects Across States



Kernel density estimates using Epanechnikov kernel

Given the demonstrated difficulties in linking the presence of death penalty laws with homicide rates, several authors also have tried to exploit variation in the intensity with which death penalty laws have been applied. Consequently, the variable of interest in these studies does not describe the presence of a death penalty law but rather a variable measuring the propensity to invoke the death penalty. The intensity with which a state pursues death penalty prosecutions may be highly politicized, raising the possibility that such estimates may reflect omitted factors related to the political economy of punishment. On the demand side, variation in crime rates may change the political pressure for executions. Equally on the supply side, it seems plausible that more vigorous deployment of the death penalty might occur at the same time that the government elects to "get tough on crime" along a range of other dimensions, including sentencing, prison conditions, arrests, police harassment, and so on. As these studies move beyond the sharp judicial or legislative experiments analyzed above, the issues involved in distinguishing correlation from causation may become even more salient.

However as Katz, Levitt, and Shustorovich emphasize, beyond the usual difficulties in establishing a causal relationship, there is a much simpler statistical dilemma: the annual number of executions fluctuates very little while the number of homicides varies dramatically. Under these conditions, it is "a difficult challenge to extract the execution-related signal from the noise in

homicide rates."[51] Indeed, following their own empirical investigation for the years 1950 to 1990, Katz, Levitt, and Shustorovich conclude that "[e]ven if a substantial deterrent effect does exist, the amount of crime rate variation induced by executions may simply be too small to be detected"[52] and that "[t]here simply does not appear to be enough information in the data on capital punishment to reliably estimate a deterrent effect."[53]

Countering these words of caution, several recent studies claim to have compiled robust evidence of the deterrent effect of capital punishment. We begin by updating Katz, Levitt, and Shustorovich's study to incorporate data revisions and add data from 1991 to 2000, before turning to these alternative studies.

A. *Katz, Levitt, and Shustorovich*

Katz, Levitt, and Shustorvich generously provided us with their 1950 to 1990 dataset, so we were easily able to replicate their results. These authors regressed state homicide rates on the number of executions per 1000 prisoners (with a rich set of controls), concluding that "the execution rate coefficient is extremely sensitive to the choice of specification . . . ."[54] Panel A of Table 4 shows our replication of their original estimates over the 1950 to 1990 sample using revised data; these estimates are very close to those reported in their paper.[55] Panel B reports results over our updated 1950 to 2000 sample, while Panel C analyzes the largest possible sample, extending back as far as 1934 and forward through to 2000.

Reading across each row, estimates of the effects of executions on the homicide rate appear quite inconsistent across specifications, with point estimates ranging from positive to negative in Panels A and B. Reading down each column, we see that this inconsistency holds across time periods as well; while several specifications are consistent with deterrence for the 1950 to 1990 sample, these results largely disappear if the models are estimated over the slightly longer period from 1950 to 2000 (Panel B). Indeed, Panel C reveals that when the models are estimated over the longest period (1934 to 2000), the signs reverse, and executions are associated with *higher* rates of murder. In sum, the alternative samples continue to point to the difficulty in pinning down robust estimates of the deterrent effect of the death penalty suggested by Katz, Levitt, and Shustorovich.

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51. Katz, Levitt & Shustorovich, *supra* note 10, at 319.
52. *Id.*
53. *Id.* at 321-22.
54. *Id.* at 330.
55. Note that we report standard errors clustered at the state level, although this makes little practical difference because Katz, Levitt, and Shustorovich reported standard errors clustered at the state-decade level.

Table 4: Estimating the Effect of Executions on Murder Rates Using the Katz, Levitt, and Shustorovich Model for Three Time Periods: 1934-2000

Dependent Variable: *Homicides per 100,000 Residents*$_{s,t}$								
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
	Panel A: Replication for 1950-1990 Sample							
Executions$_{s,t}$ per 1000 Prisoners$_{s,t}$	0.32	-0.67**	-0.31	-0.56**	0.01	-0.07	-0.08	-0.22*
	(.38)	(.33)	(.31)	(.30)	(.20)	(.14)	(.14)	(.14)
	Panel B: Augmented Sample—1950-2000							
Executions$_{s,t}$ per 1000 Prisoners$_{s,t}$	0.48	-0.58	-0.20	-0.39	-0.14	-0.29	-0.07	-0.23
	(.45)	(.38)	(.37)	(.40)	(.22)	(.20)	(.14)	(.14)
	Panel C: Maximum Sample—1934-2000							
Executions$_{s,t}$ per 1000 Prisoners$_{s,t}$	1.54***	0.19	0.48	0.20	0.67***	0.31	0.06	-0.02
	(.34)	(.27)	(.30)	(.26)	(.24)	(.19)	(.12)	(.12)
	Implied Life-Life Tradeoff[a] **[95% Confidence Interval]**							
Panel A: 1950-1990	-1.8	0.6	-0.2	0.4	-1.0	-0.8	-0.8	-0.5
	[-3.6,-0.1]	[-0.9,2.2]	[-1.7,1.3]	[-1.1,1.8]	[-2.0,-0.1]	[-1.5,-0.1]	[-1.5,-0.2]	[-1.1,0.2]
Panel B: 1950-2000	-2.2	0.4	-0.5	-0.1	-0.7	-0.3	-0.8	-0.4
	[-4.3,0.0]	[-1.4,2.2]	[-2.3,1.2]	[-2.0,1.9]	[-1.7,0.4]	[-1.2,0.7]	[-1.5,-0.2]	[-1.1,0.2]
Panel C: 1934-2000	-4.7	-1.5	-2.2	-1.5	-2.6	-1.7	-1.1	-1.0
	[-6.4,-3.1]	[-2.7,-0.2]	[-3.6,-0.7]	[-2.7,-0.2]	[-3.8,-1.5]	[-2.6,-0.9]	[-1.7,-0.6]	[-1.5,-0.4]
	Further Controls							
Crime, Economic & Demographic Controls	No	Yes	No	Yes	No	Yes	No	Yes
State Fixed Effects	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Year Fixed Effects	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Region*Year Effects	No	No	Yes	Yes	No	No	No	No
State Time Trends	No	No	No	No	Yes	Yes	No	No
State*Decade Effects	No	No	No	No	No	No	Yes	Yes

Notes: Panel A shows the Katz, Levitt, and Shustorovich estimates of the impact of executions on murder rates (using revised data). Panels B and C show how those estimates change using longer time periods, with all estimated effects showing increased execution rates correlated with increased murder rates for the full sample. The bottom half of the table shows the corresponding life-life tradeoff numbers, where negative numbers mean that net lives are lost for each execution. Note that in order to obtain the long samples in Panel C, we drop the infant mortality and unemployment rates as controls; this longer sample also introduces a few more missing data cells.

The eight specifications and data sources are as in Katz, Levitt & Shustorovich, *supra* note 10, at 327 tbl.2. Crime controls include prisoner

death rate, prisoners per crime, and prisoners per capita. Economic controls include the real per capita income, insured unemployment rate, and the infant mortality rate. The latter two are not included in Panel C. Demographic controls are the proportion of the population: black, urban, aged 0-24, and aged 25-44. Sample sizes are 1908, 2414, and 2954 for state-year observations in Panels A, B, and C, respectively, and all panels omit 1971 due to missing data on prison deaths. Population-weighted least squares regression is used, and standard errors are clustered at the state level. ***, **, and * denote statistically significant at 1%, 5%, and 10%, respectively.

(a) Implied life-life tradeoff reflects net lives saved when evaluated for a state with the characteristics of the average death penalty state in 1996.

In order to remain consistent with the debate about what Sunstein and Vermeule refer to as the "life-life tradeoff,"[56] we also compute the implied number of lives saved per execution. In order to fix a particular set of parameters (and to maintain continuity with the numbers reported by Dezhbakhsh, Rubin, and Shepherd), we report the implied net number of lives saved by an execution for a state with the characteristics of the average death penalty state in 1996 (holding all other factors constant).[57] Given that Table 4 involves the largest sample of data in our analysis, it is not surprising that the 95% confidence intervals surrounding these estimates, while wide, imply these estimates are notably more precise than we obtain with other specifications in Tables 5 through 9.

B. *Dezhbakhsh and Shepherd*

The Dezhbakhsh and Shepherd study covers data from 1960 to 2000, and their analysis of the effects of executions largely shadows their analysis of the effects of death penalty laws.[58] That is, they run the same regression as described in Table 2, but replace the death penalty binary variable with a variable intended to capture the propensity to invoke the death penalty. The first column of Table 5 shows their reported results, while the next column shows the same regression, controlling for year fixed effects. As before, we

56. *See* Sunstein & Vermeule, *supra* note 12, at 708 (introducing the concept of a "life-life tradeoff" in the capital punishment debate).

57. To compute this, note that executing one more death row inmate raises the execution rate from X/P to $(X+1)/P$, where X is the number of executions, and P is the denominator of the execution rate, which in this instance is the number of prisoners. The effect of the execution rate on the homicide rate is mediated by the estimated coefficient, β, yielding a decline in the homicide rate of $-\beta/P$. To determine the number of lives saved, we need to multiply the decline in the homicide rate (homicides per 100,000 people) by the population/100,000, and subtract one to take account of the executed convict. Thus a tradeoff of zero implies that each execution kills one convict and saves one homicide victim; a positive number implies that more than one homicide victim is saved, and a negative number suggests that each execution results in a greater number of total deaths.

58. Dezhbakhsh & Shepherd, *supra* note 33.

continue to report standard errors clustered at the state level. Superficially, these results suggest extremely significant evidence in favor of deterrence.

Table 5: Estimating the Impact of Executions on Murder Rates, Testing the Sensitivity of Dezhbakhsh and Shepherd's Results: 1960-2000

Dependent Variable: ***Annual Homicides per 100,000 Residents***$_{s,t}$						
	Published	Adding Year Fixed Effects	Omitting Texas	Alternative Definitions of Execution Risk		
	(1)	(2)	(3)	(4)	(5)	(6)
Executions$_{s,t}$	-0.145***	-0.138***	-0.137*			
	(.013)	(.013)	(.070)			
Executions$_{s,t}$ per 100,000 Residents$_{s,t}$				-8.36		
				(5.84)		
Executions$_{s,t}$ per 1000 Prisoners$_{s,t}$					-0.38	
					(0.47)	
Executions$_{s,t}$ per Homicide$_{s,t-1}$						-50.7
						(31.7)
N	(unknown)	2009	1968	2009	2009	2009
	Implied Life-Life Tradeoff[(a)] **[95% Confidence Interval]**					
Net Lives Saved per Execution	7.8 [6.1, 9.4]	7.3 [5.8, 8.9]	7.3 [-1.0, 15.5]	7.4 [-4.1, 18.8]	-0.1 [-2.4, 2.2]	5.0 [-2.3, 12.3]
	Further Controls					
State Fixed Effects	Yes	Yes	Yes	Yes	Yes	Yes
Decade Fixed Effects	Yes	Yes	Yes	Yes	Yes	Yes
Year Fixed Effects	No	Yes	Yes	Yes	Yes	Yes

Notes: Column 1 shows the results for the estimated impact of executions on murder rates reported in Dezhbakhsh & Shepherd, *supra* note 33, tbl.7 (and the basic specification and data sources are as described therein). Controls include per capita real income, the unemployment rate, police employment, proportions of the population nonwhite, aged 15-19, and aged 20-24. Column 2 begins by adding in year fixed effects, and Column 3 shows the estimated effects of executions on murder rates become much less precisely estimated when Texas is omitted. Columns 4-6 also show that the estimated effect of executions becomes insignificant when various measures of the execution rate are analyzed, instead of the raw number of executions. The bottom portion of Table 5 shows the corresponding life-life tradeoff numbers, where negative numbers mean that, on net, lives are lost for each execution.

Population-weighted least squares regression is used. Standard errors are clustered at the state level. ***, **, and * denote statistically significant at 1%, 5%, and 10%, respectively.

(a) Implied life-life tradeoff reflects net lives saved evaluated for a state with the characteristics of the average death penalty state in 1996.

However, as Richard Berk has noted, the distribution of executions across states is extraordinarily skewed.[59] Through 2004, Texas has executed 336

59. Richard Berk, *New Claims About Executions and General Deterrence: Déjà Vu All*

convicts since the *Gregg* decision. The next closest state is Virginia at 94 executions, while only ten other states have recorded more than twenty executions and seventeen states have recorded no executions.[60] As a result, it seems useful to test the sensitivity of the baseline equation to the omission of Texas. While the effect on the coefficient reported in Column 3 of Table 5 is rather small, the effect on the estimated standard error is dramatic, and the estimated impact of executions becomes statistically insignificant. Similarly, Shepherd has shown that the evidence for deterrence in these data rests critically on variation arising from a few states, and the vast majority of states experienced either no deterrence or antideterrence.[61] The implication of our Table 5, however, is not that Texas is an outlier (indeed, given the constancy of the coefficient, it probably lies along the regression line), but rather that in its absence, there is just too little variation in executions to discern an effect with any confidence.

A more direct difficulty with Dezhbakhsh and Shepherd's specification is that the independent variable is simply the number of executions in that state each year. Not only does this exaggerate the problem of Texas (the large number of executions partly reflects the fact that there are more people and more murders in Texas than in many other states), but it also is a somewhat bizarre choice. For example, this specification implies that one more execution in Wyoming would deter three-fourths of a homicide, while in California it would deter fifty homicides.

A very simple alternative that avoids this scaling issue is measuring executions per 100,000 residents. These results are reported in Column 4, and this regression suggests that the relationship between homicides and executions per capita is statistically insignificant.

An alternative scaling comes from Katz, Levitt, and Shustorovich, who define their executions variable as executions per 1000 prisoners.[62] This regression, shown in Column 5, again fails to find a significant relationship between homicide and execution rates, with the point estimate suggesting that each execution deters 0.9 homicides for a net loss of 0.1 life. Another alternative scaling—and perhaps the one most directly suggested by the economic model of crime—is to analyze the ratio of the number of executions to the (lagged) homicide rate.[63] Once again, this regression, shown in

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over Again?, 2 J. EMPIRICAL LEGAL STUD. 303, 305 (2005).

60. BONCZAR & SNELL, *supra* note 8, at 9 tbl.9.

61. Shepherd, *Deterrence Versus Brutalization*, *supra* note 46.

62. This alternative scaling yields a slightly smaller sample because data on the number of prisoners in Alaska are not available until 1972. For other missing values of the prisoner variable, we simply use linear interpolation.

63. We use the lagged homicide rate so that the number of homicides does not appear in the construction of both the independent and dependent variables. Specifically, if there were measurement errors in the number of homicides, this would cause the dependent variable to increase (decrease) and the independent variable to decrease (increase), creating

Column 6, fails to find any significant relationship.

C. *Mocan and Gittings*

Mocan and Gittings examine state homicide rates over the 1984 to 1997 (post-moratorium) period,[64] running the following regression:

$$\frac{Murders_{s,t}}{(Population_{s,t}/100{,}000)} = \beta_1 \frac{Executions_{s,t-1}}{DeathSentences_{s,t-7}} + \beta_2 \frac{Pardons_{s,t-1}}{DeathSentences_{s,t-7}} + \beta_3 \frac{Removals_{s,t-1}}{DeathSentences_{s,t-6}}$$
$$+\beta_4 \frac{DeathSentences_{s,t-1}}{Arrests_{s,t-1}} + \beta_5 \frac{HomicideArrests_{s,t-1}}{Murders_{s,t-1}} + \gamma Controls_{s,t} + \sum_s State_s * Trend_t + \sum_t Time_t + \varepsilon_{s,t}$$

The authors provided us with their data, and Panel A of Table 6 shows that we were able to replicate their results. In the process of doing so, we found a number of coding errors, and a set of corrected estimates is given in Panel B.[65] These estimates are reasonably similar to those found in Panel A, although in no case are any of the estimates of the effects of executions statistically significant. Equally, the effects of death row removals appear somewhat stronger in these numbers.

One feature that is immediately obvious from inspecting their model is that it has a rather complex temporal structure: the variables of interest are constructed as ratios to the number of death sentences imposed six or seven years earlier or the number of arrests three years earlier. While the authors choose this functional form to maintain continuity with Dezhbakhsh, Rubin, and Shepherd, this rather contrived structure comes at a significant price. Their data only runs from 1977 to 1997, and hence this lag specification costs them one-third of their sample since their deterrence variables are only defined over the 1984 to 1997 period. Moreover, given that the authors are attempting to represent the probability of execution as perceived by potential murderers, and given the paucity of evidence on how these expectations are formed, there seems little reason to strongly prefer one specification over the other. Thus, in Panel C, we rerun their regressions but note Zimmerman's argument that "any truly meaningful (subjective) assessment a potential murderer makes . . . is likely to be based upon the most recent information available to him/her."[66]

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an artificial negative correlation between execution and homicide rates.

64. Mocan & Gittings, *supra* note 11, at 478. While their data runs from 1977 to 1997, their complicated lag structure means that they can only estimate effects from 1984 onward.

65. Two types of coding errors were discovered. First, the authors attempted to drop all observations where the explanatory variable was the ratio of a positive value to zero but ended up both dropping the prior observation and including the variable they intended to drop, coded as the ratio of the numerator to 0.99. Second, in Models 3, 5, and 6, the execution rate was defined relative to the number of death sentences six years prior instead of seven years prior, as they did in their other specifications (and described in their text).

66. Zimmerman, *supra* note 11, at 170.

Table 6: Estimating the Impact of Executions on Murder Rates: Reanalyzing Mocan and Gittings: 1977-1997

	Dependent Variable:						
	Annual Homicides per 100,000 Residents$_{s,t}$					***Log Homicide Rate$_{s,t}$***	
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
	Panel A: Mocan and Gittings Results: Replication						
Executions$_{t-1}$ per Death Sentence$_{t-7}$	-0.60*			-0.63*	-0.63**	-0.05*	-0.05*
	(.35)			(0.34)	(.29)	(.03)	(.03)
Pardons$_{t-1}$ per Death Sentence$_{t-7}$		0.69**		0.73**		0.11***	
		(.32)		(.30)		(.03)	
Death Row Removals$_{t-1}$ per Death Sentence$_{t-6}$			0.17**		0.18**		0.02**
			(.07)		(.07)		(0.01)
Sample (1984-1997)	680	693	695	679	690	679	690
	Panel B: Correcting Programming Errors						
Executions$_{t-1}$ per Death Sentence$_{t-7}$	-0.50			-0.52	-0.59	-0.01	-0.02
	(.34)			(.33)	(0.39)	(0.03)	(0.02)
Pardons$_{t-1}$ per Death Sentence$_{t-7}$		0.63*		0.71**		0.09***	
		(.34)		(.30)		(0.03)	
Death Row Removals$_{t-1}$ per Death Sentence$_{t-6}$			0.24***		0.17*		0.01
			(.08)		(0.09)		(0.01)
Sample (1984-1997)	679	692	691	677	636	677	636
	Panel C: Measuring Deterrence Variables with a One-Year Lag on Full Sample						
Executions$_{t-1}$ per Death Sentence$_{t-1}$	0.03			0.01	0.01	0.01	0.01
	(0.14)			(0.13)	(0.14)	(0.01)	(0.01)
Pardons$_{t-1}$ per Death Sentence$_{t-1}$		0.41***		0.41***		0.05***	
		(.13)		(0.13)		(0.01)	
Death Row Removals$_{t-1}$ per Death Sentence$_{t-1}$			0.02		0.02		0.002
			(0.03)		(0.03)		(.002)
Sample (1978-1997)	986	984	921	977	918	977	918
	Implied Life-Life Tradeoff for Executions[(a)] **[95% Confidence Interval]**						
Panel A: Replication	4.4 [-1.8, 10.5]			4.6 [-1.4, 10.6]	4.6 [-0.5, 9.7]	2.2 [-1.2, 5.7]	2.3 [-1.3, 6.0]
Panel B: Corrected	3.4 [-2.6, 9.4]			3.6 [-2.2, 9.5]	4.2 [-2.6,11.1]	-0.2 [-3.7, 3.4]	0.5 [-2.7, 3.7]
Panel C: Full Sample	-1.2 [-3.1, 0.7]			-1.1 [-2.8, 0.7]	-1.1 [-3.0, 0.8]	-1.6 [-2.7, -0.5]	-1.6 [-2.8, -0.4]

Notes: Panel A shows the estimated effect of executions on the homicide rate, where the specification and data are from Mocan & Gittings, *supra* note 11, at 464 tbl.2. Panel B corrects some programming errors, and the resulting estimated effects of execution on murder rates are no longer significant. Panel C alters the measure of the deterrence variables and uses the full sample period from 1978 to 1997, which leads to a positive correlation between

execution and homicide rates. The bottom portion of the table shows the corresponding life-life tradeoff numbers, where negative numbers mean that, on net, lives are lost for each execution.

Controls include lags of the homicide arrest rate, death sentence rate (conditional on arrest), prisoners per violent crime, prison death rate, as well as contemporary values of real per capita income, the unemployment rate, infant mortality rate, shares of the population who are: urban, black, aged 20-34, 35-44, 45-54, 55+, and dummy variables for whether a state has a Republican governor, whether the state drinking age is 18, 19, or 20, and the 1995 Oklahoma City bombing. Population-weighted least squares regression is used with standard errors clustered at the state level. ***, **, and * denote statistically significant at 1%, 5%, and 10%, respectively.

(a) Implied life-life tradeoff reflects net lives saved evaluated for a state with the characteristics of the average death penalty state in 1996.

In Panel C, we construct each of the deterrence variables as ratios of variables lagged one year (instead of seven).[67] This relatively small change yields positive, albeit insignificant, coefficients. The difficulty in obtaining any consistent results is once again evident. Not only do the estimates of the effects of the execution rate vary significantly with only minor changes in specification, but the two related measures of the porosity of the death sentence now yield sharply different results, with the pardon rate robustly and positively associated with homicide, but the coefficient on the broader death row removal rate small and insignificant.

D. *Other Studies*

At least four other studies are worthy of brief discussion. First, Zimmerman analyzes a state panel of homicide rates over the period from 1978 to 1997, and his OLS regressions suggest no relationship between homicide rates and the execution rate. (We comment on his instrumental variables results in the next Part.) This is consistent with our reanalysis of Mocan and Gittings's data over the same time period.

Second, Dezhbakhsh, Rubin, and Shepherd analyze a quite impressive county-level dataset covering the period from 1977 to 1996. While their paper only reports instrumental variables results (more on these below), the authors have generously shared their data with us, and we have computed simple panel OLS results, borrowing all other aspects of their specification. Again, we find wildly inconsistent results across specifications, ranging from statistically

67. The immediate advantage of using the one-year lag is that the sample size increases by fifty percent from what Mocan and Gittings present. We remain unsure whether Mocan and Gittings or Zimmerman (or neither) is correct on the appropriate lag structure because there is little evidence on how criminals form their expectations. Even so, if a small change among reasonable choices makes a large difference in the estimation, then the results are too fragile to warrant reliance.

significant antideterrent effects to statistically significant deterrent effects. Disaggregating to the county level does not alleviate the problems we have seen with state-level analyses. This should not be surprising because the study's key explanatory variable, the execution rate, is still measured at the state level.[68]

Third, Dale Cloninger and Roberto Marchesini have analyzed data on the recent Illinois moratorium experiment.[69] Governor Ryan issued a moratorium on executions in January 2000 and subsequently commuted all death sentences in January 2003. It seems useful to compare the evolution of homicides in Illinois subsequent to January 2000 with the same evolution in the rest of the country. The methods employed by Cloninger and Marchesini reflect the authors' backgrounds as financial economists: they apply an event study methodology, examining the usual co-movement of the number of homicides in Illinois with the number of homicides nationally and then asking whether this relationship changed following the Illinois moratorium.

The main difficulty with their analysis is that they follow finance methods a little too closely. In finance, the variable of interest is usually a stock return, so it is standard practice to take a stock index and analyze its percentage change over some period. As such, Cloninger and Marchesini analyze the relationship between twelve-month-ended *growth* in the homicide rate in Illinois and their comparison sample. However, the debate over the efficacy of capital punishment is usually posed as asking whether it leads to lower *levels* of homicide, rather than a differential growth rate.[70] Moreover, differential growth rates—if interpreted literally—would lead to predictions that homicide rates may head to 0% or 100%.

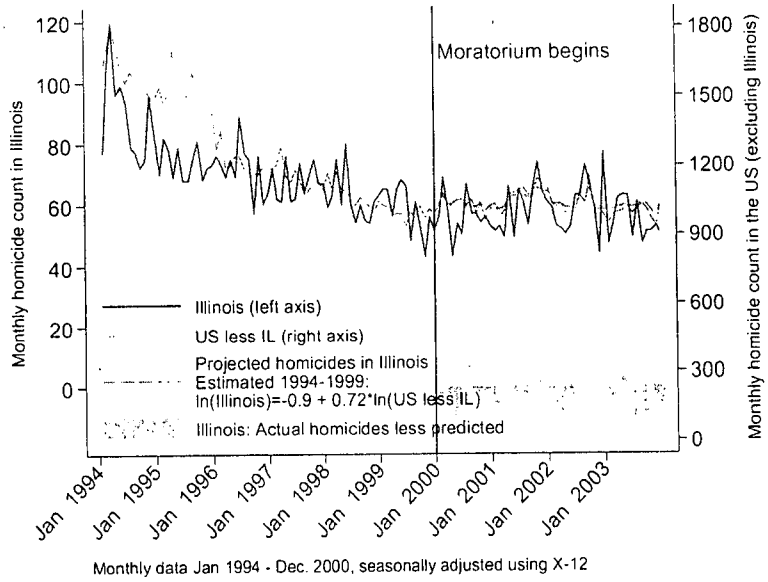
Cloninger and Marchesini generously shared their monthly data (covering January 1994 to December 2003) with us, and Figure 5 shows the seasonally adjusted number of homicides in Illinois and in the rest of the United States through this time period. The close relationship between the two again supports the contention that *levels* of homicide provide a useful baseline against which to compare the subsequent experience in Illinois. Figure 5 also shows a dashed line: the projected number of homicides in Illinois if the relationship between

68. There are potentially further issues arising from the unreliability of county-level data. *See* Michael D. Maltz & Joseph Targonski, *A Note on the Use of County-Level UCR Data*, 18 J. QUANTITATIVE CRIMINOLOGY 297, 298 (2002); *see also* Ian Ayres & John J. Donohue, III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 STAN. L. REV. 1193 (2003).

69. Dale O. Cloninger & Roberto Marchesini, *Execution Moratoriums, Commutations and Deterrence: The Case of Illinois* (Econ. Working Paper Archive, Working Paper No. 0507002, 2005), *available at* http://econwpa.wustl.edu:80/eps/le/papers/0507/0507002.pdf (last visited Dec. 4, 2005).

70. The homicide rate is probably preferable to the homicide count, although we analyze the latter here to maintain continuity with Cloninger and Marchesini, noting that population growth is unlikely to have driven much of a gap between movements in homicide rates and levels over such a short time horizon.

Figure 5. Homicides Before and After the Illinois Moratorium



the series for Illinois and the United States over the period from 1994 to 1999 had continued over the next four years. In an event study, one compares the subsequent evolution of the variable of interest with this projection, and the bars show the gap between Illinois homicides and the projected number of homicides.

It should be clear from inspecting the graph that the relationship between homicides in Illinois and the rest of the country is roughly unchanged since the moratorium. If anything, the bars appear persistently negative, suggesting that Illinois experienced about three fewer homicides per month than one would have expected based upon its previous relationship with the rest of the country.[71]

Finally, Cloninger and Marchesini[72] applied similar methods to analyze another quasi-experiment: a period from 1996 to early 1997 in which executions ground to a halt until the Texas Court of Criminal Appeals ruled on

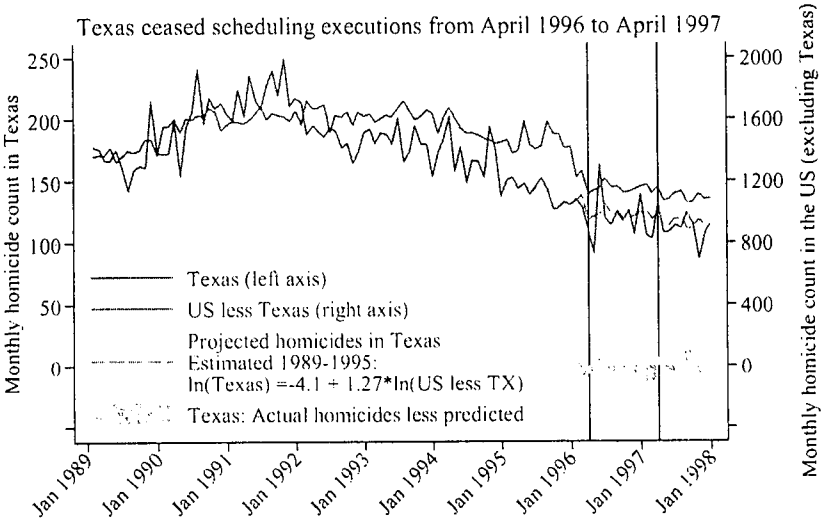
71. The post-moratorium decline in homicides is actually statistically significant, although given how sparse this specification is, we do not want to overstate this point. Over the full sample, we estimated:

$$ln(Illinois\ homicides)_t = \underset{(0.90)}{-1.04} + \underset{(0.13)}{0.74}*ln(US\text{-}IL\ homicides)_t - \underset{(0.03)}{0.06}\ Post\ 2000_t$$

where we report Newey-West standard errors to account for up to sixth-order autocorrelation. Using this full-sample estimate, murders were six percent lower during the moratorium.

72. Dale O. Cloninger & Roberto Marchesini, *Execution and Deterrence: A Quasi-Controlled Group Experiment*, 33 APPLIED ECON. 569 (2001).

Figure 6. Homicides Before and After the Texas Stay



Monthly data January 1989-December 1997, seasonally adjusted using X-12.

the legality of new legislation limiting state habeas corpus petitions.[73] Figure 6 shows our reanalysis of these data, focusing again on the number of homicides (rather than their rate of change), and once again we find no evidence of an abnormal rise (or fall) in Texas homicides during this period.

V. INSTRUMENTAL VARIABLES ESTIMATES

The studies that we have examined so far simply highlight the *correlation* between execution and homicide rates while controlling for other factors. Although their authors typically have premised their analyses on the assumption that changes in execution policy *cause* changes in crime rates, there are other possibilities that might explain this correlation.

First, a "get tough on crime" attitude might lead to longer jail sentences,[74] increased use of life without parole,[75] harsher prison conditions,[76] as well as increased use of the death penalty. It might be that criminals are responding to these other changes in deterrence, and given that the existing estimates contain no (or inadequate) controls for these factors, they may be driving the correlation between homicides and executions. There are good reasons to be

73. *Ex parte* Davis, 947 S.W.2d 216 (Tex. Crim. App. 1996); *see also* Kate Thomas, *Texas Executions Take a Sabbatical*, NAT'L L.J., Aug. 26, 1996, at A8.

74. Passell & Taylor, *supra* note 29.

75. Fagan Statement, *supra* note 24.

76. Katz, Levitt & Shustorovich, *supra* note 10.

concerned by this possibility, as very few criminals are potentially affected by the death penalty, while many inmates are likely to be affected by these broader changes in deterrence policies.

Second, public support for the death penalty may be a function of current crime rates, and as such, causation may run from homicides to executions. This could go in either direction: a high homicide rate might make the public frustrated enough to increase use of the death penalty; alternatively if a higher homicide rate leads to more executions (for a fixed execution rate), this might undermine support for the death penalty.

Finally, and more generally, there may be a large number of unobservable factors changing through time that are correlated with death penalty usage and that also affect homicide. In the absence of a comprehensive set of control variables, these unobserveable factors might be driving a spurious correlation between executions and the death penalty.

The only way to resolve clearly the issue of causation would be to run an experiment in which we would implement the death penalty more (or less) vigorously in some states and in some years than in others, and then compare the outcomes. Of course experimenting with capital punishment laws in this manner does not seem particularly feasible, but one might imagine quasi-experiments: perhaps there are some factors that might change death penalty policy but do not otherwise affect homicide rates. These factors are called "instrumental variables" and can be used to analyze the effects of such quasi-experiments. Naturally, the credibility of such an exercise depends critically on whether the instrumental variables really do generate useful experiments that change the death penalty rates but do not affect other factors.

Given the promise that the instrumental variables approach holds for resolving questions of causality, it is not surprising that Sunstein and Vermeule seem to repose the greatest confidence in a recent application of this method by Dezhbakhsh, Rubin, and Shepherd.

To briefly review that study, Dezhbakhsh, Rubin, and Shepherd analyze county data from 1977 to 1996, using data provided by John Lott and David Mustard.[77] Following Ehrlich, their paper posits that homicide rates are a function of three primary deterrence variables: homicide arrest rates, the probability of a death sentence conditional on arrest, and the probability of execution conditional on a death sentence. Lott and Mustard's data allow the authors to account for a range of other factors, so they also add controls for the assault rate; the robbery rate; real per capita personal income; real per capita unemployment insurance payments; real per capita income maintenance payments; population density; the proportion of the population aged 10-19, 20-29; black, white, or other; male or female; and NRA membership. While they have county-level data for their dependent variable (the homicide rate), the

77. *See* Dezhbakhsh, Rubin & Shepherd, *supra* note 11.

of misspecification,[86] or simply noise.

In sum, given the sensitivity of these results to rather small and sometimes arbitrary changes, one has little reason to prefer the conclusion that the death penalty will save lives to the conclusion that scores will die as a result of each execution.

A. *Problems with Invalid Instruments*

We now turn to evaluating in greater detail the instrumental variables procedure employed. Recall that the instrumental variables procedure yields valid results if the raw number of prison admissions, police payrolls, judicial expenditures, and the Republican presidential vote share in each state provide "experiments" which change the deterrence variables, but are not related in any other way to the homicide rate. If these variables are good instruments, then they should be correlated with the endogenous deterrence variables: the probability of arrest for murder, the probability of receiving a death sentence conditional on murder arrest, and the probability of execution given death sentence. It seems fairly clear that each of these instrumental variables will be correlated with crime rates; however, the credibility of this exercise depends vitally on whether the sole mediating links are changes in the murder arrest rate and application of the death penalty. This is a much tougher case to make. While these identifying assumptions are untestable in many applications, in this case there are a number of approaches we can take to examine their plausibility.

The top panel in Table 8 simply replicates Dezhbakhsh, Rubin, and Shepherd's main estimates (again showing the estimates as the number of lives that will be saved per execution). Recall that if the identifying assumptions are true, variation in the instruments should not affect the homicide rate, except through its influence on executions. In Panel B, we restrict the sample to those observations occurring when the state did not have the death penalty.[87] As such, there is no way for changes in the instruments to yield useful experiments changing the execution rate for this subsample. Thus, Panel B can be thought of as depicting the "effect" of "exogenously" executing prisoners in states that have no death penalty (an obvious oxymoron).[88] The number of state-year observations in which there is no death penalty is rather limited—about one-fifth of the sample—and hence the coefficients are not quite as precisely

86. That is, it may be that the relationship between the endogenous deterrence variables and the exogenous instrumental variables varies across states, rather than that the relationship between homicide and deterrence varies.

87. To generate our Panel B estimates, we first run the first-stage regression. Then, we drop all observations for which the state is operating under a legal death penalty regime and run the second-stage regression on this subset of the data.

88. Dezhbakhsh, Rubin, and Shepherd's instruments would pass this test of validity if there was no correlation between the instruments and homicide rates in states without the death penalty. Panel B of Table 8 shows that this is not the case.

estimated. Nonetheless, the effects are positive in five of the six columns and tend to be larger than the effects estimated for the full sample (Panel A). The most obvious interpretation is that the instruments (or their correlates) affect homicide rates directly—through channels other than death row—and hence that the assumption required for these instrumental-variables estimates to be valid is violated.

Table 8: Estimating Net Lives Saved per Execution: Exploring the Validity of the Dezhbakhsh, Rubin, and Shepherd (DRS) Instrumental Variables, 1977-1996

Dependent Variable: *Annual Homicides per 100,000 Residents*$_{c,t}$						
	(1)	(2)	(3)	(4)	(5)	(6)
	Panel A: Replication of DRS, Implied Life-Life Tradeoff[a]					
Net Lives Saved	36.05***	19.70***	51.99***	18.45***	36.27***	33.26***
	(5.83)	(3.32)	(5.14)	(4.43)	(1.94)	(4.01)
	Panel B: "Effects" in State-Years in Which There Is No Death Penalty					
Net Lives Saved	74.00**	71.48***	163.87***	-70.06***	103.01***	108.07***
	(29.62)	(8.80)	(21.64)	(15.40)	(5.34)	(14.98)
	Panel C: Restricting the Instrumental Variables to Police Payrolls, Judicial Expenditure, and Prison Admission[b]					
Net Lives Saved	-85.57***	-36.81	-71.95***	-52.30***	-23.00***	-85.67***
	(13.72)	(28.30)	(14.91)	(9.15)	(8.14)	(13.62)
	Panel D: Restricting the Instruments to the Republican Vote Share[c]					
Net Lives Saved	429.43***	81.98***	286.45***	288.76***	53.06***	242.29***
	(21.16)	(4.56)	(11.06)	(15.66)	(2.24)	(9.33)

Notes: Panel A replicates Panel B of Table 7, showing the DRS estimates of the number of net lives saved per execution. Specification and data are from Dezhbakhsh, Rubin & Shepherd, *supra* note 11, at tbls.3-4. For further details, see notes to Table 7. Panel B tests the DRS assumption that their instruments only affect homicides through their effect on executions by showing that the predicted number of executions are highly correlated with murder rates even in states with no executions. Panel C shows that if one does not use the Republican vote share as an instrument, the death penalty leads to more murders, while Panel D shows that using only the Republican vote share variables as instruments, the apparent beneficial effect of the death penalty skyrockets.

(a) Implied life-life tradeoff reflects net lives saved evaluated for a state with the characteristics of the average death penalty state in 1996.

(b) Panel C regression includes the Republican vote share variables as controls, but not as instruments.

(c) Panel D regression includes police payrolls, judicial expenditure, and prison admissions as controls, but not as instruments.

There exists an alternative way to test the validity of instrumental

variables, based on Jerry Hausman's overidentification test.[89] The logic of an overidentification test is that if the "experiments" in deterrence generated by the instrumental variables are valid, then the results from one set of experiments should be similar to those from another set of experiments. The specific system of equations offered by Dezhbakhsh, Rubin, and Shepherd cannot be estimated unless they have three instruments (because they need at least one exogenous instrument for each of their three endogenous variables); they actually employ four separate instruments (or nine, if the six Republican vote-share variables are counted separately). Thus, an overidentification test essentially suggests that if these instruments are all valid, then the coefficients should remain stable as we drop some subset of the instruments. Shepherd discusses these regressions, stating that "tests for overidentification indicate that the model is correctly specified and employs valid instruments."[90] We subjected these models to a battery of overidentification tests and could not find any evidence consistent with this claim. For instance, Panel C shows what happens when the partisanship variables are no longer regarded as instruments.[91] We see that the "experiments" generated by the combined forces of police payrolls, judicial expenditures, and prison admissions suggest that more executions lead to substantially *more* homicides. Panel D shows the complementary set of regressions: the six partisanship variables are retained as instruments, but police payrolls, judicial expenditures, and prison admissions are included as control variables. The variation induced by these variables yields dramatically different and implausibly large estimates of the deterrent effect of the death penalty.

The massive change in these coefficients suggests that at least some of these instrumental variables are not valid instruments. The large deterrent effect noted in their baseline regressions appears to be driven entirely by the partisan variables. As an aside, recall that Dezhbakhsh, Rubin, and Shepherd received their county data from John Lott, who had created the dataset to examine the impact of laws affording the right to carry concealed handguns. Like Lott, Dezhbakhsh, Rubin, and Shepherd use the exact same Republican vote-share variables as instruments in their analysis. In so doing, Lott was implicitly assuming that this political variable was influencing homicide only through its impact on arrest rates and the likelihood of adoption of a right-to-carry concealed handgun law. But in using the same Lott instruments, Dezhbakhsh, Rubin, and Shepherd assume that the political variables only influence crime rates through their effect on murder arrests, death sentences, and execution. Thus, it seems difficult to reconcile the competing assumptions made by these

89. *See* Jerry A. Hausman, *Specification Tests in Econometrics*, 46 ECONOMETRICA 1251 (1978).

90. Shepherd, *Deterrence Versus Brutalization*, *supra* note 46, at 227.

91. That is, we include the partisanship variables as control variables—in both first- and second-stage regressions.

two sets of authors about how this political variable influences crime in a state.[92] In fact, Shepherd has used three of the four Dezhbakhsh, Rubin, and Shepherd instruments—police expenditure, judicial expenditure, and percentage voting Republican in the last presidential election—as instruments in analyzing the deterrent impacts of three other legislative measures: California's strike-based sentencing scheme on crime,[93] truth-in-sentencing legislation,[94] and sentencing guidelines.[95] The use of the same instruments in multiple studies underscores that the requirements for valid instrumentation of the death penalty must be violated if these instruments are influencing crime through these other avenues unrelated to execution.

An additional way to test whether variation in these instruments causes (or reflects) changes in crime markets not mediated by the death penalty (thus invalidating the crucial identifying assumption) is to test whether the variation in executions generated by them is correlated with other crimes for which the death penalty does not apply. We have run these separate regressions using each of the FBI index crimes as individual dependent variables, but otherwise applying the Dezhbakhsh, Rubin, and Shepherd specification.[96] The results are not encouraging for Dezhbakhsh, Rubin, and Shepherd, as they suggest that executions cause more rape, assault, burglary, and larceny, and less auto theft and homicide; the effects on robbery are inconclusive. In terms of statistical significance, the relationship between the homicide and execution rates is typically less reliable (statistically significant) than that between the execution rate and rape, aggravated assault, burglary, and larceny.[97]

92. As a further aside, note that Rubin and Dezhbakhsh rerun Lott's analysis, applying these same variables as instruments for concealed handgun laws, referring to this method as "more appropriate." Paul H. Rubin & Hashem Dezhbakhsh, *The Effect of Concealed Handgun Laws on Crime: Beyond the Dummy Variables*, 23 INT'L REV. L. & ECON. 199, 206 n.11 (2003).

93. Joanna M. Shepherd, *Fear of the First Strike: The Full Deterrent Effect of California's Two- and Three-Strikes Legislation*, 31 J. LEGAL STUD. 159 (2002).

94. Joanna M. Shepherd, *Police, Prosecutors, Criminals, and Determinate Sentencing: The Truth About Truth-in-Sentencing Laws*, 45 J.L. & ECON. 509 (2002).

95. Joanna M. Shepherd, *Are Criminals Like Us? Risk Attitudes, Sentencing Guidelines, and Increased Crime* (Emory Law & Econ. Research Paper No. 04-03, 2004), *available at* http://ssrn.com/abstract=370421 (last visited Dec. 4, 2005).

96. For obvious reasons, we need to drop aggravated assault and robbery as controls when either is the dependent variable; for other index crimes and in all other respects, we leave their specification unchanged.

97. Note that Dezhbakhsh, Rubin, and Shepherd discuss this approach directly in their paper:

> We also repeat the analysis, using as our dependent variable six other crimes: aggravated assault, robbery, rape, burglary, larceny and auto theft. If executions were found to deter other crimes besides murder, it may be the case that some other omitted variable that is correlated with the number of executions is causing crime to drop across the board. However we find no evidence of this. Of the thirty-six models that we estimate (six crimes and six models per crime), only six exhibit a negative correlation between crime and the number of executions. These cases are spread across crimes with no consistency as to which crime decreases with executions.

Given the apparent problems with these instrumental-variables estimates, it seems reasonable to try to figure out what is going on and to see whether the estimates are consistent with their theory. Specifically, Dezhbakhsh, Rubin, and Shepherd provide a theoretical rationale for their instruments:

> Police and judicial-legal expenditure . . . represent marginal costs of enforcement. More expenditure should increase the productivity of law enforcement or increase the probabilities of arrest, and of conviction, given arrest. Partisan influence is used to capture any political pressure to "get tough" with criminals, a message popular with Republican candidates. . . . Prison admission is a proxy for the existing burden on the justice system; the burden may affect judicial outcomes.[98]

Table 9 reports the Dezhbakhsh, Rubin, and Shepherd first-stage regressions—always a useful diagnostic, but something not shown in their paper. For brevity, we simply show the coefficients from their preferred specification (see Model 4 in Table 8).

Having estimated the first-stage regression, we can compute the (reduced-form) effects of a change in each of the instrumental variables on the homicide rate. This value is shown in the final column, which comes from multiplying the coefficient in each column by the coefficient of the relevant instrument in the second-stage regression. Note that contrary to their theorizing, increases in police spending and judicial spending are associated with a *higher* murder rate. Moreover, the coefficients on the Republican share of the vote in the six individual elections—which we saw in Panel C of Table 7 to have such a powerful effect on the deterrence estimates—change substantially from election to election. That is, the effect on deterrence policy of having more Republican voters bounces back and forth across various elections, again counter to the theoretical rationale that Republican majorities would be tougher on crime. Moreover, these estimates bounce around in a particularly counterintuitive manner: increased voting for Reagan in 1980 was associated with a deterrent effect, while the effects of Reagan in 1984 were equal and opposite; increased voting for Bush in 1988 was associated with an antideterrent effect, while states voting strongly for Bush in 1992 had the opposite result.

Dezhbakhsh, Rubin & Shepherd, *supra* note 11, at 365 n.21. That is, while they claim that six of thirty-six estimates showed a significant pseudo-deterrent effect and were spread across crimes with no consistency, we found six of six estimates for auto theft and two of six robbery estimates yielded significant pseudo-deterrent effects. Moreover, they neglected to mention that all six rape estimates, all six assault estimates, four of six robbery estimates, all six burglary estimates, and all six larceny estimates yielded a statistically significant pseudo-antideterrent effect. Both the pseudo-deterrent and pseudo-antideterrent estimates suggest that the instrumental variables are correlated with other developments in crime markets, which would render them invalid instruments for Dezhbakhsh, Rubin, and Shepherd's analysis.

98. *Id.* at 357.

Table 9. Do the Dezhbakhsh, Rubin, and Shepherd Instruments Have the Predicted Effects on Endogenous Deterrence Variables in Their First-Stage Regressions? (1977-1996)

	Dependent variable			Net Effect on Homicide Rate[(a)]
	Probability of Arrest	Probability of Death Sentence Given Arrest	Probability of Execution Given Death Sentence	
	(1)	(2)	(3)	(4)
Police Spending	0.03 (0.023)	-0.002*** (0.000)	-0.05*** (0.004)	0.08
Judicial Spending	-0.22*** (0.034)	0.01*** (0.001)	-0.04*** (0.006)	0.58
Prison Admission	0.01*** (0.002)	-0.0001*** (0.000)	0.004*** (0.000)	-0.04
1976 * Republican Vote Share (Ford)	-0.66** (0.311)	0.03 (0.083)	0.49*** (0.053)	0.08
1980 * Republican Vote Share (Reagan I)	0.16 (0.202)	0.004 (0.004)	0.02 (0.036)	-0.45
1984 * Republican Vote Share (Reagan II)	-0.64*** (0.196)	0.04*** (0.004)	0.29*** (0.035)	0.54
1988 * Republican Vote Share (Bush I)	-0.25 (0.216)	0.06*** (0.004)	-0.03 (0.038)	0.41
1992 * Republican Vote Share (Bush II)	-0.04 (0.215)	0.05*** (0.004)	0.14*** (0.039)	-0.45
1996 * Republican Vote Share (Dole)	-0.82*** (0.212)	0.01** (0.004)	0.96*** (0.040)	-0.77
N	48,070	51,143	57,637	
	Second Stage			
Coefficients	-2.27*** (0.50)	-3.62 (14.53)	-2.71*** (0.62)	

Notes: Using the data, source, and specification from *supra* note 11, at 363 tbl.4, Model 4, this table illustrates the impact of the Dezhbakhsh, Rubin, and Shepherd instrumental variables on the three endogenous deterrent variables (Columns 1 through 3) and on homicide rates (Column 4). Contrary to their articulated rationale for these instruments, police spending, judicial spending, and Republican vote share in 1976, 1984, and 1988 correlate with higher murder rates. The police and judicial spending variables are expressed in billions of dollars. Coefficients on prison admissions and vote share variables have been multiplied by 1000 and 100, respectively. Standard errors are in parentheses, and ***, **, and * denote statistically significant at 1%, 5% or 10%, respectively.

(a) Column 4 is a simple calculation reflecting the direct effect of a change in each independent variable on the homicide rate, as mediated through each of the endogenous variables. That is, Column 4 is the sum of the first stage coefficients multiplied by the corresponding second-stage coefficients (listed in the bottom row).

B. *Problems with Statistical Significance*

At this point we have shown that the Dezhbakhsh, Rubin, and Shepherd results are highly sensitive in a range of dimensions and that both the sign and magnitude of the estimates vary wildly. From a statistical standpoint, what is most surprising is that each estimate—while often dramatically different from other estimates—also appears to be estimated quite precisely. That is, the standard errors on all of these results are quite small, and the statistical significance of the results quite substantial. This invites the inference that the statistical significance of these results is considerably overstated.

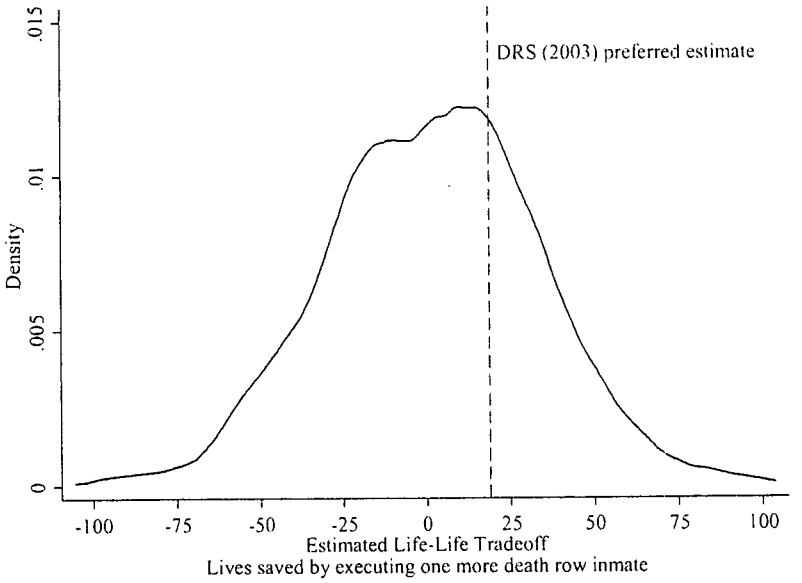
To better illustrate that the Dezhbakhsh, Rubin, and Shepherd model is not yielding reliable estimates of the effect of an additional execution on murder, we ran the following experiment using their preferred specification as our base model. We took the time series of the independent variables for each county and matched it to the time series of the homicide rate for a random county. Thus, the independent variables are, *by construction*, unrelated to the dependent variables (conditional on year fixed effects).[99] We then ran the Dezhbakhsh, Rubin, and Shepherd regression (using their preferred Model 4) and collected the relevant coefficients. We repeated this process 1000 times and, hence, generated the distribution of the estimated effects across 1000 instances *in which there is no true underlying relationship*.

Figure 7 depicts the probability density function of these estimates, and highlights where the Dezhbakhsh, Rubin, and Shepherd central estimate falls in this distribution. In these experiments, the *uncorrelated* data yielded coefficients at least as large as their estimate 30% of the time, and it yielded coefficients with an absolute value at least this big 56% of the time. That is, this exercise suggests that even if there is absolutely no relationship between the death penalty and murder, there is a substantial probability that the Dezhbakhsh, Rubin, and Shepherd model will, by chance, generate results suggesting there is a large and statistically significant effect. By contrast, the *t*-statistic that they reported ($t = 4.4$) suggests that under the same null, estimates as large as theirs occur less than 0.001% of the time.

It is now well known that there are at least two problems with the standard errors that Dezhbakhsh, Rubin, and Shepherd report. First, the data are highly autocorrelated, which leads to substantial underestimates of standard errors (and thus overestimation of precision). To explain briefly, this year's homicide and execution rates often closely resemble last year's, and so to treat the two observations as independent experiments would understate uncertainty about the relationship between the two. Second, despite the fact that the dependent

99. Formally, this is a randomization test, using block randomization. *See* BRYAN F.J. MANLY, RANDOMIZATION, BOOTSTRAP AND MONTE CARLO METHODS IN BIOLOGY (2d ed. 1997). We also obtained qualitatively similar results when randomizing the residuals instead of the independent variable, as suggested in Peter E. Kennedy, *Randomization Tests in Econometrics*, 13 J. BUS. ECON. STAT. 85 (1995).

Figure 7. Dezhbakhsh, Rubin, and Shepherd (DRS) Distribution of Estimates Under the Null of No Deterrent Effect



variable is measured at the county level, the independent variables of interest in these regressions are measured at the state level. If there are state-specific shocks through time—reflecting factors like unmodelled changes in state policies, changes in state criminal markets, and the like—then this again will lead standard OLS methods to overstate their precision. The intuition is that by disaggregating to the county level, one might gain a false sense of security that each county provides an independent experiment, when counties within a state are likely to be subject to correlated shocks.

Both of these facts are already well understood in the empirical literature,[100] and indeed, Eric Helland and Alex Tabarrok have made these points quite explicitly regarding Lott and Mustard's investigation of the right-to-carry concealed handgun laws.[101] The exercise depicted in Figure 7 provides one way of assessing statistical significance in light of autocorrelation, but it does not further take account of the correlation across counties within the same

100. *See* Brent R. Moulton, *An Illustration of a Pitfall in Estimating the Effects of Aggregate Variables in Micro Units*, 72 REV. ECON. & STAT. 334 (1990) (on clustering); Bertrand, Duflo & Mullainathan, *supra* note 45 (on autocorrelation).

101. *See* Eric Helland & Alex Tabarrok, *Using Placebo Laws To Test "More Guns, Less Crime,"* 4 ADVANCES ECON. ANALYSIS & POL'Y 1 (2004). Given that the Dezhbakhsh, Rubin, and Shepherd data are a near-identical version of the Lott and Mustard data and that the structure of their estimating equations is similar, it seems natural to suspect that the same issues arise.

state. As such, we followed Marianne Bertrand, Esther Duflo, and Sendhil Mullainathan[102] and reestimated the Dezhbakhsh, Rubin, and Shepherd models, correcting the standard error estimates to take account of correlation both across counties within states and within states and counties through time. These adjustments obviously do not change the estimated coefficients, and thus the estimated life-life tradeoff for Dezhbakhsh, Rubin, and Shepherd's preferred Model 4 remains at 18.5. However clustering by county leads the standard error to rise from 7.1 to 37.6, and clustering by state leads the estimated standard error to rise further to 51.3; block-bootstrap standard errors yielded similar estimates. That is, the 95% confidence interval around their central estimate ranges from the suggestion that each execution causes 82 more murders to each execution saving 119 lives.

Some of these same problems with statistical inference recur in Paul Zimmerman's 2004 study.[103] While several aspects of his approach are similar to those of Dezhbakhsh, Rubin, and Shepherd, there are two important differences: he exploits state-level data (over the sample from 1978 to 1997), and he uses a different set of instrumental variables. Specifically, Zimmerman argues that characteristics of homicides affect the resolve of the authorities to apply the death penalty, and so he employs variables describing homicides in the current and previous year as his instrumental variables.[104] Analyzing the subset of variation in executions that is correlated with his instruments, Zimmerman's preferred estimate suggests that each execution saves 19 lives, and his reported 95% confidence interval ranges from 7 to 31 lives. While we cannot test his identifying assumption (although we may be skeptical about it), we can test whether his results reflect chance, or a more fundamental correlation. Using Zimmerman's data, we reran his regressions so as to correct the standard error for clustering within states through time; we also estimated block-bootstrap standard errors. These exercises suggested that the true 95% confidence interval runs from each execution causing 23 homicides to each preventing 54 homicides.

102. *See* Bertrand, Duflo & Mullainathan, *supra* note 45, at 249.

103. *See* Zimmerman, *supra* note 11, at 163.

104. Thus, Zimmerman's instruments include: an indicator for whether an offender was released from death row in the previous year; an indicator of whether there was a botched execution in the previous year; and both contemporaneous and once-lagged values of the proportion of murders committed by strangers, by nonwhites, and under nonfelony-related circumstances. Of course if certain classes of homicides simply vary more than others, their share in the total will be directly correlated with the homicide rate, invalidating the use of these variables as instruments.

VI. A PARTIAL RECONCILIATION: LACK OF STATISTICAL POWER AND REPORTING BIAS

Our analysis of the effects of judicial and legislative experiments yielded quite inconclusive results. Neither adoption nor abolition of the death penalty could reliably be causally linked to homicide rates. Our reanalysis of Katz, Levitt, and Shustorovich's data shows that even with the largest samples analyzed in the literature, it is difficult to isolate any robust correlation between homicide rates and changes in the intensity with which the death penalty applies. That this is true even when analyzing data from fifty states over the period from 1934 through 2000 is perhaps surprising, although this could be taken to buttress the view that the true effect is reasonably close to zero.

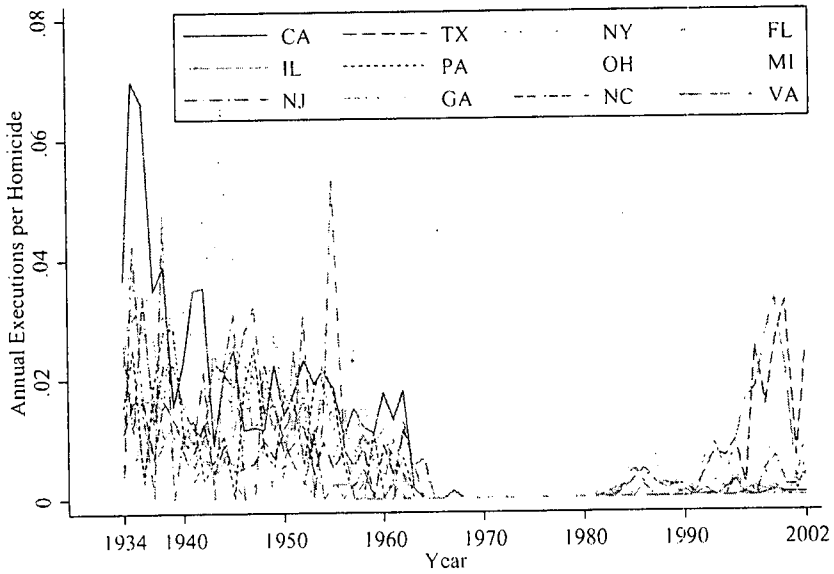
A set of studies has analyzed execution data over much shorter, more recent (post-moratorium) time periods and purports to find reliable relationships between executions and homicides.[105] While the published estimates in this set of studies point to a deterrent effect, our reanalysis shows that small changes in specifications, samples, or functional form can dramatically change the results. Indeed, several of the more expansive specifications point to an antideterrent effect of the death penalty. What then is to be made of this highly volatile set of estimates? Unless one has a particularly strong prior belief about the "correct specification" (and we do not believe that economic or econometric theory are sufficiently well developed here that one would be warranted), one cannot confidently conclude that the evidence points to either deterrent or antideterrent effects. The difficulty in drawing strong conclusions is not simply one of the statistical (in)significance of the estimates: even when coefficient estimates are plagued by wide confidence intervals, they are still informative as to the "most likely" effects of the death penalty; yet, the "most likely" effect varies too widely across specifications to provide much guidance.

Moreover, it seems unlikely that *any* study based only on recent U.S. data can find a reliable link between homicide and execution rates. Figure 8 illustrates the difficulty facing researchers fixated on recent data, showing execution rates from 1934 to 2002 for the twelve largest states (accounting for around 60% of the U.S. population). The clear message is that there has been very little variation in execution rates since 1960 with which to reliably estimate any effects. Among these twelve states, there were very few executions between the early 1960s and the mid-1990s, and since then, only Texas and Illinois provide much variation. Moreover, the difficulty of finding reliable estimates is exacerbated by the fact that homicide rates typically show tremendous volatility both year to year and decade to decade.

The difficulty of discerning reliable *correlations* between execution policy

105. *See* Dezhbakhsh, Rubin & Shepherd, *supra* note 11; Mocan & Gittings, *supra* note 11; Zimmerman, *supra* note 11.

Figure 8. Execution Risk by State: Twelve Largest States



and homicides becomes even sharper when attempting to use instrumental variables methods to isolate *causal* effects because these methods focus on only the subset of the variation in executions that is deemed "exogenous." For most plausible sets of instrumental variables, only a small number of executions can be thought of as yielding the sorts of "experiments" that this method requires, so it is commensurately more difficult for these estimates to yield robust and significant estimates. Indeed, in the previous Part we saw that realistic approaches to measuring the standard errors in existing instrumental-variables estimates pointed to an extremely large degree of uncertainty about their true effects.

All told, estimates in the existing literature appear to be quite fragile in light of small changes to specification, sample, or functional form. Estimates from a variety of approaches yielded different signs and vastly different magnitudes, a pattern of results that is at least partly reconciled by more appropriate treatments of standard errors suggesting that much of this is natural sampling error. All of this said, Sunstein and Vermeule's reading of the literature led them to see a persistent pattern of robust deterrent effects reported in these same papers. What explains this disjunction? One possibility is simply that the published estimates are a nonrepresentative sample of the wider universe of estimates that we have sought to present. If this were true, then even a careful reading of published results would suffer from a simple sample selection bias.

"Reporting bias" refers to the possibility that published results are an

unrepresentative sample. There are several reasons why this might occur. The "file drawer problem" refers to the tendency of researchers not to report on approaches that "didn't work out," in the sense of not yielding statistically significant estimates. Alternatively, "publication bias" arises when journals only publish estimates that meet standard tests of statistical significance. "Data mining" or "specification search" may also occur if career-driven or ideologically motivated researchers face incentives to report specifications that yield statistically significant evidence or estimates in favor of their preferred position. That said, it is worth emphasizing that reporting bias may occur without any of the authors being aware of it: they might simply want to report useful findings, and evidence falsifying a null hypothesis is typically regarded as more valuable.

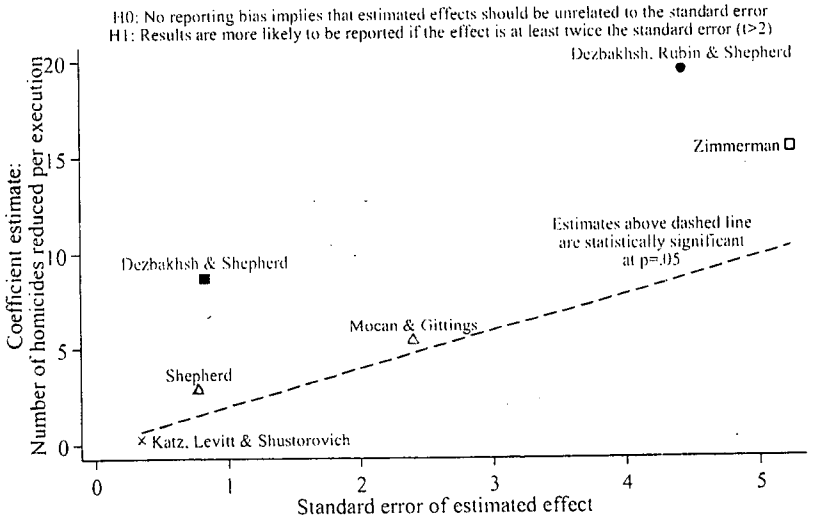
Fortunately, we can test for reporting bias.[106] The intuition for this test begins by noting that different approaches to estimating the effect of executions on the homicide rate should yield estimates that are somewhat similar. That said, some approaches yield estimates with small standard errors, and hence these should be tightly clustered around the same estimate, while other approaches yield larger standard errors, and hence the estimated effects might be more variable. Thus, there is likely to be a relationship between the size of the standard error and the variability of the estimates, but *on average there should be no relationship between the standard error and the estimated effect.* By implication, if there is a correlation between the size of the estimate and its standard error, this finding suggests that reported estimates comprise an unrepresentative sample. One simple possibility might be that researchers are particularly likely to report statistically significant results, and thus they only report on estimates that have large standard errors if the estimated effect is also large. If this were true, we would be particularly likely to observe estimates that are at least twice as large as the standard error, and therefore coefficient estimates would be positively correlated with the standard error.

In Figures 9 and 10, we compile each of the reported estimates of the average number of homicides prevented per execution in recent state or county panel-data studies, as well as the reported standard errors. To ensure that this sample is representative of the literature, we included all of the reported panel data estimates from the various papers cited by Sunstein and Vermeule, a list that coincides with Shepherd's congressional testimony.[107]

106. *See* Orley Ashenfelter, Colm Harmon & Hessel Oosterbeek, *A Review of Estimates of the Schooling/Earnings Relationship, with Tests for Publication Bias*, 6 LAB. ECON. 453 (1999).

107. Compiling the sample still involved some judgment calls. Our goal was to include all comparable aggregate estimates for the average impact of an execution on homicide rates across death penalty jurisdictions. Thus, we included the Mocan and Gittings, *supra* note 11, estimates of the effects of commutations or death row removals as estimates of the effects of an execution foregone, but we omitted the Paul R. Zimmerman, *Estimates of the Deterrent Effect of Alternative Execution Methods in the United States*, 65 AM. J. ECON. & SOC.

Figure 9. Reporting Bias in Estimated Effects of Executions on Homicide: Preferred Estimates Across Six Studies



Coefficients converted into homicides reduced for the average executing state in 1996. The central estimate from each study is shown.

Recall that if there is no reporting bias, then estimates of the effects of executions should be clustered around the same mean, albeit in a "cone" shape, as the variability of estimates rises (linearly) with the standard error. Moreover, there should be as many estimates in the top half of the cone as in the bottom half, and the estimated effect should be uncorrelated with the standard error. Instead, these data are strongly consistent with evidence of reporting bias. Figure 9 shows the "central" or "preferred" estimate from each study, and its corresponding standard error.[108]

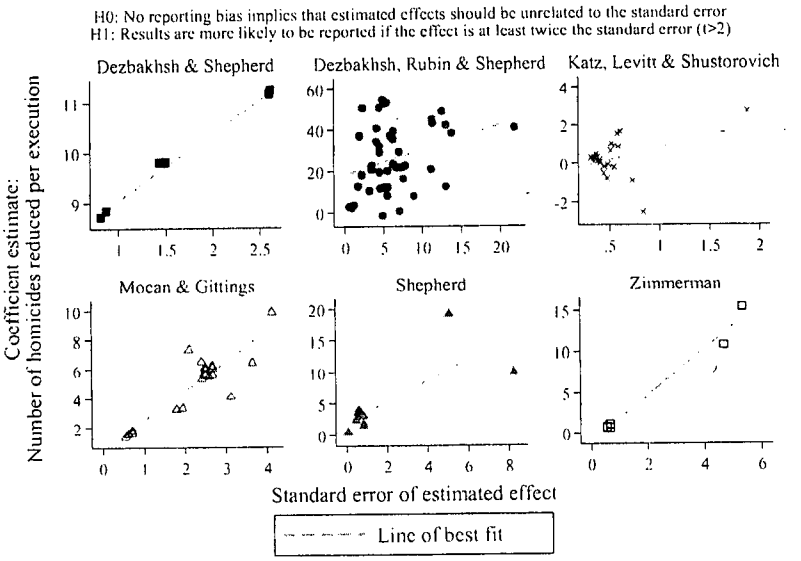
First, note that the reported estimates appear to be strongly correlated with their standard errors: we find a correlation coefficient of 0.88, which is both large and statistically significant. Second, among studies with designs that yielded large standard errors, only large positive effects are reported, despite the fact that such designs should be more likely to also yield small effects or

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(forthcoming 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=355783, estimates of the effects of execution broken down by execution method, the Shepherd, *Deterrence Versus Brutalization*, *supra* note 46, estimates broken down by state, and the Shepherd, *Murders of Passion*, *supra* note 46, estimates of the effect of executions on particular homicide types (although we include the aggregate estimates).

108. The central estimates are from Dezhbakhsh, Rubin & Shepherd, *supra* note 11, at 363 tbl.4, col.1; Dezhbakhsh & Shepherd, *supra* note 33, at tbl.7, col.1; Katz, Levitt & Shustorovich, *supra* note 10, at 327 tbl.2, col.6; Mocan & Gittings, *supra* note 11, at 464 tbl.2, col.1; Shepherd, *Murders of Passion*, *supra* note 46, at 310 tbl.3, col.1; and Zimmerman, *supra* note 11, at 183 tbl.4, col. 2.

Figure 10. Reporting Bias in Estimated Effects of Executions on Homicide: Reported Estimates Within Each Study



Coefficients converted into homicides reduced for the average executing state in 1996

even large negative effects. And third, we observe very few estimates with *t*-statistics smaller than two, despite the fact that the estimated deterrent effect required to meet this burden rises with the standard error.

Moreover, while Figure 9 focuses only on the central estimate from each study, Figure 10 shows the pattern of estimated coefficients and standard errors reported *within* each study. Typically these various estimates reflect an author's attempt to assess the robustness of the preferred result to an array of alternative specifications. Yet within *each* of these studies (except Katz, Levitt, and Shustorovich) we find a statistically significant correlation between the standard error of the estimate and its coefficient, which runs counter to one's expectations from a true sensitivity analysis.

In light of this analysis, it is probably not surprising that our sensitivity tests—sampling from the universe of unreported results—yielded more frequent and larger negative (that is, antideterrent) estimates and far more fragile estimates of the deterrent effect of the death penalty. Moreover, to the extent that we report only small deviations from a set of specifications that are likely afflicted by reporting bias, future researchers sampling from a wider array of econometric specifications and samples may find even more conflicting signals.

In sum, if the death penalty had a sufficiently powerful effect on murder rates (in either direction), we are confident that it would emerge from panel

data across all fifty states over a nearly seventy-year period. Relatively small effects—either stimulating or deterring homicide—will be hard to tease out, though, given the wide swings in homicide rates. Indeed, these wide swings might lead researchers to find spuriously large effects in small subsets of the data.

We are led to conclude that there exists profound uncertainty about the deterrent (or antideterrent) effect of the death penalty; the data tell us that capital punishment is not a major influence on homicide rates, but beyond this, they do not speak clearly. Further, we suspect that our conclusion that econometric studies are highly uncertain about the effects of the death penalty will persist for the foreseeable future. Quite simply, it is difficult to foresee any states providing a sharp enough policy shock for social scientists to reliably estimate an effect on homicide rates.[109] Consequently, we strongly suggest that substantial caution is required in interpreting *any* studies purporting to show that recent data can speak more clearly than earlier studies allowed.

CONCLUSION

We have surveyed data on the time series of executions and homicides in the United States, compared the United States with Canada, compared non-death penalty states with executing states, analyzed the effects of the judicial experiments provided by the *Furman* and *Gregg* decisions comparing affected states with unaffected states, surveyed the state panel data since 1934, assessed a range of instrumental variables approaches, and analyzed two recent state-specific execution moratoria. None of these approaches suggested that the death penalty has large effects on the murder rate. Year-to-year movements in homicide rates are large, and the effects of even major changes in execution policy are barely detectable. Inferences of substantial deterrent effects made by authors examining specific samples appear not to be robust in larger samples; inferences based on specific functional forms appear not to be robust to alternative functional forms; inferences made without reference to a comparison group appear only to reflect broader societal trends and do not hold up when compared with appropriate control groups; inferences based on specific sets of controls turn out not to be robust to alternative sets of controls; and inferences of robust effects based on either faulty instruments or underestimated standard errors are also found wanting.

Whether or not the death penalty has a deterrent effect is—as Sunstein and Vermeule rightly argue—a very important question. If policymakers are willing to debate the issue based on the consequences of capital punishment (as Sunstein and Vermeule urge them to do), then it is crucial to try to establish

109. For instance, note that the recent Illinois execution moratorium yielded a change in execution risk much smaller than the sorts of shocks seen during the first half of the century. For more information, see Figure 8, *supra*.

reliable evidence on whether executions deter or stimulate crime. As such, it seems reasonable to appeal to econometric pyrotechnics. Unfortunately, our survey of the literature suggests that too often these pyrotechnics have yielded heat rather than light.

In general, those interested in policy debates should insist upon clarity and intuitive plausibility in all aspects of research design and analysis. This is especially true in domains where research may be driven by ideology and advocacy motives; these incentives may lead researchers to use econometric sophistication to silence debate rather than enlighten policymakers. While sophistication holds an obvious allure (especially for academics), intuitive plausibility should always be preferred in the realm of real-world policy. Unfortunately, the history of the death penalty debate is replete with examples of plausibility being sacrificed on the altar of sophistication.

In many ways, our tour of the recent death penalty literature brings the debate full circle to the explosion of interest in the topic almost a half-century ago. Thorsten Sellin's research showed a clear realization of the value of conducting before and after comparisons, contrasting "treatment" states with "controls" unaffected by policy changes.[110] As Sellin recognized, it is important to compare effects in jurisdictions that are otherwise subject to similar shocks.[111] Even so, in 1975 Ehrlich argued instead for sophistication, claiming "that the statistical methods used by Sellin and others to infer the non-existence of the deterrent effect of capital punishment do not provide an acceptable test of such an effect."[112] Yet despite the technical sophistications of Ehrlich's approach, he clearly sacrificed plausibility, arguing that he could isolate which movements in the aggregate U.S. homicide rates were caused by changing execution policy and thereby estimate the deterrent effect of capital punishment. The subsequent literature, aptly summarized in a National Academy of Sciences report,[113] confirmed that Ehrlich's strong conclusions about the deterrent effects of capital punishment were unwarranted.

A quarter of a century later, a small surge of studies has appeared claiming that recent data and new econometric methods overturn the earlier consensus. Sunstein and Vermeule appear to believe this claim. Despite the sophistication of the studies on which that claim is based, our analysis shows that they either fail to account for developments in unaffected states, apply sophisticated methods in an entirely inappropriate manner, or yield results which are clearly not robust to small changes. Moreover, not only are panel data not "a newly available form of data,"[114] but they also formed the basis of Sellin's research method. While he did not bury his comparisons in jargon, Sellin's method

110. *See* Sellin, *Homicides*, *supra* note 1, at 135.

111. *Id.*

112. Ehrlich, *supra* note 3, at 398.

113. *See* DETERRENCE AND INCAPACITATION, *supra* note 5.

114. Sunstein & Vermeule, *supra* note 12, at 711.

Alternatively, to frame the issue as a Bayesian would, one's posterior belief about the deterrent effect of the death penalty surely looks a lot like one's prior belief. We can be sure that the death penalty does not cause or eliminate large numbers of homicides, but we learn little else from the data. As such, there is little evidence to convince believers in the deterrent hypothesis otherwise, as there is little to persuade believers in the competing brutalization hypothesis. Thus, it remains for Sunstein and Vermeule either to accept that their argument provides no useful guidance to policymakers or to argue that the death penalty is morally required if one has a strong enough prior belief. In light of their suspicions that "cognitive processes contribute to large mistakes, at least on questions of fact,"[120] one suspects that they would also be led to agree that—in light of the highly uncertain evidence—their argument has little prescriptive content.

To the extent that there is a prescription in Sunstein and Vermeule's argument, it is to emphasize the importance of a direct interplay between crime research and (highly politicized) policymaking. Unfortunately, recent history on this score is not particularly encouraging. Isaac Ehrlich's econometric evaluation of the deterrent effect of the death penalty breathed new life into the pro-death penalty movement. Even though Ehrlich's 1975 study was to be later discredited, the real problem was not that a flawed empirical paper had been written, but rather that there were those who leapt to use it as a tool to advance the goal of reinstating capital punishment in the United States before the validity and reliability of the work had been fully explored. In the words of the National Academy of Sciences report on Ehrlich's work: "[I]t seems unthinkable to us to base decisions on the use of the death penalty on Ehrlich's findings, as the Solicitor General of the United States has urged. They simply are not sufficiently powerful, robust, or tested at this stage to warrant use in such an important case."[121] More recently, numerous legislators, and even former Attorney General John Ashcroft, have been willing to rely on the findings of John Lott[122] as constituting powerful evidence that right-to-carry

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particularly sharp articulation, see Douglas Clement, *Does the Death Penalty Deter Homicide? New Economic Studies Seek the Answer to an Age-Old Question*, REGION, June 2002, *available at* http://minneapolisfed.org/pubs/region/02-06/debate.cfm. Clement reports:

> "What's interesting about this is that it mirrors so closely the Ehrlich debate of the '70s," said Chicago's Levitt, "which basically all came down to if you tweak his specification at all, you get numbers that are totally different." And reaching a definitive answer about deterrence could well be impossible since current execution rates may be too low to provide sufficient empirical data. "I really think not that the answer is 'yes' or 'no,'" said Levitt, "but that there's not enough information to figure it out. There may never be enough. It may just be a question that can't be answered."

Id.

120. Sunstein & Vermeule, *supra* note 12, at 740.

121. DETERRENCE AND INCAPACITATION, *supra* note 5, at 358.

122. JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS (2d ed. 2000).

laws would save lives.[123] It was only subsequent to the legislative and judicial debates that a consensus emerged in the scientific community, and in each case the early research did not withstand the scrutiny of a National Research Council report.[124]

These episodes suggest the potential dangers awaiting those who might wish to short-circuit the full process of scientific inquiry and validation and rush directly to the legislative forum when initial empirical findings seem to support a favored policy position. Lamentably, studies that were later utterly discredited continue to influence policy since the evidentiary burden required to reverse course appears to be high. In our view, Sunstein and Vermeule are a bit cavalier in thinking that we can start down a path of greater reliance on the death penalty today and then turn away from it if the evidence later proves that there is no effect (or even a pernicious effect). It is far better to insist on a stronger foundation of statistical proof before advancing a policy position, particularly one that the polity may be predisposed to embrace without regard to the degree of social scientific support.

As Hashem Dezhbakhsh—the lead author of the Dezhbakhsh, Rubin, and Shepherd study—argued with respect to John Lott's work: "The academic survival of a flawed study may not be of much consequence. But, unfortunately, the ill-effects of a bad policy, influenced by flawed research, may hurt generations."[125] While Dezhbakhsh was referring to John Lott's research on guns, his insight is equally applicable to the debate over capital punishment.

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123. In 2002, eighteen state attorneys general referenced Lott's work in a letter to Attorney General John Ashcroft supporting his interpretation of the Second Amendment as protecting the right of individuals to bear arms. *See* Letter from Bill Pryor, Alabama Attorney General, to John Ashcroft, U.S. Attorney General (July 8, 2002), *available at* http://www.ago.state.al.us/ag_items.cfm?Item=81; *see also* 146 CONG. REC. S349 (daily ed. Feb. 7, 2000) (statement of Sen. Craig); 145 CONG. REC. H8645 (daily ed. Sept. 24, 1999) (statement of Rep. Doolittle).

124. NAT'L RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW (Charles F. Wellford et al. eds., 2004).

125. Hashem Dezhbakhsh, *First Person: More Guns, Less Crime? Hashem Dezhbakhsh Disagrees*, EMORY REP., Sept. 27, 1999, *available at* http://www.emory.edu/EMORY_REPORT/erarchive/1999/September/ersepember.27/9_27_99dezhbakhsh.html.

2005-2007

HOUSE SELECT COMMITTEE ON CAPITAL PUNISHMENT

MINUTES

House Select Study Committee on Capital Punishment

PUBLIC HEARING

January 4, 2007

Minutes

The House Select Study Committee on Capital Punishment held a public hearing to allow interested parties an opportunity to offer additional input to the Committee on Thursday, January 4, 2007, at 1:00 p.m. in Room 643 of the Legislative Office Building. Representative Joe Hackney, Cochair called the meeting to order and the following members of the Committee were present: Representatives Jeff Barnhart, Nelson Cole, Pete Cunningham, Hugh Holliman, Paul Luebke, Mickey Michaux, Earline Parmon, Ronnie Sutton, Jennifer Weiss and Winkie Wilkins. A copy of the Visitor Registration is attached, (Attachment I).

Father David McBriar, Ecumenical Officer, Catholic Diocese of Raleigh was recognized. Father McBriar, a member of the North Carolina Coalition for a Moratorium on the Death Penalty spoke of several cases which he said illustrate some of the problems with the administration of the death penalty. He encouraged the Committee to recommend a two year moratorium on the death penalty to allow time for further study the issue. His comments are attached, (Attachment II).

Ms. Catherine Macri, an attorney, spoke in favor of a moratorium on executions in order to critically examine the death penalty process. She stated that one of the most compelling reasons to enact a moratorium is the lack of certainty in the capital prosecution system and the possibility of wrongful conviction. Ms. Macri's comments are attached, (Attachment III).

Ms. Megan Merz, Director, The Franciscan Coalition of Justice and Peace at the Catholic Community of St. Francis of Assisi, was recognized and spoke in support of a two year moratorium on executions in order to enact the reforms that will result in a capital punishment process that is safer and fairer. Her comments are attached, (Attachment IV).

Mr. David Work, Executive Director Emeritus, North Carolina Pharmacy Board was recognized. Mr. Work noted that he was not speaking on behalf of the Pharmacy Board. He discussed the process involved administering the drugs used in executions and spoke of a several ways in which an execution can be botched. He urged the Committee to recommend a moratorium.

Mr. Thomas Maher, Director, Center for Death Penalty Litigation, was recognized. Mr. Maher urged the Committee to consider further study of several topics. He discussed the issues of mental illness and the death penalty and said that preventing

the execution of those with serious mental illness should be a priority in any reform of the death penalty in North Carolina. Mr. Maher noted recent reforms that have improved the system and said that carrying out death sentences that were imposed prior to those reforms is simply not justice. He urged serious consideration for reforms that will ensure not only that future juries impose a sentence of death only after a full and fair trial, and only upon those for whom a sentence of life without the possibility of parole is not adequate punishment, but also that executions are not carried out when the death sentence would not have been imposed under our current system. Mr. Maher said that North Carolina should, at a minimum, consider reforms that would reduce the risk of an innocent defendant's execution. He said that such reforms could include a requirement that in a capital case, a sentence of death not be imposed unless there is reliable forensic evidence that proves the defendant's involvement in the murder. Mr. Maher's comments are attached to the minutes, (Attachment V). Also attached to the minutes are three reports referenced in Mr. Maher's comments, (Attachments VI,VII and VIII).

Ms. Teri L. Kaasa was recognized. Ms., a social psychologist and former trial consultant specializing in capital cases spoke of inequities that occur in the courtroom when selecting a jury and said that jurors often do not understand the instructions that are given to them. She urged the Committee to recommend a moratorium on executions in North Carolina. Ms. Kassa's comments are attached, (Attachment IX). Also attached is a copy of Ms. Kaasa's graduate thesis and dissertation regarding how well jurors comprehend the instructions that are routinely used to tell them how to go about deciding between a sentence of death and a sentence of life without parole, (Attachment X).

Reverend Mark Creech, Executive Director of the Christian Action League of North Carolina was the next speaker. Reverend Creech stated that it is the command of God that the state be given and should use its right to execute in order to protect innocent human life from aggressors who fail to respect its value. He said that steps should be taken to insure that capital punishment is being administered fairly and that problems within our system can be corrected without failing to expedite justice. Reverend Creech's comments are attached to the minutes, (Attachment XI).

Mr. Wayne Uber, whose twin brother was murdered in 1995, urged the Committee to make recommendations that will not undermine the authority or reputations of officers of the court. He advocated for recommendations that include as many preventative measures as possible saying that investing in prevention of premeditated murders before they occur represents the best means to deal with the problem of capital crime. Mr. Uber's comments are attached, (Attachment XII).

Ms. Shirley Burns, of Hope Mills, NC was the next speaker. Ms. Burns noted that she was speaking from two perspectives. Ms. Burns stated that her son, Marcus Robinson, was scheduled for execution in twelve days for a murder committed in 1991. She also told the Committee that another son was murdered eight months ago. She asked that the Committee acknowledge that there is a problem with the death sentencing act and she urged them to not act hastily, but to consider and weigh its pros and cons.

Reverend Duane Beck, Pastor, Raleigh Mennonite Church spoke in support of a moratorium on the death penalty to allow for further study of the issue. Reverend Beck spoke of the issue of poverty and the color of one's skin as it relates to limiting the justice that is available to all people. He spoke of restorative justice as it takes into consideration the victim as well as the perpetrator. He noted the need to find ways not just to be punitive, but also to explore ways to restore life victims as well as perpetrators. Reverend Beck said that the Mennonite Church has supported the abolition of the death penalty for fifty years.

Mr. David Mills, Common Sense Foundation, Raleigh, North Carolina spoke of death row injustices noting people on death row in North Carolina who were represented by attorneys at the trial level who did not meet today's minimum standards for qualifications as a defense attorney. He also addressed the issue of deterrence and said that statistics overwhelmingly show that the death penalty is not a deterrent against crime. Mr. Mills distributed a research report that was developed by the Common Sense Foundation. The report is attached to the minutes, (Attachment XIII).

Mr. David Zoppo, a University of North Carolina student, stated that the sword of the devil can never be used as a tool of the righteous. He said that North Carolina's capital punishment system is riddled with flaws, inconsistencies and outright injustices. He said that capital punishment cases are not only riddled with corruption and prejudicial error, but are also arbitrarily pursued by state attorneys. He said that the system is long overdue for a review urged the Committee to recommend a moratorium, if not outright abolition. Mr. Zoppo's comments are attached, (Attachment XIV).

Mr. Scott Bass, Nazareth House, Raleigh, North Carolina said that as an ordained minister and as a licensed marriage and family therapist he had worked with many who had lost loved ones to violence and other traumatic events and has never seen anecdotal, clinical or research evidence that indicates that the death penalty helps the families of victims to heal. He stated that he felt the death penalty prolongs and exacerbates their pain. He said that the death penalty traumatizes an additional family in a way that is very similar way that a murder traumatizes the family of a murder victim. He stated that there are other and better ways of protecting society than by putting a person to death. He urged the Committee to recommend an end to the death penalty.

Mr. Carnell Robinson, Chair, North Carolina Black Leadership Caucus said that the death penalty does not deter crime. He appealed to members of the Committee to recommend that the death penalty be abolished in North Carolina. He urged the members to join him in asking that the governor declare a moratorium by executive order.

Mr. Jeremy Collins, North Carolina Coalition for a Moratorium, stated that recent polling shows that the people of North Carolina support a moratorium on executions by a 2 to 1 margin. He said that the evidence is clear that the system is broken and a two year moratorium on executions is a responsible approach to the systemic flaws of the capital punishment system. He urged the Committee to take the opportunity to pause executions and study the system.

The meeting was adjourned at 2:45 p.m.

Representative Beverly Earle
Co-Chair

Representative Joe Hackney
Presiding Co-Chair

Emily Reynolds Freeman
Commission Clerk

ATTACHMENTS:

Attachment I Visitor Registration
Attachment II Comments – Father David McBriar
Attachment III Comments – Catherine Macri
Attachment IV Comments – Megan Nerz
Attachment V Comments – Thomas Maher
Attachment VI Handout – Thomas Maher
Attachment VII Handout – Thomas Maher
Attachment VIII Handout – Thomas Maher
Attachment IX Comments – Teri Kaasa
Attachment X Handout – Teri Kaasa
Attachment XI Comments – Reverend Mark Creech
Attachment XII Comments - Wayne Uber
Attachment XIII Handout – David Mills
Attachment XIV Comments – David Zoppo

ATTACHMENT I

VISITOR REGISTRATION SHEET

House Select Committee on Capital Punishment — January 4, 2007

Public Hearing — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
DAVID ZOPPO	MYSELF 1519 Dearberry Ln. Wake Forest, NC 27587
ANN G. MULLIN	PERSONAL 303 LYNDENBERRY DR. APEX, NC 27502
Jane Caxton	personal 8904 Wellesley Way Raleigh, NC, 27613
Myles H. Walburn	personal 247 Carolina Meadows Villa Chapel Hill, NC 27517-8517
Barbara L. Walburn	personal 247 Carolina Meadows Villa Chapel Hill, NC 27517-8517
REV. MARK CREECH	CHRISTIAN ACTION LEAGUE OF NC 609 SPRING FOREST RD. RALEIGH, NC 27609
Ellen M. Kort	ST. Francis of Assisi Parish.
Glenn R. Kort	Franciscan Coalition St. Francis of Assis. Parish, Raleigh, NC
(Rev.) Charles Howe	member, People of Faith Against The Death Penalty
Scott Bass	Mission Hse 2720 Poole Rd Raleigh 27610
Duane Beck	Raleigh Mennonite Church 1116 N. Blount Raleigh, NC 27604

VISITOR REGISTRATION SHEET

House Select Committee on Capital Punishment — January 4, 2007

Public Hearing — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
A. Weigl	NSO
Rusty Jacobs	WUNC Radio
Mitch Kokai	John Locke Foundation
Tim Boyum	News 14 Carolina
Constance Pontop	Citizen, Raleigh
Tim Duncan	St. Marks UMC
Marianne Williams	Franciscan Coalition St. Francis, Raleigh
Anna Arceneaux	Fair Trial Initiative Durham
Kimberly Overton	Conference of DA's
Meagan Rasch-Chabot	Center for Death Penalty Litigation
Colette Connor	Center for Death Penalty Litigation

VISITOR REGISTRATION SHEET

House Select Committee on Capital Punishment — January 4, 2007

Public Hearing — **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Stan Moore	Twin Oaks Team, Inc. 3604 Penhurst Place Ral, NC 27613
Stephen Teri Kaasa	10020 Liana Lane, Raleigh, NC 27613
Thomas Slusser	Catholic Community of St. Francis of Assisi
Evan Kane	private citizen 2728 Van Dyke Ave Raleigh NC
Michael Keough	St. Francis of Assisi
Jennifer Lindley	St. Raphael
Cathy Merlin	St. Raphael
Wayne Uber	Self / Victims 910 Highland Tr, CH 27516
[illegible] Jones	St. Francis
Jennifer Slusser	St. Francis of Assisi
Kate McIntyre	self 10408 Ireland Street Ral. NC 27614

VISITOR REGISTRATION SHEET

Capital Punishment — 1-4-07

Name of Committee — Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Aggie Dalton	St. Francis of Assisi
Carol Derrenbacher	St. Francis of Assisi - Raleigh
Mark Kleinschmidt	Fair Trial Initiative
Stephanie Hunter	Private Citizen Raleigh
Mary McNard	CDPL Durham
Thomas Maher	CDPL Durham
Gretchen Engel	CDPL Durham
Gerda Stein	CDPL Durham
Bob Geary	Citizen / Raleigh
JIM BARTON	ST. FRANCIS OF ASSISI PARISH
JUDY BARTON	ST. FRANCIS OF ASSISI, RALEIGH

VISITOR REGISTRATION SHEET

Capital Punishment 1-4-07

Name of Committee Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Mary De La Rosa	St. Francis of Assisi Catholic Church
Julio DE LA ROSA	ST. FRANCIS OF ASSISI CATHOLIC CH.
Melissa Zeph	The Justice Theater Project
Tim Throndson	The Justice Theater Project
MARÍA GARCÍA ROLPHAIL	St. Francis of Assis. Catholic Church → Franciscan Action Network / Justice Theater Project
John A Paar, M.D.	St. Francis of Assisi Catholic Church
Pat Hunter	IDS
M. Carnell Robinson	NC Black Leadership Caucus
Megan Sheridan	People of Faith Against the Death Penalty
Lupe Sanchez	St. Francis of Assissi Catholic Church
Yolanda Cruz	St. Francis of Assissi Catholic Church

VISITOR REGISTRATION SHEET

Capital Punishment — 1-4-07

Name of Committee — Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Wieland Voss	PFADP
Casandra White	Gov.'s Off.
Rosalyn Thompson	Individual Holly Springs
Harvey Thompson	" "
Pam Kelly	Self 12000 Raspberry Ln. Raleigh, NC 27614

VISITOR REGISTRATION SHEET

Capital Punishment
Name of Committee Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Gary Robertson	AP
Stephen Dear	People of Faith Against the Death Penalty
Brian Eldersroom	Common Sense Foundation
David Mills	"
Lao Rubert	CJPC
Charmaine Fuller	CJPC
Katie Maslanka	PFADP
Jeremy Collins	NCCM
Wieland Voss	PFADP
Michelina Roth	St. Francis of Assisi Parish
Leslie Bellard	St Francis of Assisi

VISITOR REGISTRATION SHEET

DP Moratorium
Name of Committee **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Sue Mathys	ST FRANCIS OF ASSISI CHURCH
Rebecca Neff	St Francis of Assisi Church
Harrison Barrow	N/A
Gail S. Phares	St. Francis of Assisi Church
Florence Hartye	" " " "
JAMES M DOUGAN James M Dougan	" " "
Kathleen Dougan	" " "
M. P. Martin	" "
Lynn Ballance	" " "
Eddie Ballance	" " "
Nancy Dilger	Citizen of NC ~ the people 6592 Wake Falls Dr, Wake Forest NC

VISITOR REGISTRATION SHEET

Name of Committee | Date

VISITORS: PLEASE SIGN BELOW AND RETURN TO COMMITTEE ASSISTANT

NAME	FIRM OR AGENCY
Donald Bickel	(Self)

ECUMENICAL OFFICER

GOOD AFTERNOON.

MY NAME IS FR. DAVID MCBRIAR.
I AM A FRANCISCAN FRIAR AND A CATHOLIC PRIEST.
I HAVE SERVED FOR 20 YEARS AS PASTOR IN BOTH ST. FRANCIS OF ASSISI CHURCH, RALEIGH, AND IMMACULATE CONCEPTION CHURCH, DURHAM.
WE FRANCISCAN FRIARS HAVE ALSO SERVED OVER THESE PAST 20 YEARS AS THE CATHOLIC CHAPLAINS AT CENTRAL PRISON,
CELEBRATING MASS EVERY THURSDAY
FOR CATHOLICS IN THE PRISON'S GENERAL POPULATION,
AS WELL AS MASS FOR CATHOLICS ON DEATH ROW.

I AM A MEMBER OF THE NORTH CAROLINA COALITION
FOR A MORITORIUM ON THE DEATH PENALTY,
AS WELL AS THE ROMAN CATHOLIC REPRESENTATIVE TO THE NCCC,
AN ORGANIZATION WHICH SUPPORTS THE MORITORIUM.

THE NORTH CAROLINA COUNCIL OF CHURCHES
IS AT THE FOREFRONT OF SOCIAL ISSUES THAT GO TO THE HEART
OF ~~WHOM GOD WOULD HAVE US TO BE~~. HUMAN ISSUES.
THE COUNCIL DRAWS TOGETHER MEMBERS OF 15 CHRISTIAN DENOMINATIONS IN THE STATE OF NORTH CAROLINA.
~~FIFTEEN CHRISTIAN DENOMINATIONS REPRESENT MORE THAN~~
~~1,000,000 CITIZENS OF THE STATE OF NORTH CAROLINA.~~
WE SUPPORT THE MORITORIUM ON THE DEATH PENALTY.

I AM HERE TODAY TO ENCOURAGE YOU
TO DECLARE A TWO YEAR MORATORIUM
ON THE DEATH PENALTY IN OUR STATE.
THERE IS GROWING EVIDENCE TO SUPPORT THIS MORATORIUM.
YOU ARE AWARE OF THE GROWING NATIONAL EVIDENCE
IN SUPPORT OF IT.
THE ACTION OF THE GOVERNOR OF FLORIDA, JEB BUSH,
THE GOVERNOR OF CALIFORNIA,
ARNOLD SCHWARTZENEGGER,
THE GOVERNOR OF ILLINOIS, GEORGE RYAN,
AS WELL AS THE ACTION OF THE MARYLAND COURTS,
ARE ENLIGHTENED AND CANNOT BE IGNORED.
THIS IS NOT A CONSTITUTIONAL ISSUE
BUT AN ISSUE OF JUSTICE AND FAIRNESS.
I KNOW YOU AGREE THAT EVERY CAPITAL PUNISHMENT SYSTEM SHOULD BE FAIR AND JUST.

IS THAT THE CASE IN OUR STATE?

IS EVERY JUDGMENT OF THE DEATH PENALTY FAIR AND JUST?

IF THE ANSWER IS "I DON'T KNOW," OR "HOW CAN I BE SURE?" THEN IN CONSCIENCE, YOU MUST DECLARE A 2 YEAR MORITORIUM UNTIL WE FIND OUT.

THE NORTH CAROLINA COALITION FOR A MORITORIUM HAS OUTLINED CASES WHICH ILLUSTRATE SOME OF THE PROBLEMS WITH THE ADMINISTRATION OF THE DEATH PENALTY IN OUR STATE. THESE CASES ARE ILLUSTRATIONS OF HIDDEN EVIDENCE, RACIAL BIAS, AND POOR LAWYERING.

I MENTION SOME OF THEM.

ALAN GELL
ADAM GELL SPENT MORE THAN FOUR YEARS ON DEATH ROW AND A TOTAL OF NINE YEARS IN PRISON FOR A CRIME HE DID NOT COMMIT.

DARRYL HUNT
DARRYL HUNT SPENT 18 YEARS IN PRISON FOR A RAPE AND MURDER HE DID NOT COMMIT.

GLEN CHAPMAN
GLAN CHAPMAN SITS ON DEATH ROW AWAITING A HEARING ON EVIDENCE WITHHELD BY THE PROSECUTOR THAT CASTS DOUBT ON HIS GUILT.

JERRY HAMILTON
JERRY HAMILTON AWAITS A NEW TRIAL AFTER HIS CONVICTION AND DEATH SENTENCE WERE THROWN OUT BECAUSE THE STATE WITHHELD EVIDENCE THAT POINTS TO HIS INNOCENCE; DNA FROM THE CRIME SCENE DOES NOT MATCH HAMILTON.

CHARLES MUNSEY
CHARLES MUNSEY'S CONVICTION AND DEATH SENTENCE WERE OVERTURNED

AFTER THE JUDGE HEARED EVIDENCE THAT
A POLICE INFORMANT FABRICATED
TESTIMONY.

RONALD FRYE
RONALD FRYE'S ALCOHOLIC LAWYER
FAILED TO INVESTIGATE AND PRESENT HIS
CASE; FRYE WAS EXECUTED.

KENNETH ROUSE
A RACIALLY PREJUDICED JUROR LIED TO BE
ABLE TO SIT ON ROUSE'S JURY; ROUSE, WHO
IS AFRICAN-AMERICAN, REMAINS ON DEATH
ROW.

JOHN DANIELS
THE STATE'S KEY WITNESS RECANTED HIS
TESTIMONY; THE VICTIM'S FAMILY BEGGED
FOR MERCY, JOHN DANIELS WAS
EXECUTED.

ROBERT BACON
A JUROR ADMITTED THAT THE
DELIBERATIONS WERE TAINTED BY RACIAL
BIAS; BACON WAS GRANTED CLEMENCY.

HENRY LEE HUNT
WE FRANCISCAN FRIARS MINISTERED TO
HENRY LEE HUNTON ON DEATH ROW. WE
HAD SERIOUS QUESTIONS ABOUT HIS GUILT.
WE PLEADED PERSONALY WITH GOVERNOR
EASLEY TO HOLD UP HIS EXECUTION.
HENRY WAS EXECUTED. QUESTIONS
REMAIN ABOUT HIS GUILT. I AM
CONVINCED THAT THIS MAN WAS
INNOCENT, YET EXECUTED BY THE STATE.

LADIES AND GENTLEMEN, DECLARE A MORITORIUM ON THE DEATH
PENALTY FOR 2 YEARS.
GATHER THE EVIDENCE.
PUT THE NECESSARY RESOURCES IN PLACE TO DETERMINE,
WITHOUT A SHADOW OF A DOUBT,
THAT THIS MAN, THIS WOMAN,
REGARDLESS OF THE HEINOUSNESS OF HIS OF HER CRIME,
SHOULD BE KILLED BY THE STATE.

FINALLY, TWENTY YEARS AGO, I SAT EVERY DAY,
IN THE COURTROOM IN FAYETTEVILLE, NORTH CAROLINA,
PART OF THE TRIAL OF A MEMBER OF MY PARISH, JEFFREY MEYER.
I WAS CALLED TO THE STAND AS A WITNESS FOR THE DEFENSE.
JEFFREY MEYER WAS 20 YEARS OLD THEN.
HE KILLED TWO PEOPLE, BRUTALLY KILLED TWO PEOPLE.
DID HE DO IT ALONE?
WAS HE UNDER THE INFLUENCE OF CONTROLLED SUBSTANCES?
WHY DID HIS ACCOMPLICE NOT RECEIVE THE DEATH PENALTY?

TWENTY YEARS LATER I SIT WITH JEFFREY MEYER ON DEATH ROW
AT CENTRAL PRISON EVERY THURSDAY.
HE IS A CHANGED MAN.
HE HAS EDUCATED HIMSELF THROUGH THE LIMITED OPPORTUNITIES
PROVIDED HIM BY THE DEPARTMENT OF CORRECTIONS.
HE IS BRIGHT, ARTICULATE, REMORSEFUL.
SHOULD HE BE EXECUTED BY LETHAL INJECTION?
IS ALL THE EVIDENCE IN?
FOR TWO YEARS HE WAS TRANSFERRED TO THE GENERAL POPULATION.
WHY?
WAS SOMEONE UNCERTAIN ABOUT THE FAIRNESS OF HIS TRIAL?

WHILE I GRIEVE FOR JEFFREY MEYER'S VICTIMS,
WHILE I LOOK FOR WAYS OF HEALING PAIN,
YET I KNOW THAT KILLING CANNOT BE STOPPED
BY KILLING INNOCENT PEOPLE,
OR BY KILLING PEOPLE FOR WHOM THERE MAY BE SOME EVIDENCE
THAT ALL THE MITIGATING CIRCUMSTANCES
HAVE NOT BEEN CONSIDERED,
OR THAT SOCIETY TREATS ONE CLASS OR RACE OF ITS PEOPLE
DIFFERENT THAN OTHER CLASSES OR RACE –
I ASK YOU TO CONSIDER A MORITORIUM ON THE DEATH PENALTY.

TWO YEARS.
MARSHALL THE EVIDENCE.
LEARN FROM OTHERS, FROM OTHER CIVILIZED PEOPLES.
AS WELL AS FROM OUR OWN COUNTRYMEN AND WOMEN.
STUDY THE ISSUE INSIDE AND OUT.
IS EQUAL JUSTICE AVAILABLE FOR ALL?
I AM CONFIDENT THAT AS REASONABLE MEN AND WOMEN,
YOU CAN ONLY CONCLUDE
THAT A TWO YEAR MORITORIUM ON THE DEATH PENALTY
IS IN THE BEST INTERESTS OF ALL OUR CITIZENS.

THANK YOU.

Good afternoon. My name is Catherine Macri, and I am here today to speak in favor of a moratorium on executions. I am an attorney, licensed in both the state of North Carolina and New Jersey. I have worked for the Prosecutor's Office, the Court of Appeals and the North Carolina Attorney General's Office in the Dept. of Crime Control and Public Safety.

From a legal perspective, one of the most compelling reasons to enact a moratorium is the lack of certainty in the capital prosecution system, as it exists today. There is a very real risk that innocent people can be convicted of a capital offense and sentenced to death. This is not a hypothetical statement, but a point of fact. It is a matter of confidence in the court system that it administer reliable, fair justice. That confidence has been eroded by the frequency of wrongful capital convictions. It is the pace of capital exonerations, not executions, that is now shaping national discourse.

The capital punishment system is broken, arguably because it is a system driven by human beings with decisions being made by human beings. There are too many variables the law cannot control, and after 30 years of implementation the capital punishment system has a dramatic record of fallibility.

For every eight persons executed, one innocent person is freed from death row. To date, 123 people have been exonerated, 5 from North Carolina. Fourteen (14) of the 123 individuals were freed as a result of DNA testing. These individuals were released after establishing evidence of innocence or because of systemic failures that prompted officials to conclude the death penalty was unwarranted.

On average these people spent over 9 years on death row for crimes they did not commit. Critically, in many instances the errors were uncovered not by the justice system but instead by journalists and law clinics.

Scientific Evidence, which is often the basis of capital convictions, can be flawed. There are numerous instances of error, misconduct, and tainted evidence. The risk of a criminalist exaggerating or distorting the probative value of the evidence is very real, as was amply demonstrated recently in the Houston, Texas crime lab. In fact, the improper use of forensic evidence was the basis of wrongful conviction in more than 30% of the DNA exonerations.

Assessment of the death penalty is ultimately a human endeavor with a consequent risk of error that is not remediable. The process of conviction is not impervious to the hazards of misconduct: instances of fraud, political pressures, career aspirations, dishonest law enforcement tactics, illegal methods of interrogation and the suppression of exculpatory DNA evidence repeatedly surface. Moreover, in the state of North Carolina, testimony of an interested co-defendant or jailhouse informant, without corroborative physical evidence, is sufficient proof for a capital conviction.

It has been said that a state that is going to take a life must give justice. Mounting evidence indicates that innocent people are sentenced to death with greater frequency than previously believed and that convincing proof of their innocence often does not emerge until long after their convictions. It is therefore foreseeable that in enforcing the death penalty innocent people will be executed who would otherwise eventually be able to prove their innocence.

In Kansas v. Marsh, four U.S. Supreme Court Justices noted that the availability of DNA testing necessitates even greater scrutiny in capital cases because of the "repeated exonerations . . . in numbers never imagined before." That cautious tenor was also reflected in the majority opinion of House v. Bell this year wherein the U.S. Supreme Court affirmed a man's right to pursue an appeal based on doubts raised through DNA testing of evidence after his trial.

The time has come to reevaluate the efficacy and appropriateness of capital punishment in North Carolina. The North Carolina judiciary cannot, in good conscience, adhere to a system that is patently flawed. The process is deficient and defective and the State has a duty to eliminate the flaws. There is no place for arrogance in a state's criminal justice system. People forgive mistakes; people do not forgive arrogance.

It is for these reasons that I urge the State to adopt a moratorium on executions. Let us critically examine the death penalty process. And let us be certain, at the end of the day, that North Carolina has eliminated the risk of executing an innocent person.

Comments to the House Select Committee on Capital Punishment
January 4, 2007
Megan Nerz
Director of the Franciscan Coalition of Justice and Peace

Good afternoon and thank you for the opportunity to speak with you about this enormously important issue. My name is Megan Nerz; I'm the Director of the Franciscan Coalition for Justice and Peace at the Catholic Community of St. Francis of Assisi, a 13,000 member suburban parish in North Raleigh. I am here today speaking in support of the two year moratorium on executions.

The Franciscan Coalition for Justice and Peace is a parish based advocacy group committed to the sacredness of life and the dignity of the human person. We engage Catholics and people of good will in the process of shaping public policy to be in keeping with Catholic Social teaching and the tradition of our patron, Francis of Assissi. We do this through issue education, public witness, policy advocacy, and grassroots empowerment. In 2007 our efforts will be directed toward educating and mobilizing our parishioners and Catholics across Eastern NC to support a two year pause on executions while the NC Legislature enacts the necessary reforms to the Capital Punishment process that will result in a safer and fairer system.

The death penalty is a hard subject.

It's hard to think about families whose lives have been shattered by the murder of a loved one. It's hard to find compassion for those who commit such senseless and awful crimes.

Most people are reluctant participants in conversations that involve the death penalty. A friend recently told me that she WANTS to believe that the system works. It seems to me that most of us want to believe that the system works...we operate on the assumption and the hope that the system works because thinking that it doesn't work is just too hard.

It's hard to think about innocent people being put to death.

It's hard to believe that prosecutors are still being charged with hiding or and falsifying evidence.

It's hard to imagine that the lethal injection process can go so horribly wrong.

It's hard to think there is significant racial bias in sentencing and in carrying out executions.

It's hard to believe that the quality of justice is contingent on the financial resources of the defendant or the county in NC where the crime was committed.

It's hard to figure out why one defendant gets life without the possibility of parole and another gets the death penalty when they've committed the same crime.

It's hard to believe that people have been sentenced to death when there has been no physical evidence connecting them to the crime.

It's hard to imagine that juries have been lead to believe that the system is nothing more than a revolving door unless a death sentence is imposed.

It's hard to think about putting mentally ill people to death.

It's hard to think about having executed people who have been represented by sleeping lawyers, inebriated lawyers, lawyers under the influence of controlled substances, or lawyers with absolutely no experience in trying capital cases.

So…it's hard—really hard …and you know what? It's always going to be hard.

But just believing that the system works…just wishing and hoping that the system works—well that's just too easy. We're asserting that the system works…but we're not sure…not really. There's a lot of evidence suggesting otherwise. We live in a nation based on laws…we are a people who value fairness and truth. If capital punishment is to be practiced, it must be administered in a just and fair manner. It seems to me we should all want that no matter if we support or oppose capital executions.

So we are asking this committee to whatever is in their power to advance the moratorium effort in order to enact the reforms that will result in a capital punishment process that, while inherently hard, is at least safer and fairer.

Thank you.

CENTER FOR DEATH PENALTY LITIGATION INC.
SUITE 301
201 WEST MAIN STREET
DURHAM, NORTH CAROLINA 27701-3228
TELEPHONE: 919-956-9545
FACSIMILE: 919-956-9547
E-MAIL: CDPL@CDPL.ORG

January 4, 2007

Representative Beverly Earle
Representative Joe Hackney
House Select Study Committee on Capital Punishment

Dear Representatives Hackney and Earle:

I had graciously been invited to speak at the last meeting of the committee studying the death penalty in North Carolina, but I was unable to attend due to medical problems. I would like to take a few minutes to comment on several topics that I believe are important in examining the manner in which the death penalty is imposed in North Carolina. I realize that some of these topics have not been the subject of extended discussion by this Committee, and I raise them to highlight the need for further study of these issues.

A. Mental Illness and the Death Penalty

The death penalty, in theory, is supposed to be reserved for the "worst of the worst;" those murderers who commit cold blooded killings for which there is no true mitigation. In practice, the death penalty is often imposed not on the worst of the worst, but on those who suffer from serious mental illness. Mental illness plays a pervasive role in the lives of many of the people who end up on death row. These defendants are often raised in families with a history of mental illness, and the accompanying instability that causes, and their lives are shaped by their illness. Mental illness plays a role in the crimes they commit, prompting them to engage in violent and bizarre behavior that would not have occurred but for their mental illness. In addition, mental illness makes it exceedingly difficult for these defendants to receive a fair trial. Their illness makes them distrustful of lawyers and makes it difficult for them to participate in the preparation of their defense in a meaningful manner. Finally, although serious mental illness should serve as a powerful reason not to impose the death penalty, in practice this group of defendants can appear dangerous and frightening to jurors. Mental illness, which should lead to compassion, instead leads to fear and revulsion.

Our current system does not adequately separate those with serious mental illness from those defendants who are more properly subject to the death penalty. First, of course, most defendants with serious mental illness do not meet the narrow and demanding test of insanity, even when their mental illness plays a significant role in the crime. Second, defendants with serious mental illness are often sentenced to death. Although North Carolina allows jurors to consider the existence of mental illness in determining whether to impose a sentence of death, mental illness that plays a role in violent behavior is often seen by jurors as making the defendant more dangerous in the future, and is not seen as a mitigating circumstance.

Preventing the execution of those with serious mental illness should be a priority in any reform of the death penalty in North Carolina. Already, the leading national professional mental health organizations have called for a prohibition on imposition of the death penalty for those with serious mental illness. Specifically, the American Psychological Association, the American Psychiatric Association and the National Alliance for the Mentally Ill have all called for the exclusion of the seriously mentally ill from the imposition of the death penalty. Significantly, the American Bar Association recently endorsed the call for the end of the death penalty for those with serious mental illness. I have attached a copy of the proposals from the APA and the ABA.

This is not simply a hypothetical problem in North Carolina. There are people on death row who suffered from serious mental illness throughout their lives, during the time they committed the crime, and during their trials. Our system failed to prevent the imposition of the death penalty in cases in which it was clear that mental illness played a significant role in the crime, and our system has failed to ensure that mental illness did not undermine the defendant's ability to receive a fair trial. North Carolina was a leader in exempting those with mental retardation from imposition of the death penalty, and should take the lead in adopting the carefully crafted proposal from the APA in exempting those with serious mental illness from the death penalty.

B. Death Sentences Imposed Prior to Beneficial Impact of Current Reforms

I have practiced as a criminal defense lawyer in North Carolina since 1984, and can attest firsthand to the significant improvements that have taken place as a result of several recent reforms. Specifically, the creation of IDS, the improvement in the scope of discovery given to those charged with crimes, the decision to allow jurors to chose a sentence of life without the possibility of parole in a capital case, and the decision to grant prosecutors discretion not to seek the death penalty have all contributed to the improvement in our criminal justice system in general and capital prosecutions in particular. Defense lawyers are more likely to be competent and zealous advocates for their clients and to have the proper tools to represent their clients, and prosecutors are more likely to provide access to needed discovery. Jurors receive a more full and meaningful presentation of the facts. The option of imposing a sentence of life without parole allows jurors to impose a punishment that is adequate and fair, without imposing a sentence of death.

As a result of these reforms, juries in North Carolina are imposing far fewer death sentences. In 2006, there were a total of five death sentences imposed, and this is consistent with the decisions of jurors in the preceding few years. Prior to these reforms there were 20 or more death sentences imposed a year. This leaves open the question of the fairness of executing those defendants sentenced to death prior to the reforms. It is safe to say that there are scores of defendants currently under a sentence of death who received their sentences prior to the reforms, and who would not have been sentenced to death under our current capital punishment system. Carrying out death sentences that were imposed under a system that we now know to have been deeply flawed is simply not justice. Serious consideration needs to be given to the effective implementation of reforms that will ensure not only that future juries impose a sentence of death only after a full and fair trial and only upon those for whom a sentence of life without the possibility of parole is not adequate punishment, but also that executions are not carried out when the death sentence would not have been imposed under our current system.

C. Avoiding the Execution of an Innocent Defendant

There should be no disagreement that a system that includes capital punishment must take all available measures to avoid the execution of an innocent defendant. There should also be no question that our current system, despite all of its strengths, leaves open the possibility that an innocent person will be convicted, sentenced to death and executed. These concerns were cited, among others, by the New Jersey Death Penalty Study Commission's Report, issued January 2, 2007, as a basis for abolishing the death penalty. The New Jersey Study Commission observed that 14 people who had been sentenced to death in this country were later exonerated by DNA evidence. Significantly, the Commission noted that DNA evidence plays a role in only a small number of cases, and that the risk of wrongful conviction based upon faulty eyewitness testimony, dishonest informants and other sources remains. The Commission relied, in part, on the case of Ronald Cotton, who was convicted in North Carolina of rape based upon faulty eyewitness testimony. While Mr. Cotton was later exonerated by DNA evidence, many cases do not have such forensic evidence to uncover the miscarriage of justice. Just one example is that of the conviction and death sentence for Alan Gell, who was convicted based upon testimony of witnesses who claimed to be present when Mr. Gell allegedly committed the murder. There was no DNA evidence to refute this testimony, and it was only through the hard work of post-conviction attorneys – and luck – that Mr. Gell was able to discover that the victim must have died while Mr. Gell was in jail and that there was evidence that the witnesses had concocted their story. The fact that Mr. Gell avoided execution, after years on death row, does not diminish the fact that an innocent person was convicted, sentenced to death and had that conviction and sentence affirmed on direct appeal.

The risk that an innocent person will be executed is too high to rely on post-conviction proceedings to uncover any wrongful convictions; often there simply is no incontrovertible proof that the witnesses were in error or dishonest. In addition, North Carolina's new Innocence Inquiry Commission is simply not equipped adequately to handle capital cases. First, the Commission only considers evidence that has not already

been presented in court, which eliminates virtually all claims that could be brought by a capital defendant as such evidence would most likely be presented in post-conviction proceedings, and judged under the legal standards applicable to such proceedings. Second, such a claim would only be brought after the legal proceedings had been completed, and there is no provision for the Commission to stay an execution pending review of the claim of innocence.

The risk that an innocent person would be executed was one of the reasons New Jersey is now seriously considering abolishing the death penalty. It is not too much to suggest that North Carolina, at a minimum, consider implementing reforms that would reduce the risk of an innocent defendant's execution. Such reforms could include a requirement that – in a capital case – a sentence of death not be imposed unless there is reliable forensic evidence that proves the defendant's involvement in the murder. I would therefore strongly request that further study be undertaken to determine reforms that could be implemented that would reduce, if not eliminate, the risk of the execution of an innocent person.

Thomas K. Maher
Executive Director

Diminished Responsibility in Capital Sentencing
POSITION STATEMENT

Approved by the Assembly, November 2004
Approved by the Board of Trustees, December 2004

"Policy documents are approved by the APA Assembly and Board of Trustees...These are ... position statements that define APA official policy on specific subjects..." -- *APA Operations Manual.*

Defendants shall not be sentenced to death or executed if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their conduct, (b) to exercise rational judgment in relation to their conduct, or (c) to conform their conduct to the requirements of the law. A disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this provision.

Commentary

Anglo-American law has long recognized that serious mental disorder diminishes a person's responsibility for criminal conduct and that execution is often a cruel and excessive punishment for offenders who were severely disturbed at the time of the offense. The insanity defense itself originally served primarily to prevent execution of mentally ill offenders, especially when the death penalty was mandatory for murder and other felonies. During the 20th century, even after the death penalty was no longer a mandatory punishment for murder, many states allowed evidence of mental disorder to be used to reduce a first-degree murder charge to second-degree murder, thereby precluding a death sentence.

Under the current generation of capital sentencing statutes upheld by the Supreme Court in 1976, a defendant convicted of a capital crime is entitled to introduce evidence of mental disorder in mitigation at the sentencing phase of the trial, where it is weighed by the jury, together with the prosecution's evidence in aggravation, in deciding whether the death penalty is justified. However, many observers of capital sentencing proceedings, including participating psychiatrists, believe that juries tend to give too little weight to mitigating evidence of severe mental disorder, leading to inappropriate execution of offenders whose responsibility was significantly diminished by mental retardation or mental illness.

The important decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), shows that this concern is shared by the Supreme Court. The Court recognized in *Atkins* that the ordinary practice of capital adjudication does not prevent persons with severely diminished responsibility due to mental retardation from being sentenced to death and thereby being punished in a manner grossly disproportionate to their culpability. The remedy adopted by the Supreme Court in Atkins was to preclude death sentences for defendants diagnosed with mental retardation. This categorical remedy was based on the judgment that virtually all defendants with mental retardation lack the morally requisite capacities for capital punishment.

A systematic risk of disproportionate punishment also arises in cases involving defendants with severe mental illness. Even though defendants with mental illness are entitled to introduce mental health evidence in mitigation of sentence, commentators on capital sentencing have often observed that juries tend to devalue undisputed and strong evidence of diminished responsibility in the face of strong evidence in aggravation. See, e.g., Phyllis Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 22 Fordham L. Rev. 21 ((1997). Indeed, such evidence is often a double-edged sword, tending to show both impaired capacity as well as future dangerousness. See, e.g., Richard J. Bonnie and C. Robert Showalter, *Psychiatrists and Capital Sentencing: Risks and Responsibilities in a Unique Legal Setting*, 12 Bulletin of the American Academy of Psychiatry and Law 159-67 (1984)

As the Supreme Court observed in *Zant v Stephens*, treating evidence of mental illness as an aggravating factor would violate the due process clause:

> [In this case, Georgia did not attach] the "aggravating" label to ... conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness. Cf. *Miller v. Florida*, 373 So.2d 882, 885-886 (Fla.1979). If the aggravating circumstance at issue in this case had been invalid for reasons such as these, due process of law would require that the jury's decision to impose death be set aside. (462 U.S. at 885)

Similarly, one of the problems with the Texas capital sentencing statute that has been before the Court repeatedly is that juries were instructed for three decades to consider the aggravating force of the evidence (in proving future dangerousness) without being told to consider its potentially mitigating weight. (See, e.g., *Penry v. Johnson*, 121 S.Ct 1910 (2001) and *Penry v. Lynaugh*, 492 U.S. 302 (1989)).

Strong evidence of diminished responsibility due to mental illness should preclude a death sentence and should not be weighed against evidence in aggravation. The core rationale for precluding death sentences for defendants with mental retardation is equally applicable to defendants with severe mental illness. However, the purely diagnostic exclusion utilized by the Supreme Court in Atkins is not a plausible approach for dealing with mental illness. Even among persons with major mental disorders, such as schizophrenia, symptoms vary widely in severity, as does the impact of the disorder on the person's behavior. Thus, a mere diagnosis of a major mental disorder does not identify a narrow class of cases in which a death sentence would virtually always be disproportionate to the offenders' culpability. Instead, the category must be further narrowed to include only those defendants whose severe mental disorders are characterized by significant impairments of responsibility-related capacities.

The task of defining criteria of diminished responsibility must start with the criteria for the insanity defense – the goal is to specify a degree of impairment that significantly reduces responsibility even though it does not foreclose conviction and punishment. The most widely accepted formula for defining diminished responsibility is found in the capital sentencing provisions in the Model Penal Code. Section 210.6 (4) includes among mitigating circumstances the following:

> "(g) At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication."

This provision, which appears in the capital sentencing laws of a great majority of death penalty states, was designed to identify conditions of strong mitigation that should be balanced against aggravating circumstances. Because the task at hand is to identify an *exclusionary* criterion, the best approach is to tighten and narrow the Model Penal Code's language to require a *significant* impairment of the relevant responsibility-related capacities (ability to appreciate and conform) resulting from *severe mental disorder*. Impairments associated with other disorders or with intoxication should not be given preclusive force, although they should continue to be taken into account in determining the suitability of a death sentence.

The Position Statement language supplements the Model Penal Code criteria of impaired capacity with an additional phrase (impaired capacity "to exercise rational judgment in relation to conduct") in order to encompass what many people intuitively regard as the most basic prerequisite for moral agency -- a capacity for rationality. This language is also designed to correct for unduly narrow interpretations of what it means to lack "appreciation." Some expert witnesses and courts have said that "appreciation" refers only to cognitive functioning, thereby failing to include affective disturbance that can distort a person's understanding and judgment.

The American Psychiatric Association • 1000 Wilson Blvd., Suite 1925 • Arlington, VA 22209-3901
Telephone: (703) 907-7300 • Fax: (703) 907-1085 • Email: apa@psych.org

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AMERICAN BAR ASSOCIATION

SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES
CRIMINAL JUSTICE SECTION
COMMISSION ON MENTAL AND PHYSICAL DISABILITY LAW
ABA DEATH PENALTY MORATORIUM IMPLEMENTATION PROJECT
ABA DEATH PENALTY REPRESENTATION PROJECT
BEVERLY HILLS BAR ASSOCIATION

RECOMMENDATION

RESOLVED, That the American Bar Association, without taking a position supporting or opposing the death penalty, urges each jurisdiction that imposes capital punishment to implement the following policies and procedures:

1. Defendants should not be executed or sentenced to death if, at the time of the offense, they had significant limitations in both their intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury.

2. Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform their conduct to the requirements of the law. A disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this provision.

3. Mental Disorder or Disability after Sentencing

(a) *Grounds for Precluding Execution.* A sentence of death should not be carried out if the prisoner has a mental disorder or disability that significantly impairs his or her capacity (i) to make a rational decision to forgo or terminate post-conviction proceedings available to challenge the validity of the conviction or sentence; (ii) to understand or communicate pertinent information, or otherwise assist counsel, in relation to specific claims bearing on the validity of the conviction or sentence that cannot be fairly resolved without the prisoner's participation; or (iii) to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner's own case. Procedures to be followed in each of these categories of cases are specified in (b) through (d) below.

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(b) *Procedure in Cases Involving Prisoners Seeking to Forgo or Terminate Post-Conviction Proceedings.* If a court finds that a prisoner under sentence of death who wishes to forgo or terminate post-conviction proceedings has a mental disorder or disability that significantly impairs his or her capacity to make a rational decision, the court should permit a next friend acting on the prisoner's behalf to initiate or pursue available remedies to set aside the conviction or death sentence.

(c) *Procedure in Cases Involving Prisoners Unable to Assist Counsel in Post-Conviction Proceedings.* If a court finds at any time that a prisoner under sentence of death has a mental disorder or disability that significantly impairs his or her capacity to understand or communicate pertinent information, or otherwise to assist counsel, in connection with post-conviction proceedings, and that the prisoner's participation is necessary for a fair resolution of specific claims bearing on the validity of the conviction or death sentence, the court should suspend the proceedings. If the court finds that there is no significant likelihood of restoring the prisoner's capacity to participate in post-conviction proceedings in the foreseeable future, it should reduce the prisoner's sentence to the sentence imposed in capital cases when execution is not an option.

(d) *Procedure in Cases Involving Prisoners Unable to Understand the Punishment or its Purpose.* If, after challenges to the validity of the conviction and death sentence have been exhausted and execution has been scheduled, a court finds that a prisoner has a mental disorder or disability that significantly impairs his or her capacity to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner's own case, the sentence of death should be reduced to the sentence imposed in capital cases when execution is not an option.

REPORT

PREAMBLE

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the United States Supreme Court held that execution of people with mental retardation violates the Eighth Amendment's ban on cruel and unusual punishment. The Individual Rights and Responsibilities Section of the American Bar Association recognized that *Atkins* offered a timely opportunity to consider the extent, if any, to which other types of impaired mental conditions ought to lead to exemption from the death penalty. To achieve that objective, the Section established a Task Force on Mental Disability and the Death Penalty. The Task Force, which carried out its deliberations from April, 2003 to March, 2005, was composed of 24 lawyers and mental health professionals (both practitioners and academics), and included members of the American Psychiatric Association and the American Psychological Association.[1] The American Psychiatric Association[2] and the American Psychological Association[3] have officially endorsed the Task Force's proposal.[4] The following commentary discusses the three paragraphs of the proposal.

PARAGRAPH 1:

Paragraph 1 of the Recommendation is meant to exempt from the death penalty persons charged with capital offenses who have significant limitations in both intellectual functioning and adaptive skills. Its primary purpose is to implement the United States Supreme Court's

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1 The Task Force's members are Dr. Michael Abramsky; Dr. Xavier F. Amador; Michael Allen, Esq.; Donna Beavers; Professor John H. Blume; Professor Richard J. Bonnie; Colleen Quinn Brady, Esq.; Richard Burr, Esq.; Dr. Joel A. Dvoskin; Dr. James R. Eisenberg; Professor I. Michael Greenberger; Dr. Kirk S. Heilbrun; Ronald Honberg, Esq.; Ralph Ibson; Dr. Matthew B. Johnson; Professor Dorean M. Koenig; Dr. Diane T. Marsh; Hazel Moran; John Parry, Esq.; Professor Jennifer Radden; Professor Laura Lee Rovner; Robyn S. Shapiro, Esq.; Professor Christopher Slobogin; and Ronald J. Tabak, Esq. Drs. Paul S. Appelbaum, Howard V. Zonana and Jeffrey Metzner also contributed significantly to the Task Force's deliberations and recommendations.,

2 *See* Am. Psychiatric Ass'n, Diminished Responsibility in Capital Sentencing; Death Sentences for Persons with Dementia or Traumatic Brain Injury; Mentally Ill Prisoners on Death Row: *available at* http://www.psych.org/edu/other_res/lib_archives/archives/200406.pdf, 200508.pdf, 200505.pdf.

3 *See* American Psychological Association, Excerpt from the Council of Representatives 2005 Meeting Minutes (Feb. 18-20, 2005); Excerpt from the Council of Representatives 2006 Meeting Minutes (Feb. 17-19, 2006).

4 The recommendation being presented to the House of Delegates is identical to the wording approved by these other groups, except that minor changes have been made to paragraph 3(c) and 3(d) to remove any potential doubt that, where either provision applies, the sentence would be the one that would be applicable in a capital case in situations in which the death penalty is not a sentencing option.

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holding in *Atkins v. Virginia*,[5] which declared that execution of offenders with mental retardation violates the cruel and unusual punishment prohibition in the Eighth Amendment. The Court based this decision both on a determination that a "national consensus" had been reached that people with mental retardation should not be executed,[6] and on its own conclusion that people with retardation who kill are not as culpable or deterrable as the "average murderer," much less the type of murderer for whom the death penalty may be viewed as justifiable.[7]

While the *Atkins* Court clearly prohibited execution of people with mental retardation, it did not define that term. The Recommendation embraces the language most recently endorsed by the American Association of Mental Retardation, which defines mental retardation as a disability originating before the age of eighteen that is "characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills."[8] The language of the Recommendation is also consistent with the most recent edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, which defines a person as mentally retarded if, before the age of 18, he or she exhibits "significantly subaverage intellectual functioning" (defined as "an IQ of approximately 70 or below") and "concurrent deficits or impairments in present adaptive functioning . . . in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety."[9] Both of these definitions were referenced (albeit not explicitly endorsed) by the Supreme Court in *Atkins*, and both have been models for states that have defined retardation for purposes of the death penalty exemption.[10] Both capture the universe of people who, if involved in crime, *Atkins* describes as less culpable and less deterrable than the "average murderer." As the APA's Diagnostic and Statistical Manual indicates, even a person with only "mild" mental retardation, as that term is defined in the Manual, has a mental age below that of a teenager.[11]

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5 536 U.S. 304 (2003).

6 *Id.* at 313-17.

7 *Id.* at 318-20.

8 MANUAL OF THE AMERICAN ASSOCIATION OF MENTAL RETARDATION 13 (10th ed., 2002).

9 See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL 49 (text rev. 4th ed. 2000) (hereafter DSM-IV-TR).

10 536 U.S. at 308 n.3. DEATH PENALTY INFO. CTR., STATE STATUTES PROHIBITING THE DEATH PENALTY FOR PEOPLE WITH MENTAL RETARDATION, www.deathpenaltyinfo.org/article.php?scid (describing state laws).

11 DSM-IV-TR, *supra* note 9, at 43 (stating that people with "mild" mental retardation develop academic skills up to the sixth-grade level, amounting to the maturity of a twelve year-old). For more on the definition of retardation, see James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 MEN. & PHYS. DIS. L. REP. 11-24 (2003); Richard J. Bonnie, *The APA's Resource*

The language in this part of the Recommendation is also meant to encompass dementia and traumatic brain injury, disabilities very similar to mental retardation in their impact on intellectual and adaptive functioning except that they always (in the case of dementia) or often (in the case of head injury) are manifested after age eighteen. Dementia resulting from the aging process is generally progressive and irreversible, and is associated with a number of deficits in intellectual and adaptive functioning, such as agnosia (failure to recognize or identify objects) and disturbances in executive functioning connected with planning, organizing, sequencing, and abstracting.[12] The same symptoms can be experienced by people with serious brain injury. Of course, people with dementia or a traumatic head injury severe enough to result in "significant limitations in both intellectual functioning or adaptive behavior" rarely commit capital offenses. If they do, however, the reasoning in *Atkins* should apply and an exemption from the death penalty is warranted, because the only significant characteristic that differentiates these severe disabilities from mental retardation is the age of onset.[13]

PARAGRAPH 2:

Paragraph 2 of the Recommendation is meant to prohibit execution of persons with severe mental disabilities whose demonstrated impairments of mental and emotional functioning at the time of the offense would render a death sentence disproportionate to their culpability. The Recommendation uses the phrase "disorder or disability" because, even though those words are often used interchangeably, some prefer one over the other. The Recommendation indicates that only those individuals with "severe" disorders or disabilities are to be exempted from the death penalty, and it specifically excludes from the exemption those diagnosed with conditions that are primarily manifested by criminal behavior and those whose abuse of psychoactive substances, standing alone, renders them impaired at the time of the offense.

Rationale: This part of the Recommendation is based on long-established principles of Anglo-American law that the Supreme Court recognized and embraced in *Atkins* and recently affirmed in *Roper v. Simmons*,[14] in which it held that the execution of juveniles who commit crimes while under the age of eighteen is prohibited by the Eighth Amendment. In reaching its holding in *Atkins*, the Court emphasized that execution of people with mental retardation is inconsistent with both the retributive and deterrent functions of the death penalty. More

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Document on Mental Retardation and Capital Sentencing: Implementing Atkins v. Virginia, 32 J. AM. ACAD. PSYCHIAT. & L. 304, 308 (2004).

12 DSM-IV-TR, *supra* note 9, at 135 (describing symptoms of dementia).

13 *Compare id.*, at 135 (describing symptoms of dementia) with *id.* at 46 (symptoms of mental retardation).

14 125 S.Ct. 1183 (2005).

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specifically, as noted above, it held that people with mental retardation who kill are both less culpable and less deterrable than the average murderer, because of their "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others."[15] As the Court noted, "[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution."[16] Similarly, with respect to deterrence, the Court stated, "[e]xempting the mentally retarded from [the death penalty] will not affect the 'cold calculus that precedes the decision' of other potential murderers."[17]

The Court made analogous observations in *Simmons*. With respect to culpability, the Court stated:

> Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.[18]

On the deterrence issue it said, "'[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.'"[19]

The same reasoning applies to people who, in the words of the Recommendation, have a "severe mental disorder or disability" that, at the time of the offense: "significantly impaired their capacity" (1) "to appreciate the nature, consequences, or wrongfulness of their conduct"; (2) "to exercise rational judgment in relation to the conduct"; or (3) "to conform their conduct to the requirements of law." Offenders who meet these requirements, even if found sane at trial, are not as culpable or deterrable as the average offender. A close examination of this part of the Recommendation makes clear why this is so.

The Severe Mental Disorder or Disability Requirement. First, the predicate for exclusion from capital punishment under this part of the Recommendation is that offenders have a "severe" disorder or disability, which is meant to signify a disorder that is roughly equivalent to disorders

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15 536 U.S. at 318.
16 *Id.* at 319.
17 *Id.*
18 125 S.Ct. at 1196.
19 *Id.* (quoting *Thompson v. Oklahoma,* 487 U.S. 815, 837 (1988)).

that mental health professionals would consider the most serious "Axis I diagnoses."[20] These disorders include schizophrenia and other psychotic disorders, mania, major depressive disorder, and dissociative disorders – with schizophrenia being by far the most common disorder seen in capital defendants. In their acute state, all of these disorders are typically associated with delusions (fixed, clearly false beliefs), hallucinations (clearly erroneous perceptions of reality), extremely disorganized thinking, or very significant disruption of consciousness, memory and perception of the environment.[21] Some conditions that are not considered an Axis I condition might also, on rare occasions, become "severe" as that word is used in this Recommendation. For instance, some persons whose predominant diagnosis is a personality disorder, which is an Axis II disorder, may at times experience more significant dysfunction. Thus, people with borderline personality disorder can experience "psychotic-like symptoms ... during times of stress."[22] However, only if these more serious symptoms occur at the time of the capital offense would the predicate for this Recommendation's exemption be present.

The Significant Impairment Requirement. To ensure that the exemption only applies to offenders less culpable and less deterrable than the average murderer, this part of the Recommendation further requires that the disorder significantly impair cognitive or volitional functioning at the time of the offense. *Atkins* held the death penalty excessive for *every* person with mental retardation, and the Supreme Court therefore dispensed with a case-by-case assessment of responsibility. However, for the disorders covered by this second part of the Recommendation, preclusion of a death sentence based on diagnosis alone would not be sensible, because the symptoms of these disorders are much more variable than those associated with retardation or the other disabilities covered by the Recommendation's first paragraph.

The first specific type of impairment that this part of the Recommendation recognizes as a basis for exemption from the death penalty (if there was a severe disorder at the time of the offense) is a significant incapacity "to appreciate the nature, consequences, or wrongfulness" of the conduct associated with the offense (section (a)). This provision is meant to encompass those individuals with severe disorder who have serious difficulty appreciating the wrongfulness of their criminal conduct. For instance, people who, because of psychosis, erroneously perceived

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20 *See* DSM-IV-TR, *supra* note 9, at 25-26 (distinguishing Axis I diagnoses from Axis II diagnoses).

21 *See id.*, at 275-76 (schizophrenia); 301 (delusional disorders); 332-33 (mood disorder with psychotic features); 125 (delirium); 477 (dissociative disorders).

22 *See id.*, at 652. Other Axis II diagnoses that might produce psychotic-like symptoms include Autistic Disorder, *id.* at 75, and Asperger's Disorder. *Id.* at 84.

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their victims to be threatening them with serious harm would be covered by this language,[23] as would delusional offenders who believed that God had ordered them to commit the offense.[24]

Section (a) also refers to offenders who fail to appreciate the "nature and consequences" of the crime. This language would clearly apply to offenders who, because of severe disorder or disability, did not intend to engage in the conduct constituting the crime or were unaware they were committing it.[25] It would also apply to delusional offenders who intended to commit the crime and knew that the conduct was wrongful, but experienced confusion and self-referential thinking that prevented them from recognizing its full ramifications. For example, a person who experiences delusional beliefs that electric power lines are implanting demonic curses, and thus comes to believe that he or she must blow up a city's power station, might understand that destruction of property and taking the law into one's own hands is wrong but might nonetheless fail to appreciate that the act would harm and perhaps kill those who relied on the electricity.

The second type of impairment recognized as a basis for exemption from the death penalty under this part of the Recommendation (in section (b)) is a significant incapacity "to exercise rational judgment in relation to the conduct" at the time of the crime. Numerous commentators have argued that irrationality is the core determinant of diminished responsibility.[26] As used by these commentators, and as made clear by the Recommendation's threshold requirement of severe mental disability, "irrational" judgment in this context does not mean "inaccurate," "unusual" or "bad" judgment. Rather, it refers to the type of disoriented, incoherent and delusional thinking that only people with serious mental disability experience. Furthermore, as noted above, the Recommendation requires that the irrationality occur in connection with the offense, rather than simply have existed prior to the criminal conduct.

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23 This is a fairly common perception of people with schizophrenia who commit violent acts. See Dale E. McNiel, *The Relationship Between Aggressive Attributional Style and Violence by Psychiatric Patients*, 71 J. CONSULTING & CLINICAL PSYCHOLOGY 404, 405 (2003).

24 *Cf. People v. Schmidt*, 216 N.Y. 324, 110 N.E. 945 (1915) (stating that if a person has "an insane delusion that God has appeared to [him] and ordained the commission of a crime, we think it cannot be said of the offender that he knows the act to be wrong).

25 These offenders would not have the *mens rea* for murder, and perhaps not even meet the voluntary act requirement for crime. *See* Wayne LaFave, Criminal Law 405 (3d ed. 2000) (describing the voluntary act requirement under the common law).

26 *See, e.g.*, HERBERT FINGARETTE & ANN FINGARETTE HASSE, MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY 218 (1979); MICHAEL MOORE, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP 244-245 (1985); Stephen J. Morse, *Immaturity and Irresponsibility,* 88 J. Crim. L. & Criminology 15, 24 (1997); ROBERT F. SCHOPP, AUTOMATISM, INSANITY AND THE PSYCHOLOGY OF CRIMINAL RESPONSIBILITY: A PHILOSOPHICAL INQUIRY 215 (1991).

Under these conditions, offenders who come within section (b) would often also fail to appreciate the "nature, consequences, or wrongfulness" of their conduct. But there is a subset of severely impaired individuals who may not meet the latter test and yet who should still be exempted from the death penalty because they are clearly not as culpable or deterrable as the average murderer. For instance, a jury rejected Andrea Yates' insanity defense despite strong evidence of psychosis at the time she drowned her five children. Apparently, the jury believed that, even though her delusions existed at the time of the offense, she could still appreciate the wrongfulness (and maybe even the fatal consequences) of her acts. Yet that same jury spared Yates the death penalty, probably because it believed her serious mental disorder significantly impaired her ability to exercise rational judgment in relation to the conduct.[27]

The third and final type of offense-related impairment recognized as a basis for exemption from the death penalty by this part of the Recommendation is a significant incapacity "to conform [one's] conduct to the requirements of law" (section (c)). Most people who meet this definition will probably also experience significant cognitive impairment at the time of the crime. However, some may not. For example, people who have a mood disorder with psychotic features might understand the wrongfulness of their acts and their consequences, but nonetheless feel impervious to punishment because of delusion-inspired grandiosity.[28] Because a large number of offenders can make plausible claims that they felt compelled to commit their crime, however, enforcement of the Recommendation's requirement that impairment arise from a "severe" disorder is especially important here.

Exclusions. In addition to the severe disability threshold and the requirement of significant cognitive or volitional impairment at the time of the offense, a third way this part of the Recommendation assures that those it exempts from the death penalty are less culpable and deterrable than the average murderer is to exclude explicitly from its coverage those offenders whose disorder is "manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs." The Recommendation's reference to mental disorders "manifested primarily by repeated criminal conduct" is meant to deny the death penalty exemption to those offenders whose only diagnosis is Antisocial Personality Disorder.[29] This language is virtually identical to language in the Model Penal Code's insanity formulation,

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27 For a description of the Yates case, see Deborah W. Denno, *Who is Andrea Yates? A Short Story About Insanity*, 10 Duke J. Gender L. & Pol'y 37 (2003).

28 DSM-IV-TR, *supra* note 9, at 332-33.

29 *Id.* at 650 et. seq. (defining as a symptom of antisocial personality disorder "failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest).

which was designed to achieve the same purpose.[30] However, the Recommendation uses the word "primarily" where the MPC uses the word "solely" because Antisocial Personality Disorder consists of a number of symptom traits in addition to antisocial behavior, and therefore the MPC language does not achieve its intended effect. Compared to the MPC's provision, then, the Recommendation's language broadens the category of offenders whose responsibility is not considered sufficiently diminished to warrant exemption from capital punishment.

Similarly, the Recommendation denies the death penalty exemption to those offenders who lack appreciation or control of their actions at the time of the offense due "solely to the acute effects of voluntary use of alcohol or other drugs." Substance abuse often plays a role in crime. When voluntary ingestion of psychoactive substances compromises an offender's cognitive or volitional capacities, the law sometimes is willing to reduce the grade of offense at trial, especially in murder cases,[31] and evidence of intoxication should certainly be taken into account if it is offered in mitigation in a capital sentencing proceeding.[32] However, in light of the wide variability in the effects of alcohol and other drugs on mental and emotional functioning, voluntary intoxication alone does not warrant an automatic exclusion from the death penalty.[33] At the same time, this Recommendation is not meant to prevent exemption from the death penalty for those offenders whose substance abuse has caused organic brain disorders or who have other serious disorders that, in combination with the acute effects of substance abuse, significantly impaired appreciation or control at the time of the offense.[34]

How This Recommendation Relates to the Insanity Defense. The language proposed in this part of the Recommendation is similar to modern formulations of the insanity defense.[35] Nonetheless, in light of the narrow reach of the defense in most states (and its abolition in a few),[36] many offenders who meet these criteria will still be convicted rather than acquitted by

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30 *See* AMERICAN LAW INSTITUTE, MODEL PENAL CODE § 4.01(2) and commentary (draft, 1962) (stating that "mental disease or defect as used in the insanity formulation does not include "abnormality manifested only by repeated or otherwise anti-social conduct).

31 *See generally* LAFAVE, *supra* note 25, at 415-16.

32 *See* Jeffrey L. Kirchmeier, *A Tear in the Eye of the Law: Mitigating Factors and the Progression Toward a Disease Model of Criminal Justice*, 83 OREGON L. REV. 631, 679 n.237 (2004) (listing statutes and judicial decisions from over a dozen states that have recognized intoxication as a mitigating circumstance).

33 In *Montana v. Egelhoff*, 518 U.S. 37 (1996), a plurality of the Supreme Court held that the voluntary intoxication defense is not constitutionally required. *Id.* at 38. At least 13 states now reject the voluntary intoxication defense. See Molly McDonough, *Sobering Up*, 88 A.B.A. J. 28 (2002).

34 *See, e.g.*, DSM-IV-TR, *supra* note 9, at 170 (describing dementia due to prolonged substance abuse).

35 The language in 2(a) and 2(c), for instance, is almost identical to the language in the Model Penal Code's insanity formulation. *See* MODEL PENAL CODE, *supra* note 30, at § 4.01(1).

36 Today, five states do not have an insanity defense, another twenty-five do not recognize volitional impairment as a basis for the defense, and many states define the cognitive prong in terms of an inability to "know" (as opposed to "appreciate") the wrongfulness of the act or, as is true in federal court, leave out the

reason of insanity. Even in those states with insanity formulations that are very similar to the Recommendation's language, these individuals might be convicted, for a whole host of reasons;[37] in such cases, the Recommendation would require juries and judges to consider whether cognitive and volitional impairment removes the defendant from being among the most morally culpable offenders. This approach rests on the traditional understanding that significant cognitive or volitional impairment attributable to a severe disorder or disability often renders the death penalty disproportionate to the defendant's culpability, even though the offender may still be held accountable for the crime.[38] It also underlies the various formulations of diminished responsibility that predated the contemporary generation of capital sentencing statutes.[39]

How This Recommendation Relates to Mitigating Factors. This part of the Recommendation sets up, in effect, a conclusive "defense" against the death penalty for capital defendants who can demonstrate the requisite level of impairment due to severe disorder at the time of the offense. However, the criteria in the Recommendation do not exhaust the relevance of mental disorder or disability in capital sentencing. Those offenders whose mental disorder or disability at the time of the offense was not severe or did not cause one of the enumerated impairments would still be entitled to argue that their mental dysfunction is a mitigating factor, to be considered with aggravating factors and other mitigating factors in determining whether capital punishment should be imposed.[40]

PARAGRAPH 3:

This paragraph of the Recommendation is meant to address three different circumstances under which concerns about a prisoner's mental competence and suitability for execution arise after the prisoner has been sentenced to death. Subpart (a) states that execution should be precluded when a prisoner lacks the capacity (i) to make a rational decision regarding whether to pursue post-conviction proceedings, (ii) to assist counsel in post-conviction adjudication, or (iii)

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word "substantial≅ in the phrase Alack of substantial capacity to appreciate≅ in the Model Penal Code formulation. *See* RALPH REISNER ET AL., LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS 534-36 (4th ed. 2004).

37 *See generally* Michael L. Perlin, "*The Borderline Which Separated You from Me≅: The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375 (1997) (exploring reasons for hostility to the insanity defense).

38 *See* Ellen Fels Berkman, *Mental Illness as an Aggravating Circumstance in Capital Sentencing*, 89 COLUM. L. REV. 291, 297 (1989) (noting that "nearly two dozen jurisdictions list as a statutory mitigating circumstance the fact that the defendant's capacity to appreciate the criminality of her conduct was substantially impaired, often as a result of mental defect or disease and that "an equally high number of states includes extreme mental or emotional disturbance' as a mitigating factor).

39 *See generally* SHELDON GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW (1925).

40 *See, e.g.*, MODEL PENAL CODE, *supra* note 30, at § 210.6.

to appreciate the meaning or purpose of an impending execution. The succeeding subparts spell out the conditions under which execution should be barred in these three situations.

Prisoners Seeking to Forgo or Terminate Post-Conviction Proceedings. The United States Supreme Court has ruled that a competent prisoner is entitled to forgo available appeals.[41] If the prisoner is not competent, the standard procedure is to allow a so-called "next friend" (including the attorney) to pursue direct appeal and collateral proceedings aiming to set aside the conviction or sentence. Subpart 3(b) of the Recommendation addresses the definition of competence in such cases, providing that a next friend petition should be allowed when the prisoner has a mental disorder or disability "that significantly impairs his or her capacity to make a rational decision."

Reportedly, 13% of the prisoners executed in the post-*Gregg* era have been so-called "volunteers."[42] Any meaningful competence inquiry in this context must focus not only on the prisoner's understanding of the consequences of the decision, but also on his or her *reasons* for wanting to surrender, and on the rationality of the prisoner's thinking and reasoning. In *Rees v. Peyton*,[43] the U.S. Supreme Court instructed the lower court to determine whether the prisoner had the "capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether the prisoner is suffering from a mental disease, disorder or defect which may substantially affect his capacity in the premises."[44] Unfortunately, the two alternative findings mentioned by the Court are not mutually exclusive – a person with a mental disorder that "affects" his or her decision-making may nonetheless be able to appreciate his or her position and make a "rational" choice. For this reason, the lower courts have integrated the *Rees* formula into a three-step test: (1) does the prisoner have a mental disorder? (2) if so, does this condition prevent the prisoner from understanding his or her legal position and the options available to the prisoner? (3) even if understanding is unimpaired, does the condition nonetheless prevent the prisoner from making a rational choice among the options?[45]

Because the courts have adopted a fairly broad conception of mental disorder (the first step) and the prisoner's understanding of his or her "legal position" (the second step) is hardly

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41 *See, e.g., Gilmore v. Utah*, 429 U.S.1012 (1977).

42 John Blume, Killing the Willing: "Volunteers, Suicide and Competency, 103 MICH. L. REV. 939, 959 (2005).

43 384 U.S. 312 (1966) (case remanded for competency determination after condemned prisoner directed attorney to withdraw petition for certiorari).

44 *Id.* at 314.

45 *See, e.g., Hauser v. Moore*, 223 F.3d 1316, 1322 (11th Cir. 2000); *Rumbaugh v. Procunier*, 753 F.2d 395 (5th Cir 1985).

ever in doubt in these cases, virtually all the work under the *Rees* test is done by the third step.[46] Conceptually, the question is relatively straightforward – is the prisoner's decision attributable to the mental disorder or to "rational choice"?

Unequivocal cases of irrationality rarely arise. For example, if an offender suffering from schizophrenia tells his or her attorney to forgo appeals because the future of civilization depends upon the offender's death,[47] the "reason" for the prisoner's choice can comfortably be attributed to the psychotic symptom. However, decisions rooted in delusions are atypical in these cases. The usual case involves articulated reasons that may seem "rational" under the circumstances, such as (a) a desire to take responsibility for one's actions and a belief that one deserves the death penalty or (b) a preference for the death penalty over life imprisonment. The cases that give the courts the most trouble are those in which such apparently "rational" reasons are intertwined with emotional distress (especially depression), feelings of guilt and remorse, and hopelessness. In many cases, choices that may otherwise seem "rational" may be rooted in suicidal motivations. Assuming, for example, that the prisoner is depressed and suicidal but has a genuine desire to take responsibility, how is one to say which motivation "predominates"?

John Blume has studied the prevalence of significant mental disorder among the 106 prisoners who have volunteered for execution. According to Blume, 14 of the "volunteers" had recorded diagnoses of schizophrenia, 23 had recorded diagnoses of depression or bipolar disorder, 10 had records of PTSD, 4 had diagnoses of borderline personality disorder and 2 had been diagnosed with multiple personality disorder. Another 12 had unspecified histories of "mental illness."[48] Given this high prevalence of mental illness, the courts should be more willing than they now are to acknowledge suicidal motivations when they are evident and should be more inclined than they are now to attribute suicidal motivations to mental illness when the clinical evidence of such a link is convincing. The third step of the *Rees* test would then amount to the following: Is the prisoner who seeks execution able to give plausible reasons for doing so that are clearly *not* grounded in symptoms of mental disorder?[49] Given the stakes of the decision, a relatively high degree of rationality ought to be required in order to find people

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46 Richard J. Bonnie, Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures, 54 CATH. UNIV. L. REV.1169 (2005).

47 Cf. *Illinois v. Haynes*, 737 N.E.2d 169, 178 (Ill. 2000); *In re Heidnick*, 720 A. 2d 1016 (Pa 1998).

48 Blume, *supra* note 41, Appendix B, at 989-96. The text refers only to significant mental disorders that could have distorted the prisoner's reasoning process and impaired capacity for Arational choice.≅ In addition to these cases, Blume reports that 20 of these prisoners had histories of substance abuse unaccompanied by any other mental disorder diagnosis, another 6 had personality disorders (with or without substance abuse) and 4 had sexual impulse disorders.

49 See Bonnie, *supra* note 46, at 1187-88. A more demanding approach would ask whether the prisoner is able to give plausible reasons that reflect authentic values and enduring preferences.

competent to make decisions to abandon proceedings concerning the validity of a death sentence.[50]

Prisoners Unable to Assist Counsel in Post-Conviction Proceedings. Subpart 3(c) of the Recommendation addresses the circumstances under which impaired competence to participate in adjudication should affect the initiation or continuation of post-conviction proceedings. The law in this area is both undeveloped and uncertain in many respects. However, some principles have begun to emerge.

Under the laws of many states and the federal Anti-Terrorism and Effective Death Penalty Act (AEDPA), collateral proceedings are barred if they are not initiated within a specified period of time. However, it is undisputed that a prisoner's failure to file within the specified time must be excused if such failure was attributable to a mental disability that impaired the prisoner's ability to recognize the basis for, or to take advantage of, possible collateral remedies. Similarly, the prisoner should be able to lodge new claims, or re-litigate previously raised claims, if the newly available evidence upon which the claim would have been based, or that would have been presented during the earlier proceeding relating to the claim, was unavailable to counsel due to the prisoner's mental disorder or disability.[51]

Assuming, however, that collateral proceedings have been initiated in a timely fashion, the more difficult question is whether, and under what circumstances, a prisoner's mental disability should require suspension of the proceedings. Subpart 3(c) provides that courts should suspend post-conviction proceedings upon proof that a prisoner is incompetent to assist counsel in such proceedings and that the prisoner's participation is necessary for fair resolution of a specific claim.

Thorough post-conviction review of the legality of death sentences has become an integral component of modern death penalty law, analogous in some respects to direct review. Any impediment to thorough collateral review undermines the integrity of the review process and therefore of the death sentence itself. Many issues raised in collateral proceedings can be adjudicated without the prisoner's participation, and these matters should be litigated according to customary practice. However, collateral proceedings should be suspended if the prisoner's

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50 See Richard J. Bonnie, *The Dignity of the Condemned*, 74 VA.L. REV. 1363, 1388-89 (1988); Cf. Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope*, 47 UNIV. MIAMI L. REV. 539, 579-80 (1993).

51 *See, e.g., Council v. Catoe*, 359 S.C. 120, 597 S.E.2d 782, 787 (2004); *Commonwealth v. Haag*, 809 A.2d 271, 285 (PA, 2001).

counsel makes a substantial and particularized showing that the prisoner's impairment would prevent a fair and accurate resolution of specific claims,[52] and subpart 3(c) so provides.

Where the prisoner's incapacity to assist counsel warrants suspension of the collateral proceedings, it should bar execution as well, just as ABA Standards recommend. ABA Standard 7-5.6 provides that prisoners should not be executed if they cannot understand the nature of the pending proceedings or if they "[lack] sufficient capacity to recognize or understand any fact which might exist which would make the punishment unjust or unlawful, or [lack] the ability to convey such information to counsel or to the court."[53] As the commentary to Standard 7-5.6 indicates, this rule "rests less on sympathy for the sentenced convict than on concern for the integrity of the criminal justice system."[54] Scores of people on death row have been exonerated based on claims of factual innocence, and many more offenders have been removed from death row and given sentences less than death because of subsequent discovery of mitigating evidence. The possibility, however slim, that incompetent individuals may not be able to assist counsel in reconstructing a viable factual or legal claim requires that executions be barred under these circumstances.

Once the post-conviction proceedings have been suspended on grounds of the prisoner's incompetence to assist counsel, should the death sentence remain under an indefinite stay? The situation is analogous to the suspension of criminal proceedings before trial; in that context, the proceedings are typically terminated (and charges are dismissed) after a specified period if a court has found that competence for adjudication is not likely to be restored in the foreseeable future. In the present context, it would be unfair to hold the death sentence in perpetual suspension. A judicial finding that the prisoner's competence to assist counsel is not likely to be restored in the foreseeable future should trigger an automatic reduction of the sentence to the disposition the relevant law imposes on capital offenders when execution is not an option.

Prisoners Unable to Understand the Punishment or its Purpose. In *Ford v. Wainwright* (1986),[55] the U.S. Supreme Court held that execution of an incompetent prisoner constitutes cruel and unusual punishment proscribed by the Eighth Amendment. Unfortunately, the Court

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52 *Council v. Catoe*, 359 S.C. 120, 597 S.E.2d 782, 787 (A[T]he default rule is that [post-conviction review] hearings must proceed even though a petitioner is incompetent. For issues requiring the petitioner's competence to assist his [post-conviction] counsel, such as a fact-based challenge to his defense counsel's conduct at trial, the [post-conviction] judge may grant a continuance, staying review of these issues until petitioner regains his competence.); *Carter v. State*, 706 So.2d 873, 875-77 (Fla. 1997); *State v. Debra*, 523 N.W.2d 727 (Wisc. 1994) (non-capital case); *People v. Kelly*, 822 P.2d 385, 413 (Cal. 1992).

53 *ABA Criminal Justice Mental Health Standards* 290 (1989).

54 *Id*, at 291.

55 477 U.S. 399.

failed to specify a constitutional definition of incompetence or to prescribe the constitutionally required procedures for adjudicating the issue.[56] The Court also failed to set forth a definitive rationale for its holding that might have helped resolve these open questions. Rather it listed, without indicating their relative importance, a number of possible reasons for the competence requirement. These rationales included the need to ensure that the offenders could provide counsel with information that might lead to vacation of sentence; the view that, in the words of Lord Coke, execution of "mad" people is a "miserable spectacle . . . of extream inhumanity and cruelty [that] can be no example to others"; and the notion that retribution cannot be exacted from people who do not understand why they are being executed.[57] Apparently based on the latter rationale, Justice Powell, in his concurring opinion in *Ford*, stated: "I would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it."[58] Justice Powell pointed out that states are free to preclude execution on other grounds (particularly inability to assist counsel), but most courts and commentators have assumed that the Eighth Amendment requirement is limited to the test stated by Justice Powell. Most commentators have also agreed with Justice Powell's view that the *Ford* competence requirement is grounded in the retributive purpose of punishment.[59]

There has been some confusion about the meaning of the idea that the prisoner must be able to understand (or be aware of) the nature and purpose for (reasons for) the execution. In *Barnard v. Collins*,[60] decided by the Fifth Circuit in 1994, the state habeas court had found that Barnard's "perception of the reason for his conviction and impending execution is at times distorted by a delusional system in which he attributes anything negative that happens to him to a conspiracy of Asians, Jews, Blacks, homosexuals and the Mafia."[61] Despite the fact that Barnard's understanding of the reason for his execution was impaired by delusions, the Fifth Circuit concluded that his awareness that "his pending execution was because he had been found

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56 State courts have disagreed about the procedures required to make *Ford* competence determinations. A sensible outline of the required procedures appears in the ABA Standard 7.5-7 and the Sixth Circuit's decision in *Coe v. Bell*, 209 F.3d 815 (6th Cir. 2000). The prisoner is entitled to state-subsidized counsel and expert assessment once the prisoner presents evidence raising a significant doubt about his competence. The issue should be adjudicated at hearing before a judge at which the prisoner bears the burden of proving his incompetence by a preponderance of the evidence. *See also* Paul F. Enzinna and Jana L. Gill, *Capital Punishment and the Incompetent: Procedures for Determining Competency to be Executed after Ford v. Wainwright*, 41 FLA. L. REV. 115 (1989).

57 *Id.* at 406-08.

58 *Id.* at 422 (Powell, J., concurring).

59 *See* Barbara Ward, *Competency for Execution: Problems in Law and Psychiatry*, 14 FLA. ST. UNIV. L. REV. 35, 49-56 (1986); Christopher Slobogin, *Mental Illness and the Death Penalty*, 24 MEN. & PHYS. L. REP. 667, 675-77 (2000).

60 13 F.3d 871 (5th Cir, 1994).

61 *Id.* at 876.

guilty of the crime" was sufficient to support the state habeas court's legal conclusion that he was competent to be executed. [62]

In order to emphasize the need for a deeper understanding of the state's justifying purpose for the execution, subpart 3(d) of the Recommendation would require that an offender not only must be "aware" of the nature and purpose of punishment but also must "appreciate" its personal application in the offender's own case – that is, why it is being imposed *on the offender*. This formulation is analogous to the distinction often drawn between a "factual understanding" and a "rational understanding" of the reason for the execution.[63] If, as is generally assumed, the primary purpose of the competence-to-be-executed requirement is to vindicate the retributive aim of punishment, then offenders should have more than a shallow understanding of why they are being executed.

Whether a person found incompetent to be executed should be treated to restore competence implicates not only the prisoner's constitutional right to refuse treatment but also the ethical integrity of the mental health professions.[64] Some courts have decided that the government may forcibly medicate incompetent individuals if necessary to render them competent to be executed, on the ground that once an individual is fairly convicted and sentenced to death, the state's interest in carrying out the sentence outweighs any individual interest in avoiding medication.[65] However, treating a condemned prisoner, especially over his or her objection, for the purpose of enabling the state to execute the prisoner strikes many observers as barbaric and also violates fundamental ethical norms of the mental health professions.

Mental health professionals are nearly unanimous in the view that treatment with the purpose or likely effect of enabling the state to carry out an execution of a person who has been found incompetent for execution is unethical, whether or not the prisoner objects, except in two highly restricted circumstances (an advance directive by the prisoner while competent requesting such treatment or a compelling need to alleviate extreme suffering).[66] Because treatment is unethical, it is not "medically appropriate" and is therefore constitutionally impermissible when a

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62 *Id.*

63 *See Martin v. Florida*, 515 So. 2d 189, 190 (Fla. 1987).

64 Kirk S. Heilbrun, Michael L. Radelet, Joel A. Dvoskin, *The Debate on Treating Individuals Incompetent for Execution*, 149 AMERICAN JOURNAL OF PSYCHIATRY 596 (1992); Richard J. Bonnie, *Dilemmas in Administering the Death Penalty: Conscientious Abstention, Professional Ethics and the Needs of the Legal System*, 14 LAW & HUMAN BEHAVIOR 67 (1990).

65 *Singleton v. Norris*, 319 F.3d 1018 (8th Cir.) (*en banc*), *cert denied*, 124 S. Ct. 74 (2003).

66 See Council on Ethical and Judicial Affairs, American Medical Association, Physician Participation in Capital Punishment, 270 JAMA365 (1993); American Psychiatric Association and American Medical Association, Amicus Brief in Support of Petitioner in *Perry v. Louisiana*, 498 U.S. 38 (1990); Richard J. Bonnie, *Medical Ethics and the Death Penalty*, 20 HASTINGS CENTER REPORT, MAY/JUNE, 1990, 12, 15-17.

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prisoner objects under the criteria enunciated by the Supreme Court in *Sell v. United States*[67] and *Washington v. Harper*.[68] As the Louisiana Supreme Court observed in *Perry v. Louisiana*,[69] medical treatment to restore execution competence "is antithetical to the basic principles of the healing arts," fails to "measurably contribute to the social goals of capital punishment," and "is apt to be administered erroneously, arbitrarily or capriciously."[70]

There is only one sensible policy here: a death sentence should be automatically commuted to a lesser punishment (the precise nature of which will be governed by the jurisdiction's death penalty jurisprudence) after a prisoner has been found incompetent for execution.[71] Maryland has so prescribed,[72] and subpart 3(d) of the Recommendation embraces this view. Once an offender is found incompetent to be executed, execution should no longer be a permissible punishment.

The current judicial practice is to entertain *Ford* claims only when execution is genuinely imminent. Should courts be willing to adjudicate these claims at an earlier time? Assuming that a judicial finding of incompetence – whenever rendered – would permanently bar execution (as proposed above), subpart 3(d) provides that *Ford* adjudications should be available only when legal challenges to the validity of the conviction and sentence have been exhausted, and execution has been scheduled.[73]

Procedures: While this paragraph contemplates that hearings will have to be held to determine competency to proceed and competency to be executed, it does not make any recommendations with respect to procedures. Federal constitutional principles and state law will govern whether the necessary decisions must be made by a judge or a jury, what burdens and standards of proof apply, and the scope of other rights to be accorded offenders. Additionally, in

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67 539 U.S. 166 (2003).

68 494 U.S. 210 (1990).

69 610 So.2d 746 (La. 1992).

70 *Id.* at 751.

71 A state could try to restore a prisoner's competence without medical treatment, but the prospects of an enduring change in the prisoner's condition are slight.

72 Md. Code of Correctional Services, 3-904(a)(2), (d)(1).

73 This does not mean that no litigation challenging the validity of the sentence can be simultaneously occurring. For all practical purposes, "exhaustion" means that one full sequence of state post-conviction review and federal habeas review have occurred where, as in most jurisdictions, no execution date set during the initial round of collateral review is a "real" date. Given the many procedural barriers to successive petitions for collateral review, an execution date set after the completion of the initial round may be a "real" date, even if a successive petition has been filed or is being planned. In such a case, the state may contest the prisoner's request for a stay of execution. A *Ford* claim should be considered on its merits in such a case, and it should be considered earlier on in a jurisdiction where a "real" execution date is set during the initial round of collateral review.

any proceedings necessary to make these determinations, the victim's next-of-kin should be accorded rights recognized by law, which may include the right to be present during the proceedings, the right to be heard, and the right to confer with the government's attorney. Victim's next-of-kin should be treated with fairness and respect throughout the process.

Respectfully Submitted,

Paul M. Igasaki, Chair
Section of Individual Rights and Responsibilities

Michael S. Pasano, Chair
Criminal Justice Section

Scott C. LaBarre, Chair
Commission on Mental and Physical Disability Law

James E. Coleman, Jr., Chair
Death Penalty Moratorium Implementation Project

Terri Lynn Mascherin, Chair
Death Penalty Representation Project

August 2006

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GENERAL INFORMATION FORM

Submitting Entity: Section of Individual Rights and Responsibilities

Submitted By: Paul M. Igasaki, Chair
Section of Individual Rights and Responsibilities

1. Summary of the Recommendation

The Recommendation, without taking a position supporting or opposing the death penalty, calls upon each jurisdiction that imposes capital punishment to implement the following policies and procedures:

1) defendants should not be executed or sentenced to death if, at the time of the offense, they had significant limitations in both their intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury;

2) defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform their conduct to the requirements of the law. A disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this provision; and

3) A death sentence should not be carried out if the prisoner has a mental disorder or disability that significantly impairs his or her capacity (i) to make a rational decision to forgo or terminate post-conviction proceedings available to challenge the validity of the conviction or sentence, (ii) to understand or communicate pertinent information, or otherwise assist counsel, in relation to specific claims bearing on the validity of the conviction or sentence that cannot be fairly resolved without the prisoner's participation, or (iii) to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner's own case. [See resolution for more detail re paragraph 3.]

2. Approval by Submitting Entity
The Council of the Section of Individual Rights and Responsibilities approved the Report with Recommendation during its Midyear Meeting on Friday, Feb.10, 2006.

The Section of Individual Rights and Responsibilities has been advised that the following have agreed to co-sponsor the proposed resolution:

Criminal Justice Section
Commission on Mental and Physical Disability Law
Death Penalty Representation Project
Death Penalty Moratorium Project

Has This or a Similar Recommendation Been Submitted to the House of Delegates Board of Governors Previously?

No.

3. What Existing Association Policies Are Relevant to this Proposed Resolution and Would They Be Affected by Its Adoption?

The ABA has adopted numerous policies addressing the need for fair implementation of capital punishment, including:

- Urging jurisdictions that impose capital punishment not to carry out the death penalty without guaranteeing fairness, due process, and minimum risk to innocent persons. 2/97
- Urging that no person with mental retardation, as defined by the American Association on Mental Retardation, should be sentenced to death or executed and supporting enactment of legislation prohibiting the execution of defendants with mental retardation. 2/89
- Opposing discrimination in capital sentencing on the basis of race. 2/89
- Opposing the imposition of capital punishment upon any person for any offense committed while under the age of 18. 8/83

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This proposed resolution would build upon these existing policies by urging each jurisdiction that imposes capital punishment to implement the policies and procedures outlined in Section 1 above.

In addition, Paragraph 2 of the proposed resolution includes language derived from ABA Criminal Justice Standard 7-6.1. Moreover, paragraph 3 of the proposed resolution clarifies and supplements ABA Criminal Justice Standards 7-5.6 and 7-5.7.

4. What Urgency Exists that Requires Action at this Meeting of the House?

Many commentators have said, in the wake of *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Roper v. Simmons*, 125 U.S. 1183 (2005), that the next major issue regarding capital punishment is to what extent, if any, should people with mental illness be exempt from executions. It is important that the ABA have an important voice in dealing with this issue, particularly because this proposal takes a nuanced approach. That is, it does not say that everyone who has a mental illness should be exempt from capital punishment, but rather considers the type of mental illness and how it contributed to the capital crime. The resolution also deals with several important issues that arise when death row inmates have mental illness that may affect their ability competently to waive appeals, to assist their counsel or to be executed.

The proposed resolution is identical to the language adopted by the American Psychiatric Association and the American Psychological Association, except for two clarifying changes made in paragraph 3 of the proposed resolution to specifically state that if the death penalty is vacated, the sentence would be the next most severe punishment.

5. Status of Legislation

In 2002, the United States Supreme Court held that it is unconstitutional to execute a person with mental retardation, in *Atkins v. Virginia.* Subsequent to *Atkins*, proposed legislation to deal with the application of the death penalty to people with other disabilities have been introduced in some states.

6. Cost to the Association (Both Direct and Indirect Costs)

Adoption of this proposed resolution would result in only minor indirect costs associated with Government Affairs and Section staff time devoted to the policy subject matter as part of the staff members' overall substantive responsibilities.

7. Disclosure of Interest

There are no known conflicts of interest.

8. Referrals

By copy of this form, the Report with Recommendation will be referred to the following additional entities, including all Sections and Divisions:

Section of Administrative Law and Regulatory Practice
Section of Antitrust Law
Section of Business Law
Section of Dispute Resolution
Section of Environment, Energy, and Resources
Section of Family Law
General Practice, Solo and Small Firm Section
Government and Public Sector Lawyers Division
Section of Intellectual Property Law
Section of International Law and Practice

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Section of Labor and Employment Law
Law Practice Management Section
Section of Legal Education and Admissions to the Bar
Section of Litigation
Section of Public Contract Law
Section of Public Utility, Communications and Transportation Law
Section of Real Property, Probate and Trust Law
Section of Science and Technology Law
Section of State and Local Government Law
Section of Taxation
Tort and Insurance Practice Section
Judicial Division
Law Student Division
Senior Lawyers Division
Young Lawyers Division
Commission on Domestic Violence
Commission on Homelessness and Poverty
Commission on Law and Aging
Commission on Women in the Profession

9. Contact Person (Prior to Meeting)

Ronald J. Tabak
Skadden, Arps, Slate, Meagher & Flom
4 Times Square, 24th Floor
New York, NY 10036-6522
Tel: (212) 735-2226
Fax: (917) 777-2226
Email: rtabak@probonolaw.com

Tanya Terrell-Collier, Director
Section of Individual Rights and Responsibilities
740 15th Street, NW
Washington, DC 20005
Tel: (202) 662-1030
Fax: (202) 662-1031
Email: terrellt@staff.abanet.org

10. Contact Person (Who Will Present the Report to the House)

C. Elisia Frazier, Delegate
Section of Individual Rights and Responsibilities
International Paper Company
Senior Counsel – Woods Products Division
6400 Poplar Avenue
Memphis, TN 38197
Tel : (901) 419-3801
Email : c.elisia.frazier@ipaper.com

Richard M. Macias
Section of Individual Rights and Responsibilities
Richard Macias & Associates
2741 Prewett Street
PO Box 31569
Los Angeles, CA 90031
Tel : (323) 224-3906
Email : rmmacias@aol.com

11. Contact Person Regarding Amendments to this Recommendation

C. Elisia Frazier, Delegate
Section of Individual Rights and Responsibilities
International Paper Company
Senior Counsel – Woods Products Division
6400 Poplar Avenue
Memphis, TN 38197
Tel : (901) 419-3801
Email : c.elisia.frazier@ipaper.com

Richard M. Macias
Section of Individual Rights and Responsibilities
Richard Macias & Associates
2741 Prewett Street
PO Box 31569
Los Angeles, CA 90031
Tel : (323) 224-3906
Email : rmmacias@aol.com

A periodic research report from the Common Sense Foundation | October 2006

The Plain Truth

DEATH ROW INJUSTICES

DEATH ROW INJUSTICES

Too many death-row inmates were represented by lawyers who would not even meet the minimum standards of today

If you were on trial for your life, would you want a qualified attorney to represent you?

The Common Sense Foundation has conducted a ground-breaking study that has found **at least 37 people** currently on N.C.'s death row who did not have lawyers at trial who would meet today's minimum standards of qualification. Moreover, of those who have been executed since 1977, **at least 16 people** did not have lawyers with the minimum qualifications required of capital defense attorneys today.

For those 37 death-row inmates who have not received similar help from any court, justice demands that they all receive new trials immediately with appointed counsel that meets current standards of qualification.

At least 37 people currently on N.C.'s death row did not have lawyers at trial who would meet today's minimum standards of qualification.

A New Hanover County attorney talked about how he was unable to adequately defend his client even though he had successfully tried two capital cases previously. His first two cases, he said, were relatively straightforward and included facts that were good for the defendant. However, when he was suddenly charged with representing a defendant who had a relatively complex case with unfavorable facts, this attorney said he realized he lacked some of the basic knowledge needed to properly defend people facing the death penalty.

Indigent Defense Services

In August 2000, the North Carolina General Assembly passed the Indigent Defense Services Act, creating the Office of Indigent Defense Services (IDS) and charging it with the responsibility of overseeing the provision of legal representation to indigent defendants and others entitled to counsel under North Carolina law, including capital defendants.

IDS created a benchmark of statewide standards for capital defense attorneys, standards that had no precedent in recent state history. The new rules required certain minimal levels of experience before an attorney could be appointed to represent a capital defendant.

Among other standards, IDS required that each capital defendant be appointed two defense lawyers, one lead counsel and one associate counsel. Attorneys in the lead role were held to an even higher standard than those serving as associate counsel. Extensive experience (either in previous capital trials or other homicide trials), "substantial

We now know that **at least sixteen people have been executed who did not have qualified trial attorneys.** How many more will be executed before we address these systematic wrongs?

During any pause in executions, meaningful reforms must be enacted if the death penalty is to be reinstated. Flaws in the administration of the death penalty in North Carolina have already led to important reforms; among them, the removal of the mentally retarded from death-row, open-file discovery, and the creation of IDS. The lack of retroactive capital defense standards requires similar attention. The following actions must be taken immediately to ensure that every North Carolinian receives a fair trial.

Defendants Currently on Death Row in North Carolina

Sent to death row before IDS	Data available on attorneys	Attorneys failed to meet IDS standards	Percentage of studied group	Percentage of group with data available
147	115	**37**	25%	32%

Defendants Who Have Been Executed By The State of N.C. Since 1977

Number of people executed since 1977	Data available on attorneys	Attorneys failed to meet IDS standards	Percentage of studied group	Percentage of group with data available
43	30	**16**	37%	**53%**

Recommendations

The death penalty is inherently an ineffective and discriminatory procedure that should be abolished. In North Carolina, capital punishment has repeatedly been shown to be racially biased, costly, arbitrary, and ineffective at deterring crime. Legal challenges to the constitutionality of lethal injection, the exoneration of death-row inmates, and the exposing of cheating prosecutors add to the already loud claims for reform.

Short of abolition, a moratorium on executions is necessary to keep the state from killing anyone else until these injustices can be adequately and retroactively addressed. A poll conducted last year by the North Carolina Academy of Trial Lawyers showed that a majority of North Carolinians want a pause in all executions until our system of capital punishment can be fixed.

Justice in North Carolina demands the following changes to our system:

- **Immediate new trials** for the 37 death-row inmates named in this study
- **A full investigation** by the N.C. General Assembly to determine how many other death-row inmates did not have lawyers who would have met IDS qualification standards
- **A two-year moratorium** on executions during which time an extensive review of capital punishment in our state can be conducted

Research conducted by attorney Nicholas Woomer-Deters.

Special thanks to Fund for Nonviolence, the Chapel of the Cross, Jim Crow, the Center for Death Penalty Litigation, and the Capital Defender's Office.

Comments to House Select Committee on Capital Punishment

Good afternoon and thank you for the opportunity to address you today.

My name is Teri Kaasa. I am a social psychologist and former trial consultant specializing in capital cases; graduate student at NC State studying comprehension of pattern jury instructions in capital cases by jurors. I am teaching a course in Psychology and Law this semester at Peace College. In all these capacities I learned a lot about the administration of capital punishment in NC.

As a trial consultant I worked capital cases across the state of NC. I saw first hand the inconsistencies in how these cases are handled depending on what part of the state one is tried in. These disparities in the administration of justice should not occur no matter the consequences, however, when the possible outcome is the ultimate loss of human life, their impact becomes intolerable. Whether someone lives or dies in NC should not be a product of the county in which someone is tried for a crime, and currently that is very much the case.

Inequities occur in the courtroom when selecting a jury. The requirement for a death qualified jury has been repeatedly shown in research literature to increase the conviction-proneness of the jury and favor the prosecution. Not only that, but discussion of issues of punishment with potential jurors PRIOR TO even hearing evidence let alone a conviction, biases the jury in favor of a conviction as well. I have also witnessed first hand judges' rehabilitating jurors who should be excused for cause for being ADP jurors by pressuring them that they "could follow the law as I give it to you and consider a life sentence" when the juror has clearly expressed the opposite opinion, thus requiring the defense to use their precious peremptory challenges to remove individuals who should have been excused for cause. No similar attempts are made to "rehabilitate" Witt excludables who say they are unable to consider the death penalty.

As my graduate thesis and dissertation I conducted a study of how well jurors comprehend the instructions that are routinely used to tell them how to go about deciding between a sentence of death and a sentence of LWOP. What my research and others that have researched this same issue tells us is that using the current pattern instructions, ***jurors understand what they are required to do to make this decision no better than had they heard no instructions at all.*** Furthermore, due to the nature of the disparities in requirements for finding aggravating and mitigating circumstances, jurors are wrong much more often wrong with respect to finding mitigating circumstances than they are with respect to finding aggravating circumstances. They apply the more stringent criteria to finding aggravating circumstances to mitigating circumstances in violation of both the spirit and the letter of the law. But they do so unknowingly and the result is a decrease in the likelihood of finding mitigation and an increase in the likelihood of reaching a death verdict.

As a result of my combined academic and practical experience with the death penalty in North Carolina, I urge you to, at a minimum, place a moratorium on executions if not abolish the use of the death penalty in North Carolina altogether.

Thank you.

Running head: CAPITAL SENTENCING INSTRUCTIONS

Capital Sentencing Instructions: Making Them Comprehensible

Teri White and James Luginbuhl

North Carolina State University

Abstract

In two experiments, college students were presented with the North Carolina capital sentencing instructions presently in use, a revised version, or no instructions at all. In the revised version, sentence structure was simplified, uncommon words were replaced or defined, and the differing standards of proof and role of unanimity for aggravating and mitigating factors were clarified. Comprehension of key legal concepts was assessed via either a multiple choice or a vignette format. Results of both experiments showed that (a) comprehension of the proof criteria for aggravating factors was fairly high initially and improved somewhat with the revised instructions, (b) comprehension of the proof criteria for mitigating factors was quite low initially but showed dramatic improvement under the revised instructions, and (c) exposure to the presently used North Carolina pattern instructions did not yield higher comprehension of the proof criteria for mitigation than exposure to no instructions at all. Since the legal concepts evaluated apply to most of the states that have the death penalty, it is concluded that juror comprehension of capital sentencing instructions could be significantly improved in the majority of the states that provide for the imposition of capital punishment.

Capital Sentencing Instructions: Making Them Comprehensible

"No one is exempt from talking nonsense; the misfortune is to do it solemnly."

Montaigne

The right to a trial by jury is fundamental to the American system of jurisprudence. It is guaranteed in Article III and by the fifth, sixth and seventh amendments to the U. S. Constitution. Juries, however, are drawn from among ordinary citizens who typically have little understanding of the law and legal concepts and who often have inaccurate views of the law based, for example, on television shows and media coverage of newsworthy trials. Yet, such jurors are called upon to make difficult and complex decisions in courtrooms across the country every day. Surely the most difficult of these decisions is the one made by jurors in a capital trial who have found the defendant guilty of capital murder--should the defendant be sentenced to life in prison or to the ultimate punishment of death?

Prior to 1972, juries had much discretion and little guidance in the imposition of the death penalty. However, in Furman v. Georgia (1972), the Supreme Court ruled that this unbridled discretion yielded such inconsistency that it amounted to cruel and unusual punishment in violation of both the eighth and fourteenth amendments. Furman rendered the death penalty statutes invalid in all states with the death penalty at that time, and the sentences of all death row inmates were commuted to life in prison.

In an attempt to develop procedures that would pass constitutional muster, various states took different approaches to developing new death penalty statutes. The North Carolina legislature created a statute making the imposition of the death penalty mandatory for a defendant convicted of a death which resulted from first degree murder, first degree rape, first degree arson, or first degree burglary. Louisiana took a similar approach. The Supreme Court ruled, however, in Woodson v. North Carolina (1976) and Roberts v. Louisiana (1976), that the mandatory imposition of the death penalty was also a violation of the eighth amendment, holding that the severity and finality of death required

individual consideration, a determination on a case-by-case basis of whether the death sentence was appropriate.

At the same time, however, in Gregg v. Georgia (1976), Jurek v. Texas (1976), and Proffitt v. Florida (1976), the Supreme Court upheld the revised death penalty statutes of those three states and endorsed the notion of "guided discretion" to assist the decision-makers (usually a jury) in determining whether the death sentence was appropriate in each individual case. States could constitutionally execute offenders as long as jurors were instructed properly about the factors to consider and how those factors were to be weighed in making the sentencing decision. The Court apparently believed that such guided discretion would produce rational and consistent death penalty determinations (Diamond, 1993).

The general procedure upheld in Gregg was to have a bifurcated, or two-stage trial, in which the jury first determined whether the defendant was guilty of a capital crime (generally first degree murder). Upon a finding of guilt by the jury, the trial moved to the second stage where the jury determined the appropriate sentence--life or death. In all but a few states, jurors hear evidence in this penalty phase about aggravating circumstances (which argue for death) and mitigating circumstances (which argue for life). Furthermore, jurors must determine whether the aggravating circumstances outweigh the mitigating circumstances and, in North Carolina, whether the aggravating circumstances, in light of any mitigating circumstances, are "sufficiently substantial" to call for the death penalty [North Carolina Gen. Stat @15A-2000 (b), (c)].

The implication of Gregg is that the constitutionality of a death penalty statute rests on the application of a sentencing scheme which incorporates and gives weight to factors that argue both for and against the death penalty and provides for guided discretion with regard to each individual defendant. These concepts and procedures are conveyed to the jury via judicial instructions, typically read by the judge to the jury at the conclusion of the evidence and closing statements in the penalty phase of the trial. Such instructions

are crucial, in that the constitutionality of a death penalty statute rests on the ability of the judge's instructions to explain the law and provide guided discretion for the jury that decides whether an individual should live or die.

It would seem self-evident that instructions of such import should be understandable to jurors. Unfortunately, not only capital sentencing instructions, but a wide variety of judicial instructions seem to be poorly understood by jurors (e.g., Buchanan, Pryor, Taylor & Strawn, 1978; Ellsworth, 1989; Elwork, Sales and Alfini, 1977; Forston, 1973; O'Mara & von Eckartsberg, 1977; Reifman et al., 1992; Severance & Loftus, 1982; Strawn & Buchanan, 1976).

Ellsworth (1989), for example, discovered that during deliberation by mock jurors, only about half of their statements about the law were correct, with one-fifth of the statements seriously in error. Deliberation did not help correct these misunderstandings. Other researchers have found comprehension rates of 50% or less regarding substantive law and such concepts as presumption of innocence, reasonable doubt, and the admissibility of evidence (Buchanan et al., 1978; Reifman et al., 1992; Strawn & Buchanan, 1976). It has even been found on occasion (Elwork et al., 1977; Severance & Loftus, 1982) that comprehension of the law by jurors who received instructions was no better than that of jurors who received no instructions.

Apart from social science research, Steele and Thornburg (1988) describe instances of case law that document juror miscomprehension, through notes sent by the jurors to the judge during deliberation, as well as instances where testimony about conversations among jurors is allowed. These misunderstandings have not been cause for retrial even when it was shown on appeal that the jury reached decisions based on inaccurate understanding of the instructions (e.g., Compton v. Henrie, 1963; Whited v. Powell, 1956).

What do we know specifically about the comprehension of capital sentencing instructions? As indicated earlier, central to the sentencing procedure in most states[1] is the

jury's determination of the existence of aggravating and mitigating circumstances. Aggravating circumstances are aspects of the defendant or the murder that make the defendant especially deserving of the death penalty. Only upon finding at least one aggravating circumstance is the jury allowed to consider the death penalty. By contrast, mitigating circumstances are aspects of the defendant or the murder that, while not reducing the severity of the crime, nevertheless argue for life instead of death. In its final decision on life or death, the jury takes into account both the aggravating and the mitigating factors it has found, although the precise form this process takes varies from state to state[2].

One can see how the incorporation of aggravating and mitigating factors into the sentence determination relates to the Supreme Court's desire, expressed in Furman, to reduce the arbitrariness of the death penalty, while at the same time retaining individualized sentencing. Having to find an aggravating factor before considering death sets limits on who is eligible for death, which should reduce arbitrariness and reserve the death penalty only for the most deserving. On the other hand, the introduction of mitigating factors allows the jury to consider issues unique to this crime or defendant, providing for an individualized sentencing decision. Such a procedure, in theory, should achieve the guided discretion desired by the Court.

Most states communicate these procedures to the jury through "pattern instructions" which typically are drawn up by a committee of lawyers and judges. The pattern instructions are written to state the law accurately. The question is, do these pattern instructions communicate to the jurors the procedures that the Court is counting on to produce guided discretion? Luginbuhl and Howe (1995) identified three important criteria relating to aggravation and mitigation that jurors must understand: the specific factors that may be considered in aggravation and mitigation; the standards of proof for aggravation and mitigation; and the unanimity requirements for proving aggravation and

mitigation. What is significant about these three criteria is that aggravation and mitigation differ with respect to each one.

In determining whether a capital defendant should receive a death sentence, jurors may consider only those aggravating factors listed in the state statute and specifically identified by the judge in the instructions. In contrast, jurors may consider 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" (Lockett v. Ohio, 1978). In other words, the evidence jurors may consider in aggravation is limited by law, but no such limitation exists for mitigation.

Second, an aggravating circumstance must be proven beyond a reasonable doubt, while mitigating circumstances require only a preponderance of the evidence to be proven. Thus, the required burden of proof for aggravating circumstances is more stringent than for mitigating circumstances.

Finally, jurors must agree unanimously on the existence of any specific aggravating circumstance, whereas a mitigating circumstance can be deemed to exist even if found by only an individual juror. Thus, unanimity is required to prove the existence of aggravation, but unanimity is not required to prove mitigation.

Combining these three criteria, it can be seen that aggravating factors are limited in number, each must be proven beyond a reasonable doubt, and unanimity among the jury on each is required. By contrast, mitigating factors are unrestricted, each can be proven by a preponderance of the evidence, and an mitigating factor is deemed to exist even if found by any number of jurors, including a lone juror.

Errors in comprehending these differences between aggravation and mitigation will likely coincide with commonly held schemas about the law, and such errors would appear to favor a verdict of death (Luginbuhl and Howe, 1995). For example, most people have heard of the reasonable doubt standard of proof. If this standard is applied (incorrectly) to mitigating factors, then mitigation will be more difficult to prove than

required by law. Likewise, most individuals are aware of the concept of unanimity in jury decisions. Again, if this standard is applied (incorrectly) to mitigating factors, mitigation will be more difficult to prove than the law intends.

A few studies have explored the comprehension of capital sentencing instructions. Luginbuhl (1992) compared comprehension of an "older" set of North Carolina capital sentencing instructions with the "newer" pattern instructions in use at the time. While participants (jury-eligible citizens) who were exposed to the newer instructions showed a significant increase in understanding over those exposed to the older instructions, only 53% of those hearing the newer instructions correctly answered all eight comprehension questions.

In a more elaborate study, Zeisel (1990; see also Diamond, 1993; Levi, 1993) presented potential Illinois jurors with a factual case summary, followed by the Illinois pattern capital sentencing instructions. Jurors then responded to a series of vignettes to assess their comprehension of the crucial points of law supposedly conveyed by the instructions. Comprehension was poor. For example, only about a quarter of the jurors understood that jurors could individually find mitigating factors, and less than half understood that the jury could consider factors in mitigation that had not been specifically mentioned in the instructions.

Blankenship, Luginbuhl, Cullen, & Redick (1997) provided several hundred jurors on jury duty in Tennessee with a copy of the instructions used in a trial that resulted in a death sentence. Scenarios, adapted from those used by Zeisel (1990), were used to test comprehension. Jurors displayed relatively good comprehension of the law as it related to aggravation, but quite poor comprehension of the law as it related to mitigation.

Employing detailed interviews with jurors who had actually served on capital trials, Luginbuhl & Howe (1995) demonstrated jurors' poor comprehension of the relevant North Carolina sentencing procedures. Approximately one quarter of the jurors misunderstood the procedures with regard to aggravating circumstances, while roughly

half of the jurors were mistaken when it came to mitigating circumstances. As pointed out earlier, the impact of these errors would likely favor a sentence of death, not life.

Those who have studied capital sentencing instructions note the complexity of the language, ambiguity of the concepts (e.g., Levi, 1993), and a failure of the instructions to counter juror expectations and schemas (e.g., Luginbuhl and Howe, 1995), as contributing to these high rates of misunderstanding. For example, both the Illinois and the North Carolina pattern capital sentencing instructions ask jurors to determine whether the mitigating circumstances are insufficient to outweigh the aggravating circumstances. Answering in the negative (i.e., no, the mitigating circumstances are not insufficient to outweigh the aggravating circumstances) means, in fact, that the mitigating circumstances do outweigh the aggravating. Such a determination would compel the jurors to vote for life imprisonment instead of death, but one wonders to what extent the convoluted nature of the question will cause jurors to answer in a fashion opposite their intention.

The sentence structure of the instructions also clouds understanding. Roughly 25% of the sentences found in the North Carolina instructions are written in passive voice, where the positions of the subject and the object are interchanged. The passive voice ("Only those circumstances identified by statute may be considered by you as aggravating circumstances") is more difficult to follow than the active voice ("You may consider only those circumstances identified by statute as aggravating circumstances").

Sentences also are frequently quite long (an average of twenty-eight words), and have compound and embedded clauses that increase their complexity. Low-frequency words, such as "deem," "extenuating," "substantiality," "pecuniary," and "culpability" are used. In addition, the use of phrases more common in written discourse than in oral communication makes the overall reading of the instructions awkward. For example, a statement like, "[D]o you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances you found is, or are, sufficiently substantial to call for imposition of the death penalty when considered with the mitigating circumstance

or circumstances found by one or more of you?" is difficult to read, let alone to understand in oral discourse.

Can capital sentencing instructions be improved? Some jury instructions have been rewritten to improve comprehension. For example, Elwork, Sales, and Alfini (1977) found significantly increased comprehension for a set of pattern instructions (not capital sentencing instructions) rewritten in accord with relevant psycholinguistic principles. We wanted to see whether the same could be done for the North Carolina capital sentencing instructions. Thus, in both experiments to be reported, we exposed participants to no instructions, pattern instructions, or revised instructions.

In addition, we wanted to explore a methodological issue. Juror comprehension of capital sentencing concepts has been assessed using different measurement formats. Both Luginbuhl (1992) and Luginbuhl and Howe (1995) assessed comprehension using a multiple choice format. Questions of law were asked, and the respondent chose the correct answer from several alternatives. On the other hand, Zeisel's study (cited in Diamond, 1993; Levi, 1993) used short vignettes. Each vignette described how a juror or jury responded to a particular set of circumstances, and the respondent was asked to indicate whether the judge's instructions had been followed. While significant misunderstandings were revealed under each format, it is possible that the specific format used to assess juror or mock juror comprehension could influence the interpretation of the results. For example, one format could lead to higher apparent comprehension than the other.

According to Bloom (1956, cited in Gage & Berliner, 1975), there are six major areas within which cognitive learning activities can be classified. These are: knowledge, comprehension, application, analysis, synthesis and evaluation. These categories describe increasingly higher levels of cognitive activity. Because knowledge (i.e., recognition of ideas and facts when certain cues, signals or clues are presented) requires a lower level of cognitive activity than does application (i.e., ability to use abstractions, rules, principles, ideas and methods in particular and concrete situations), one might expect comprehension

scores on a multiple-choice measure to be somewhat higher than those on the vignette measure. On the other hand, since the multiple choice format had four possible answers, and the vignette only two, one could predict better performance on the vignette measure. Thus, comprehension in both experiments was assessed in either multiple choice or vignette format.

The major hypothesis in the two experiments to be described was that comprehension of the law would be higher among participants exposed to our revised capital sentencing instructions than for those exposed to the presently used pattern instructions or to no instructions. We also anticipated that comprehension under the multiple choice format might be higher than under the vignette format, but this variable was manipulated primarily to determine if it had an effect.

EXPERIMENT 1

Method

Participants

Ninety-two introductory psychology students participated in Experiment 1 as one way of satisfying a research requirement. One participant from the study was deleted from the analyses due to extensive missing data, leaving a total of 91 participants.

Materials

The sentencing instructions were presented on videotape, read by a middle-aged man wearing a black robe. The pattern instructions consisted of the relevant portions of the capital sentencing instructions currently used in North Carolina. The revised instructions covered the same content as the pattern instructions, but we rewrote them to reduce the total use of passive voice from twenty-five percent of the sentences to six percent. In addition, we simplified the sentence structure, and eliminated many words that were unnecessarily vague, repetitive and abstract. We also attempted to clearly explain the differing standards of proof and of unanimity as applied to aggravating and mitigating

factors. The revised instructions were reviewed for legal accuracy by an attorney who specializes in capital cases.

We assessed comprehension using one of two formats: multiple choice or vignette. The multiple choice format consisted of direct knowledge questions modeled after those used by Luginbuhl (1992). Each question was followed by a set of four answers from which to choose the correct response based on the judge's instructions. The questions in vignette format were adapted from those used by Zeisel (see Diamond, 1993; Levi, 1993). Each vignette described a set of circumstances faced by a hypothetical juror or jury, as well as the action chosen by the juror or jury. For each scenario, the respondent indicated whether the decision was correct or not based on the judicial instructions.

Comprehension of nine issues was assessed. These were: 1) at least one aggravating circumstance must be found before death can be imposed; 2) aggravating circumstances must be proven beyond a reasonable doubt; 3) aggravating circumstances must be agreed upon unanimously; 4) aggravating circumstances are limited to those identified in the state statute; 5) mitigating circumstances need be proven only by a preponderance of the evidence; 6) mitigating circumstances need not be agreed upon unanimously; 7) mitigating circumstances are not limited by statute; 8) the relative weighing procedures for aggravating and mitigating circumstances; and, 9) the death penalty can be imposed only if the aggravating circumstances, taking into account the mitigating circumstances, are substantial enough to call for the death penalty.

The questions were matched so that the issues were ordered identically in each format. There were 14 questions: six questions assessed comprehension of aggravating factor issues, five questions assessed comprehension of mitigating factor issues, and three questions assessed comprehension of the relative weighing factors involved in the sentencing decision. In addition to the comprehension test, respondents' demographic characteristics (age, race and gender) and death penalty attitude were assessed.

Procedure

The experiment was a 3 (Instructions: no instructions, simplified instructions, pattern instructions) x 2 (Question format: multiple choice vs. vignette) design. Participants reported to the assigned room, generally in groups of 4 - 6. The experimenter read a brief introduction to the research stating that its purpose was to assess how well jurors in death penalty cases understood the instructions from the judge on sentencing a convicted capital defendant to life in prison or to death.

Participants then received either no instructions, the pattern instructions, or the revised instructions. Participants who received no instructions completed one of the two formats of the comprehension test immediately after the introduction, followed by the demographic questions and death penalty attitude question. Those exposed to the pattern instructions or the revised instructions viewed their respective videotape and then completed either the multiple choice or the vignette comprehension test, followed by the demographic and death penalty questions. The two question formats were distributed randomly among the participants at each session. All participants remained in the room until the dependent measures were completed, at which time they were fully debriefed.

Results

Seventy-six percent of the participants were Caucasian, 17% were African-American, and 8% were of other racial or ethnic background (one participant failed to indicate race). Fifty-two percent of the participants were female and 48% were male. Twenty-one percent strongly supported, 42% somewhat supported, 18% neither supported nor opposed, 12% somewhat opposed, and 7% strongly opposed the death penalty. There were significant differences in death penalty attitude across race, but not gender. On a 5-point scale, with higher means indicating opposition, African-Americans were less supportive of the death penalty ($\underline{M} = 3.4$) than whites ($\underline{M} = 2.18$), $\underline{F}\ (2, 87) = 8.15$, $\underline{p} < .001$.

Two way multivariate analyses of variance were conducted to test the effects of the instructions manipulation and comprehension test question format on participants'

understanding of the instructions. Three composite dependent variables were created from the comprehension test questions. The number of correct responses to the six questions related to aggravating factors was summed to create a composite comprehension score labeled "aggravation." Similarly, the number of correct responses to the five questions relating to mitigating factors was summed to create a composite comprehension score labeled "mitigation." Finally, the number of correct responses to the remaining three questions on the relative weighing and totality of circumstances surrounding the 6sentence was summed to create a composite comprehension score labeled "weighing." Table 1 shows the number of correct responses for each composite dependent variable, as well as the total number of correct responses (highest possible score is 14) by instruction type and measurement format.

Table 1

Mean number correct (by Instruction Type, Question Format and Composite Dependent Variable)

	Question Format	
Instruction Type	Vignette	Multiple Choice
No Instruction		
Aggravation	4.60	2.28
Mitigation	1.27	1.64
Weighing	2.40	1.64
Total Correct	**8.27 (15)**	**5.60 (15)**
Pattern Instruction		
Aggravation	5.07	3.33
Mitigation	1.80	2.33
Weighing	2.20	2.07
Total Correct	**9.07 (15)**	**7.73 (15)**
Revised Instruction		
Aggravation	5.44	4.00
Mitigation	4.06	3.40
Weighing	2.44	2.47
Total Correct	**11.94 (16)**	**9.87 (15)**

(N's in parentheses) Note. Highest possible scores: Aggravation = 6; Mitigation = 5; Weighing = 3; Total Correct = 14.

Instructions. There was a significant main effect for instructions, with participants who viewed the revised instructions showing the highest comprehension rates, followed, in order, by those who viewed the pattern instructions and no instructions, overall Wilks' Lambda value of .566, F (6, 166) = 9.15, $p < .0001$. Looking at the three composite dependent variables separately, instructions had a significant effect on aggravation, F (2, 85) = 8.40, $p < .001$ and mitigation, F (2, 85) = 23.25, $p < .0001$, but not on weighing , F (2, 85) = 2.27, $p < .12$[3].

Examining the six aggravation questions, participants who received the revised instructions demonstrated mean comprehension scores of 4.72 (highest possible score = 6), while those who received the pattern instructions and no instructions had means of 4.20, and 3.50 respectively. Simple effects tests showed that the difference in comprehension means between the revised instructions and no instructions was significant ($p < .0001$) as was the difference in means between no instructions and pattern instructions ($p < .02$). The difference in comprehension means between pattern instructions and revised instructions was not significant ($p < .09$).

The composite aggravation measure contained two questions regarding the burden of proof, two questions concerning unanimity requirements, and two additional questions regarding the role of aggravators. Because the instructions manipulation may have differentially influenced comprehension on these three different components, we repeated the MANOVAs on each of these three groups of two questions each. The instructions manipulation had a significant effect for unanimity ($p < .03$) and for role ($p < .04$), but not for burden of proof ($p > .15$). In all cases, comprehension means were highest under revised instructions, intermediate under pattern instructions, and lowest under no instructions.

Turning to the five mitigation questions, participants who received the revised instructions had mean comprehension scores of 3.73 (highest possible score = 5), while

those who received pattern instructions or no instructions had comprehension means of 2.06 and 1.40 respectively. Again using simple effects tests, the difference in mean comprehension between the revised instructions and pattern instructions was significant ($p < .0001$), as was the mean difference between revised instructions and no instructions ($p < .0001$); however, the difference between no instructions and pattern instructions did not achieve significance ($p < .10$).

Similar to the composite aggravation measure, the mitigation measure had the same three components of burden of proof, unanimity, and role (only one question). MANOVAs conducted on these three components separately showed that the instructions significantly influenced comprehension on burden of proof ($p < .001$), unanimity ($p < .001$), and role ($p < .02$). As was the case for aggravation, comprehension means were always highest under revised instructions, intermediate under pattern instructions, and lowest under no instructions.

Simplifying and clarifying the pattern instructions led to significant increases in comprehension, particularly with regard to mitigating issues. While we presented mean comprehension scores earlier, the percentage correct presents an even more compelling picture. The percentage of correct responses for the six aggravating questions rose from 57% (no instructions) to 70% (pattern instructions) to 79% (revised instructions). For mitigation, by contrast, these percentages are 29% to 41% to 75%. Thus, while comprehension of mitigating, as compared to aggravating issues, was much lower under no instructions or pattern instructions, comprehension of mitigating issues rose to almost equal that of aggravating issues under the revised instructions.

Question format. There was a significant main effect for question format, with an overall Wilks' Lambda value of .60, $F(3, 83) = 18.65$, $p < .0001$. This effect was confined to the aggravation composite dependent measures, $F(1, 85) = 51.88$, $p < .0001$, with comprehension scores significantly higher under the vignette format ($M = 5.03$) than under the multiple choice format ($M = 3.24$).

While the absolute levels of comprehension varied between the multiple choice and the vignette measures, comprehension on both showed increases from no instructions to pattern instructions to revised instructions, and both showed large effects on several questions. For example, Vignette Question #12 asked whether the jury was correct (it was) in considering a mitigating circumstance in their penalty decision even though they believed it had been proven only by a preponderance of the evidence instead of by a reasonable doubt. The pattern instructions yielded only 13% of the participants responding correctly; the revised instructions yielded 75% correct responses.

Similarly, on Vignette Question #13, ten jurors decide to consider a mitigating circumstance in their penalty decision, even though two jurors did not believe it had been proven. Of those participants who received pattern instructions, only 13% knew the jury was correct; of those receiving the revised instructions, 94% of the participants knew the jury was correct.

Multiple Choice Question #5 asked how many jurors must agree on a mitigating factor for it to be found. Only 40% of the participants exposed to the pattern instructions correctly answered that a single juror could find a mitigating circumstance; the percent correct rose to 73% under the revised instructions. Similarly, Multiple choice Question #13 asked which type of circumstance did not require unanimous agreement. While 47% of those receiving the pattern instructions correctly identified the answer as mitigating circumstances, 80% of those receiving the revised instructions did so.

The increase in comprehension of mitigation brought about by the revised instructions was particularly striking. While the law sets less stringent standards for proving mitigation than for proving aggravation, our results suggest that mitigation will be less difficult to prove than aggravation (as the law intends) only when individuals hear clear, unambiguous instructions as opposed to the presently used pattern instructions.

There was no significant interaction between instructions and question format on any of the three composite dependent measures. Additionally, Pearson's correlations of

death penalty attitude with each of the three composite dependent variables were not significant. Thus, death penalty attitude was not correlated with the extent to which participants understood the instructions.

EXPERIMENT 2

Results from Experiment 1 provided support for the prediction that comprehension of capital sentencing instructions could be improved by their being written in a simpler, more understandable form. In addition, the format of the assessment questions had a significant effect on the comprehension of aggravating issues.

We wanted to replicate and extend these findings by making the experience of our participants more similar to that of actual jurors. Jurors in a real trial have a context within which to apply the sentencing instructions. They have heard evidence about the case from the trial itself; in addition they hear evidence on specific aggravating and mitigating circumstances during the penalty phase. Those specific aggravating and mitigating circumstances are repeated and elaborated on by the judge when he or she reads the sentencing instructions. Thus, we conducted a second experiment similar to the first, but with the addition of specific case evidence.

Method

Participants

One hundred and seventy-five introductory psychology students participated in Experiment 2 as one means of fulfilling an experimental requirement. One participant was deleted from the analyses for failing to complete many of the dependent measures, leaving 174 participants.

Materials

A summary of evidence concerning a hypothetical murder was developed and read by the participants. Wendi, an abused wife had taken out a restraining order against her husband, John, who came to her house in spite of the restraining order. When she called the police and wouldn't let him in, he broke down her door, pulled a 10-inch butcher knife

from his boot, and stabbed her to death. Remorse then set in, and he waited for the police to come and arrest him. At the trial it was further revealed that John had recently taken out a large life insurance policy on his wife. John was convicted of first degree murder. Participants also read about the aggravating factors presented at the penalty phase (that the murder was especially cruel; that the murder was committed for monetary gain), as well as mitigating evidence (that John was being manipulated by another woman). The stage was thus set for participants to hear the judge's instructions for deciding on the penalty of life or death.

The videotaped penalty instructions were identical to those used in Experiment 1 except that each version (pattern and revised) contained additional specific information about the aggravating and mitigating factors that had been presented in the case evidence read by the participants. This provided a context within which to interpret the sentencing instructions.

Since participants were now provided a context, it seemed methodologically useful to explore whether the addition of the same context to the measurement instrument would lead to increased comprehension. Accordingly, another variable, question specificity, was introduced by creating two additional versions of the comprehension test questions: case-specific multiple choice and case-specific vignette versions.

The format of these two new versions was identical to that of the multiple choice and vignette questions used in Experiment 1 except that the questions contained specific references to the evidence presented both in the case summary and in the judicial instructions. For example, the stem of a general multiple choice question, "What is the standard of proof for aggravating circumstances?" became "What is the standard for proving the aggravating circumstance that the murder was committed for monetary gain?" In the vignette format, the general scenario,

> The jury is considering whether a particular aggravating circumstance exists. They all agree that the aggravating circumstance has been proven

by a preponderance of the evidence, although it was not proven beyond a reasonable doubt. Therefore, the jury concludes it cannot use this as an aggravating circumstance in deciding the sentence,

was changed to read,

The jury is considering the 14 stab wounds as evidence that the murder was especially cruel. Since the victim died after the second stab wound, though, they believe the cruelty of the murder has been proven only by a preponderance of the evidence. Therefore, the jury concludes it cannot use the cruelty of the crime as an aggravating circumstance in deciding the sentence.

Half of the participants received the comprehension test questions in the general format, the other half in the specific format.

Experiment 2 was a 3 (Instructions: no instructions, pattern instructions, simplified instructions) X 2 (Question format: multiple choice vs. vignette) X 2 (Question specificity: general vs. specific) completely crossed design.

Procedure

Groups comprising generally 4 - 6 participants received the same introduction used in Experiment 1. All participants then read a written case summary of evidence and returned the case summary to the experimenter. Subsequently, each participant experienced one of the three instruction conditions (no instructions, pattern instructions, simplified instructions). Participants who received no instructions went ahead and completed one of the four versions of the comprehension test.

Participants who received the pattern instructions or simplified instructions viewed their respective instruction videotape and subsequently completed one of the four versions of the comprehension test. The four versions of the comprehension test were distributed randomly among the participants at each session. After completing the comprehension test, all participants answered the demographic questions and the death penalty attitude question, after which they were fully debriefed.

Results

Eighty-four percent of the participants were Caucasian, 9% were African-American, and 7% were of other racial or ethnic background (2 participants failed to indicate their race). Forty-two percent of the participants were female and 58% were male. Measures of attitude toward the death penalty revealed that 14% strongly supported, 50% somewhat supported, 21% neither supported nor opposed, 10% somewhat opposed and 6% strongly opposed the death penalty. There were significant differences in death penalty attitude across gender, but not race. On a 5-point scale, with higher means indicating opposition, females were more likely to oppose the death penalty ($\underline{M} = 2.75$) than males ($\underline{M} = 2.25$), $\underline{F}\ (1, 170) = 9.98$, $\underline{p} < .002$.

Three way multivariate analyses of variance (MANOVA) were performed to examine the effects of instructions, question format, and question specificity on participants' comprehension of the instructions. In a manner identical to Experiment 1, the three composite variables of aggravation, mitigation, and weighing were created[4].

Instructions. The number of correct responses on the three composite variables, as well as the total correct (out of a possible score of 14) by experimental condition are shown in Table 2. As in Experiment 1, there was a significant main effect for instructions; participants' comprehension of the relevant legal concepts was highest under revised instructions, followed, in order, by pattern instructions and no instructions. The overall Wilks' Lambda value for the instruction effect was .625, $\underline{F}\ (6, 320) = 14.15$, $\underline{p} < .0001$.

The effects of the instruction manipulation were significant for aggravation, $\underline{F}\ (2, 162) = 12.15$, $\underline{p} < .0001$ and for mitigation, $\underline{F}\ (2, 162) = 35.77$, $\underline{p} < .0001$, but not for weighing, $\underline{p} > .15$. Since comprehension on weighing issues was not affected by the instructions, this measure will not be considered further.

Table 2

Mean number correct (by Instruction Type, Question Format and Composite Dependent Variable)

	Question Format			
	Vignette		Multiple Choice	
	Question Specificity			
Instruction Type	general	specific	general	specific
No Instruction				
Aggravation	4.93	4.36	2.53	3.13
Mitigation	1.20	1.57	1.27	1.20
Weighing	1.73	2.36	1.47	1.93
Total Correct	**7.86 (15)**	**8.29 (14)**	**5.27 (15)**	**6.26 (15)**
Pattern Instruction				
Aggravation	4.93	4.13	3.73	4.67
Mitigation	1.93	1.40	1.20	1.47
Weighing	2.36	1.40	2.60	2.33
Total Correct	**9.22 (14)**	**6.93 (15)**	**7.53 (15)**	**8.47 (15)**
Revised Instruction				
Aggravation	5.29	4.86	3.87	5.31
Mitigation	4.07	2.86	2.60	2.92
Weighing	2.21	2.00	1.53	2.54
Total Correct	**11.57 (14)**	**9.71 (14)**	**8.00 (15)**	**10.77 (13)**

(N's in parentheses) Note. Highest possible scores: Aggravation = 6; Mitigation = 5; Weighing = 3; Total Correct = 14.

With regard to aggravation, participants who heard the revised instructions displayed the highest mean comprehension scores of 4.83 (highest possible = 6), while the means for those who heard the pattern instructions or no instructions were 4.37 and 3.74 respectively. All three means differed significantly from each other (no instructions vs. revised instructions, $p < .001$; no instructions vs. pattern instructions, $p < .005$; pattern instructions vs. revised instructions, $p < .04$).

As before, the aggravation composite variable was comprised of two questions inquiring about burden of proof, two questions regarding unanimity, and two questions on other aspects of the role of aggravation. Separate MANOVAs on each of these sets of two questions showed a significant effect of the instructions manipulation on unanimity ($p < .0001$) and on role ($p < .04$), but not on burden of proof ($p > .3$). In all cases, mean comprehension scores increased from no instructions to pattern instructions to revised instructions.

Turning to mitigation, participants exposed to the revised instructions demonstrated the highest mean comprehension scores of 3.11 (highest possible = 5), while those exposed to pattern instructions and no instructions had means of 1.50 and 1.31 respectively. The differences in mean comprehension comparing the revised instructions with both the pattern instructions and the no instructions were significant ($p < .0001$); however, the difference in means between the no instruction and pattern instructions conditions was not ($p > .4$). Thus, participants exposed to the pattern instructions understood mitigating issues no better than those exposed to no instructions at all.

The mitigation composite variable had the same sub-components of burden of proof, unanimity, and role (1 question) as did aggravation, and separate MANOVAs were conducted on each of these three sets of questions. The role of instructions was significant at $p < .0001$ for both proof and unanimity, and at $p < .001$ for role. The number of correct answers increased from no instructions to pattern instructions to revised instructions, with one trivial reversal.

As in Experiment 1, simplifying the instructions was particularly beneficial to comprehension of mitigating issues, raising levels of accurate comprehension from 26% (no instructions) to 30% (pattern instructions) to 62% (revised instructions). In contrast, levels of comprehension of aggravating factors improved from 62% to 73% to 81%. While comprehension of mitigating issues, compared to aggravating issues, was much poorer

under no instructions and pattern instructions, exposure to the revised instructions brought comprehension of mitigation issues up to a relatively high level.

Question format. There was a significant main effect for question format, with an overall Wilks' Lambda value of .849, F (3, 160) = 9.48, $p < .0001$. The effect of question format was significant for aggravation, F (1, 162) = 23.49, $p < .0001$ and mitigation, F (1, 162) = 4.34, $p < .04$, (but not for weighing, $p > .60$). For both aggravating and mitigating issues, participants who received the vignette format demonstrated significantly higher mean comprehension scores than those who received the multiple choice format (aggravating issues: vignette vs. multiple choice means = 4.75 vs. 3.87, $p < .001$; mitigating issues: vignette vs. multiple choice means = 2.17 vs. 1.78, $p < .04$).

In Experiment 1, the vignette format yielded higher comprehension scores on aggravation only, whereas in Experiment 2 the vignette format produced higher comprehension on both aggravation and mitigation. As in the first experiment, however, while the absolute levels of comprehension differed between formats, both demonstrated the same patterns of comprehension as a function of the instructions. For example, summing over all five mitigation questions, the percent correct responses on the multiple choice measure rose from 28% (no instructions) to 32% (pattern instructions) to 69% (revised instructions). The corresponding percentages on the multiple choice measure were 25%, 27%, and 59%. Under neither format did the pattern instructions lead to better comprehension of mitigation than no instructions at all.

There was a significant interaction between question format and question specificity, with an overall Wilks' Lambda value of .884, F (3, 160) = 6.97, $p < .001$. This interaction was significant for aggravation, F (1, 162) = 19.39, $p < .001$, showing that when the comprehension test questions were specific, mean comprehension was not affected by question format (multiple choice/specific M = 4.37; vignette/specific M = 4.45). On the other hand, when the comprehension test questions were general, comprehension declined for the multiple choice format (M = 3.38) but improved for the

vignette format M = 5.05). All pairs of means differed significantly from one another at p < .02 or higher, except the multiple choice/specific vs. vignette/specific means.

In addition to the interaction with question specificity, question format interacted with instructions, with an overall Wilks' Lambda value of .871, F (6, 320) = 3.81, p< .002. The interaction was significant on the aggravation composite dependent variable, F (2, 162) = 6.85, p < .002. This interaction stems from the no instructions condition, where comprehension levels were significantly higher under the vignette format (M = 4.65) than under the multiple choice format (M = 2.83), p < .0001.

There was no main effect for question specificity. Additionally, Pearson's correlations of death penalty attitude with each of the three dependent variables were not significant.

Discussion

These two experiments demonstrate that the current version of the North Carolina capital sentencing instructions are not well-understood, at least by college student participants. At the same time, we have shown that participants' comprehension of the critical concepts surrounding both aggravating and mitigating factors can be improved significantly when the instructions are rewritten using simplified language and syntactic construction.

While comprehension of the criteria for proving aggravating factors did improve under the revised instructions, the improvement with regard to mitigating factors was striking. In the absence of good instructions, it is understandable that the criteria for proving mitigation might be unclear, since they run counter to lay knowledge and schemas regarding legal concepts (proof beyond a reasonable doubt; unanimity). Our results demonstrate that instructions written in understandable language can clarify such legal concepts for the listener.

Of particular note, comprehension of mitigating issues by participants exposed to the currently used pattern instructions was not significantly higher than for those who

heard no instructions. Other researchers (noted in the introduction) have sometimes found that comprehension of legal concepts was not improved by hearing judicial instructions. The implication of these results is that jurors who hear the present North Carolina pattern instructions in an actual trial may understand mitigation no better than if they had not been instructed at all.

Since mitigation is the primary avenue by which jurors can be led away from a death sentence (e.g., Haney, 1995), this is a particularly troublesome finding. Our participants presented with the present North Carolina pattern instructions exhibited major misconceptions regarding mitigation. Combining the data from both experiments, of the participants who responded to the multiple choice measures, over half who viewed the pattern instructions believed that mitigators had to be agreed upon unanimously, but only about 14% who viewed the revised instructions held this incorrect belief. Similarly, the revised instructions fostered much greater understanding that mitigators required only proof by a preponderance of the evidence, and that any factor introduced into evidence could be considered as a mitigator. The law establishes less stringent requirements for demonstrating mitigation than for aggravation; yet this lower threshold was adequately conveyed to our participants only by our revised instructions--not by those presently in use.

To comment briefly on some of the other findings, revision of the instructions did not significantly affect comprehension of weighing factors. Not only did this composite variable comprise only three questions, thus attenuating the range of movement, but comprehension even in the absence of instructions was relatively high. The lack of a difference on this variable, however, does indicate that the effects found for mitigation and aggravation cannot be accounted for by any procedural difference that artifactually decreased the understanding of the participants exposed to the pattern instructions.

With regard to question format, we had anticipated that since the multiple choice format required only recognition of the correct response while the vignette format required

correct application of the information, participants would show higher comprehension scores when the format was multiple choice. In both experiments, however, participants frequently had higher comprehension scores under the vignette format than under the multiple choice format, and whenever the difference between formats achieved significance, comprehension favored the vignette format.

An obvious difference between the two formats is that the vignettes provided two choices from which to select the correct response while the multiple choice questions provided four choices. If participants merely guessed, they had a 50% chance of being right under the vignette format but only a 25% chance under the multiple choice format. And our data do suggest that participants (not unreasonably) did some guessing. For example, in Experiment 2, the influence of question format on comprehension of aggravation occurred only under no instructions. In the absence of instructions, it is quite reasonable that many participants would guess at the correct response.

The effect of question format (higher comprehension scores under the vignette than the multiple choice measures) was most consistent for aggravation, yielding similar patterns in both experiments. This suggests that guessing was not random; participants may have guessed at the correct response consistent with their common knowledge or schemas about legal concepts. For example, aggravating factors must be found unanimously and beyond a reasonable doubt, and this is consistent with peoples' schemas of the law. If the participants applied such schemas to aggravation, they would get the "correct" answer, and it might have been easier to apply such schemas with the straightforward "yes-no" nature of the vignette format than with the several options of the multiple choice format. These same standards, if applied to mitigation however, would yield incorrect responses, and thus the advantage of "informed" guessing on the vignette format would not be expected to occur with any consistency for mitigating factors. Our results support this reasoning.

Prior research on comprehension of judicial instructions has relied on the use of only one format of dependent measure, either vignette or multiple choice. Our data suggest that use of a vignette format for the comprehension test (or any dependent measure that has only two response choices) may artificially inflate comprehension scores, particularly in the no instructions condition of these studies. Studies using such a format may imply a higher rate of comprehension than actually exists.

Let us return to our primary finding, that the revised instructions state the law regarding mitigation in a way that the lay person can understand, while the pattern instructions do not. The relevance of these results goes beyond the mere fact of increased comprehension. It has been established (Lockett v. Ohio, 1978) that ". . . the sentencer [may] 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" (p. 585). This due process guarantee continues to be upheld (e.g., Eddings v. Oklahoma, 1982; Mills v. Maryland, 1988; Morgan v. Illinois, 1992). Since the North Carolina pattern instructions are likely to lead the jury to apply unconstitutionally stringent criteria to proving mitigation, such instructions preclude the jury from giving adequate consideration to mitigation, in violation of due process.

There was no deliberation in the present study. Would the opportunity to discuss the questions and the law have affected the results? Prior research (e.g., Diamond & Levi, 1996; Ellsworth, 1988; Luginbuhl, 1992) suggests that where instructions are relatively clear, and where the majority correctly understands the law before beginning to deliberate, that deliberation will improve comprehension even further. However, where instructions are unclear, deliberation will have little effect. As stated by Diamond and Levi (1966), ". . . deliberation can be depended upon to improve comprehension only when a substantial majority of the members of a jury begin deliberations with a correct understanding of the information at issue" (p. 230).

Is the legal profession receptive to data showing poor comprehension of judicial instructions? Court reaction to the use of simpler language in judicial instructions has been largely negative, although a few jurisdictions have been willing to explore the possibilities of increasing comprehension in this manner. Elwork et al. (1977), for example, acknowledge the efforts made both in Florida and in Pennsylvania to seek the aid of communications experts during the drafting of their pattern jury instructions to ensure that the phrasing was, theoretically at least, more comprehensible.

Others, however, are openly willing to acknowledge that comprehension is typically compromised for the sake of legal and technical accuracy. In 1956, the original drafters of California's Book of Approved Jury Instructions stated, for example, that the "one thing an instruction must do above all else is correctly state the law. This is true regardless of who is capable of understanding it" (Sales et al., 1977). More recently in Gacy v. Welborn (1993), the Illinois 7th Circuit court appellate judge rejected Zeisel's findings of poor comprehension of the instructions used in Free, saying:

> Instead of inquiring what juries actually understood, and how they really reasoned, courts invoke a 'presumption' that jurors understand and follow their instructions. [This] is a rule of law--a description of the premises underlying the jury system, rather than a proposition about jurors' abilities and states of mind (pp. 9-10).

Unfortunately, even though the judge does criticize "polysyllabic mystification" in judicial instructions, his view that because the law assumes something is true, it therefore is true, appears to represent the norm among the judiciary.

We do not agree with these sentiments. As pointed out by Cho (1994), "A jury that has sentenced a defendant to death because it misunderstood an otherwise legally accurate instruction is not following the law. The jury is, in effect, exercising jury nullification." This results in the arbitrary and capricious application of the death penalty, the very ill the instructions seek to remedy.

Furthermore, without undue effort we were able to rewrite the North Carolina instructions to significantly increase participants' understanding of crucial concepts. While our participants were college students, there is little reason to believe that comprehension of the average juror would not be similarly increased. Furthermore, while no two states have identical capital sentencing instructions, virtually all the states with capital punishment deal with aggravating and mitigating factors and apply the same standards of proof to them as does North Carolina. We therefore have every reason to believe that comprehension of the capital sentencing instructions of other states could be similarly improved so that they provide guided, rather than misguided discretion.

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Author Note

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Footnotes

[1]In a few states, most notable Texas and Oregon, the primary focus of the jury is on whether the defendant is likely to pose a threat to society in the future, commonly referred to as "future dangerousness."

[2]A few states, e.g., California, have what is called "aggravated first degree murder," in which evidence regarding statutory aggravating factors is presented during the guilt/innocence stage of the trial. The defendant is convicted of aggravated first degree murder (and is eligible for the death penalty) if the jury finds the existence of one or more of the aggravating factors.

[3]All of the major analyses to be reported were performed again after those who would never vote for the death penalty, or would always vote for the death penalty, were removed. Removal of those participants did not alter the pattern nor the significance of the results, and we therefore report the analyses on the entire sample.

[4]As in Experiment 1, the analyses to be reported were done a second time, after removing those participants would never or always vote for the death penalty. The results were unchanged.

Madame Chairman and members of the Committee,

My name is Rev. Mark Creech, Executive Director of the Christian Action League of North Carolina

Today there are many people of faith, specifically the Christian faith – people whom I respect deeply because of their commitment to justice, who not only believe that the evidence of flaws in our justice system warrant a moratorium on executions, but also believe [if they would admit it] that there is no crime so atrocious a person deserves to die for it. Their arguments, perhaps too some, may seem to take the moral high ground.

Complicating the issue for Committee members may also be the vast array of compelling statistics and examples in favor or opposition to both a moratorium and the death penalty itself.

Nevertheless, I suggest that there is essentially one question, if properly considered, would have an amazing clarifying effect on these matters: Are we so concerned about making sure someone who might not be guilty of a capital crime isn't executed that we forget about protecting the lives of those who are most certainly innocent – the people of North Carolina?

What we call the death penalty is as old as the human race, dating back to the days of Noah, just after God had destroyed a wicked and violent civilization. In Genesis 9:6, God set forth the standard under which human life would make a new beginning, stating: "Whoso sheddeth man's blood, by man shall his blood be shed: for in the image of God made he man." This command antedates Israel and the Mosaic code; transcends Old Testament law, per se, and advocates public policy that is binding for all governments of all eras. This principle is affirmed in the New Testament by the apostle Paul, who says, "It is not without purpose that the ruler carries the sword. He is God's servant, to inflict his avenging wrath upon the wrongdoer." The sword, mind you, is an instrument of death.

In other words, it is the command of God that the state be given and should use its right to execute in order to protect innocent human life from aggressors who fail to respect its value. St. Thomas Aquinas put it this way: "The civil rulers execute, justly and sinlessly, pestiferous men in order to protect the peace of the state."

Certainly, when capital punishment isn't being administered fairly, we need to take steps to assure justice in the fear of God. But today with all the pretrial, trial, appeals, writ and clemency procedures to minimize the chance of an innocent person being convicted, sentenced to death and finally executed, again and again we discover the injustices committed in the process so thoroughly that there is no solid evidence of even one innocent person having been executed since 1900.

Moreover, if one argues North Carolina needs to declare a moratorium on the death penalty in order to be certain no innocent is ever executed. Then one also needs to understand that a moratorium is not necessarily a guarantee that innocents won't die. For instance, one study by two professors at the University of Houston, revealed that as a result of an unofficial execution hiatus during most of 1996 and early 1997 in Texas, the state appeared to have spared few, if any, condemned prisoners while the citizens of that state experienced an added loss of 90 innocent lives to homicide," over and above what would have been expected had not the moratorium been in place.

Let us face the fact clearly: The death penalty will never be administered by a flawless judicial system. But if, as a people, we are determined to do the will of God, have a heart for justice and are committed to focusing primarily on protecting innocent life as opposed to codling those declared guilty, we can correct the problems within our system without failing to do our duty, which is to expedite justice as soon as possible by executing those whose hands are intentionally stained with the blood of others.

On Thurday, March 23rd 1995 Jeff Uber was shot 3 times for 3 credit cards. The murder had been planned at least two weeks prior. Two men were eventually implicated in the crime. One served less than a year behind bars the other is serving two consecutive life sentences without the possibility of parole.

Jeff Uber is one of the "real victims" if you ask me. He can't be here today so you will have to settle for me, his identical twin brother. I can tell you with reasonable certainty that he'd not be pleased with this study on capital punishment at least from what I've seen and heard about so far. This doesn't mean that these opinions cannot be changed. Some of what I have to say from here on might seem a bit "inflammatory", I can only hope that you will put my words to some constructive use later on.

If Jeff Uber were here today, he would note that this study is the result of much legal maneuvering and political concessions. Just the same he'd not object to impartial and objective study on this issue if that were possible. For this study to be taken seriously, I'd like to challenge all parties to do more than advocate for their own personal interests.

To the "academy of ambulance chasers", I demand that you

Do more than just represent what you believe is in the best interests of your client.
Do not advocate for policies that diminish or undermine the authority or reputations of other officers of the court (including district attorneys).
Avoid the temptation to grandstand for the media or publicly appraise the courts or your peers.

To the "sheeple of faith against capital punishment", I demand that you

Avoid the temptation to imply that we will "go to hell" just because we happen to disagree with you on this one subject or ostracize those of us that disagree with you.
Remember that this is the United States of America, not the Catholic States of America, in this nation, law (statute) trumps religious belief when it comes to criminals and our courts.
Remember that "the punishment is not the problem"!

To the "professional students", mental health advocates, or academics

Don't just think only in terms such of study, medicate, rehabilitate or incarcerate. We live in a dynamic world and hypothesizing over sparse statistics doesn't change individuals that have already demonstrated strong predatory instincts.

Experience the real world first! It's no surprise to this relative of a homicide victim that social elitists don't have the same sense of urgency as I do when it comes to dealing with premeditated murderers for as long as feel insulated (economically, socially and geographically).

To the "buzzards" (a.k.a.) media:

Avoid the temptation to sensationalize individual cases or develop a false sense of "fear, uncertainty or doubt/dread" about events, as they occur.

To the "politician" (not to be confused with "legislator")

Don't walk over dead bodies of "real victims" for favors.
Condemned inmates are NOT victims!

As the brother of a homicide victim I request that this study or the recommendations that result from it include as many preventative measures as possible. Investing in "prevention" of premeditated murders (before they occur) represents the best means to deal with the problem of capital crime.

Instead of just investing more precious time and resources into studying a punishment, our legislature needs to invest in:

Motive Reduction – Enforce the laws that we already have more quickly and decisively.

Target Hardening - Make it harder to commit crimes that lead to capital murders, increase the presence of law enforcement and educate the public on ways to protect themselves and their property.

Confrontation avoidance – Instruct the public on the value of avoiding situations that encourage uncontrolled argument. Promote "Leave and Live" strategies especially when it comes to dealing with individuals that cannot control their behaviors.

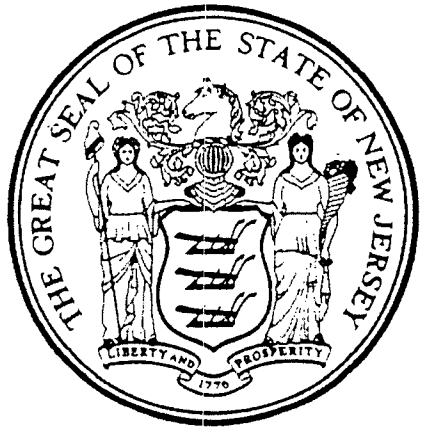
In closing, I'd like to say that no amount of "prevention" will stop all premeditated murders with aggravating factors from occurring in the future. I personally don't look forward to the occasional and deserved execution but I do understand that they are necessary. Our forefathers created judicial and penal systems and imposed capital punishment on those that could not be deterred from capital crime. Fewer capital crimes should result in a smaller number of executions.

Wayne Uber
910 Highland Trail
Chapel Hill, NC 27516
(919)929-6476

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*Full Report available at New Jersey Death Penalty Study Commission website:
http://www.njleg.state.nj.us/committees/njdeath_penalty.asp

ATTACHMENT VIII



NEW JERSEY DEATH PENALTY STUDY COMMISSION REPORT

JANUARY 2007

EXECUTIVE SUMMARY

The New Jersey Death Penalty Study Commission was created by P.L.2005, c.321. The enactment directed the Commission to study all aspects of the death penalty as currently administered in New Jersey and to report its findings and recommendations, including any recommended legislation, to the Legislature and the Governor. The enactment also directed the Commission to study seven specific issues. The Commission's findings and recommendations are set out below.

FINDINGS

(1) There is no compelling evidence that the New Jersey death penalty rationally serves a legitimate penological intent.

(2) The costs of the death penalty are greater than the costs of life in prison without parole, but it is not possible to measure these costs with any degree of precision.

(3) There is increasing evidence that the death penalty is inconsistent with evolving standards of decency.

(4) The available data do not support a finding of invidious racial bias in the application of the death penalty in New Jersey.

(5) Abolition of the death penalty will eliminate the risk of disproportionality in capital sentencing.

(6) The penological interest in executing a small number of persons guilty of murder is not sufficiently compelling to justify the risk of making an irreversible mistake.

(7) The alternative of life imprisonment in a maximum security institution without the possibility of parole would sufficiently ensure public safety and address other legitimate social and penological interests, including the interests of the families of murder victims.

(8) Sufficient funds should be dedicated to ensure adequate services and advocacy for the families of murder victims.

RECOMMENDATIONS

The Commission recommends that the death penalty in New Jersey be abolished and replaced with life imprisonment without the possibility of parole, to be served in a maximum security facility. The Commission also recommends that any cost savings resulting from the abolition of the death penalty be used for benefits and services for survivors of victims of homicide.

FINDINGS OF THE NEW JERSEY DEATH PENALTY STUDY COMMISSION

There is no compelling evidence that the New Jersey death penalty rationally serves a legitimate penological intent.

The costs of the death penalty are greater than the costs of life in prison without parole, but it is not possible to measure these costs with any degree of precision.

There is increasing evidence that the death penalty is inconsistent with evolving standards of decency.

The available data do not support a finding of invidious racial bias in the application of the death penalty in New Jersey.

Abolition of the death penalty will eliminate the risk of disproportionality in capital sentencing.

The penological interest in executing a small number of persons guilty of murder is not sufficiently compelling to justify the risk of making an irreversible mistake.

The alternative of life imprisonment in a maximum security institution without the possibility of parole would sufficiently ensure public safety and address other legitimate social and penological interests, including the interests of the families of murder victims.

Sufficient funds should be dedicated to ensure adequate services and advocacy for the families of murder victims.

ISSUE 1

WHETHER THE DEATH PENALTY RATIONALLY SERVES A LEGITIMATE PENOLOGICAL INTENT SUCH AS DETERRENCE

Commission's Finding: There is no compelling evidence that the New Jersey death penalty rationally serves a legitimate penological intent.

The penological objectives generally cited by supporters of the death penalty are deterrence and retribution.

Deterrence

The published studies on whether the death penalty functions as a deterrent to other murders are conflicting and inconclusive.

Several witnesses testified that, because the death penalty is carried out so rarely across the country (and has never been carried out in New Jersey under the 1982 act) deterrence is a particularly difficult issue to measure. There were approximately 16,000 murders in the United States in 2005; 125 defendants were sentenced to death that year; 60 were executed. Thus, less than 1 percent of those who commit murder nationwide ultimately receive the death penalty and less than one-half of that small number are executed.

In New Jersey, a similarly small percentage of defendants await execution. There were 418 murders in the State in 2005. In the 24 years since the restoration of the death penalty in this State in 1982 there have been only 455 "death-eligible" defendants (cases in which the evidence supported the elements of a capital prosecution). Of those, 228 were tried capitally and 60 death sentences were imposed. Only nine persons are currently on death row. That translates to less than 2 percent of the death-eligible defendants and an even smaller percentage of the total number of defendants convicted of capital murder.

The measurement of any deterrent effect based on such minuscule percentages is fraught with difficulty. Nonetheless, more than a dozen studies have been published in the past 10 years reaching opposite conclusions. Some claim that the death penalty has a strong deterrent effect. Some proponents claim that studies show that each execution can prevent between three and 18 homicides. Other studies conclude that the death penalty has little if any deterrent effect.

According to Professor Jeffrey Fagan of Columbia University Law School, however, many of these studies use incomplete data or are otherwise flawed. For example, all but one of the studies group all types of murder together, claiming that all are equally deterred by the death penalty. However, many murders are not planned in advance but are committed impulsively or in a sudden outburst of rage. It is not logical, according to Professor Fagan, to believe that such defendants would respond rationally to threats of punishment.

In Professor Fagan's testimony before the Subcommittee on the Constitution, Civil Rights and Property Rights of the United States Senate Judiciary Committee in February 2006 he also noted that "domestic" or intimate partner homicides have been declining steadily since the early 1970's, regardless of fluctuations[3] in the number of executions since capital punishment was reinstated in this country following the 1976 Gregg decision.

Richard Dieter[4], Executive Director of the Death Penalty Information Center in

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[3]According to the Death Penalty Information Center, there have been 1,056 executions in the United States since 1976. (Data updated as of November 14, 2006.) The numbers of executions fluctuate yearly: For example, there were five executions in 1983; 25 in 1987; 14 in 1991; 68 in 1998; a high of 98 executions in 1999; 59 in 2004 and 60 in 2005.
http://www.deathpenaltyinfo.org/article.php?scid=8&did=146

[4] Oral testimony of Richard Dieter to the New Jersey Death Penalty Study Commission. 19 July 2006. Pages 37-45 of hearing transcript.

Washington, D.C., testified before the Commission that the states without a death penalty[5] have far *lower* murder rates than the states with the death penalty. Mr. Dieter also noted that of the four geographic regions in the United States, the South has the highest murder rate, yet carries out 80% percent of the executions in the country. By contrast, the Northeast has the lowest murder rate and carries out less than 1% of the executions.

According to Professor Fagan, many of the social factors that explain homicide rates, such as demographic composition and poverty, also predict death sentencing rates among the states. Professor Fagan noted that state homicide rates are influenced by powerful social, economic and legal forces which change at a relatively slow pace, and thus are unlikely to be influenced by the effects of extremely rare events such as executions. Professor Fagan also stated that the deterrence studies ignore large amounts of missing data from states such as Florida, which carry out a large number of executions, and that by leaving out this data the results are likely to be biased.

He noted that the studies do not take into account the fact that most states in most years have no executions. In addition, the studies do not take into account the fact that a large percentage of executions takes place in only one state, Texas, which was responsible for over one-third of the 965 executions in this country between 1976 and June 2004. Thus, attempting to calculate deterrent effects from this data is misleading.

Professor Fagan also noted that the studies do not test deterrence directly; that is, the studies fail to show that murderers are actually aware of executions that take place in their states or in other states.

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[5] 13 states, and the District of Columbia, do not have a death penalty: Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, New York, Rhode Island, Vermont, West Virginia and Wisconsin. (Although New York enacted a death penalty statute in 1995, it was struck down by the state's high court in 2004 and has not been re-enacted.)

By contrast with Professor Fagan, the Commission heard testimony (by video conference) from Kent Scheidegger[6], legal director of the Criminal Justice Legal Foundation in Sacramento, California, that the death penalty "does have a deterrent effect and does save innocent lives if it is actually enforced." Mr. Scheidegger presented data that, he stated, showed that states that actively use the death penalty have had the greatest improvements in murder rates since the 1976 restoration of the death penalty nationwide. Mr. Scheidegger stated that New Jersey does not have an effective death penalty because our "court of last resort is determined to block it and willing to twist the law to do so."

Testimony on deterrence was also received from Professor Erik Lillquist[7] of Seton Hall University School of Law, who stated that recent econometric studies suggest that the death penalty does have a deterrent impact, at least if the death penalty is carried out in sufficient numbers. He also stated that, paradoxically, studies suggest that under some circumstances executions can cause a "brutalization effect" so that the murder rate will increase. He stated:

> It just may be impossible to know what the deterrent or brutalization effect is here . . . at least as an empirical matter – simply because we're never going to have a large enough database that can be removed of the confounding variables, such that we can come to a conclusion. When scientists run studies in general, we try to do it in a controlled environment. You can't do that with murders and the death penalty . . . So we have to do these econometric studies.

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[6] Oral testimony of Kent Schiedegger to the New Jersey Death Penalty Study Commission. 25 October 2006. Pages 5-15 of hearing transcript.

[7] Oral testimony of Prof. Erik Lillquist to the New Jersey Death Penalty Study Commission. 16 August 2006. Pages 27-51 of hearing transcript.

> But they have confounding variables we can't control, because we can't control them well enough given the limited data sizes. We may never be able to get a firm conclusion as to whether or not a deterrent value exists.

Nearly twenty years ago, the New Jersey Supreme Court discussed the inconsistencies among deterrence studies in State v. Ramseur, 106 N.J. 123 (1987). The Court's conclusions are still valid today:

> The argument about deterrence is different. All accept its legitimacy as a penological goal; the division, and it is a sharp one, concerns an empirical question. Does the death penalty deter murder? The answers, the reasons, and the statistics conflict and proliferate, [n14] but add up to only one conclusion: the Legislature could reasonably find that the death penalty deters murder, just as it could find that it does not. Given the plethora of scientific analysis, "common-sense" explanations of the penalty's deterrent effect based on logic . . . are neither persuasive nor important.

---------- Footnote ----------

[n14] See Ehrlich, "The Deterrent Effect of Capital Punishment: A Question of Life and Death," 65 Am.Econ.Rev. 397 (1975) (purporting to establish a deterrent impact) and its progeny of critics, e.g., Baldus & Cole, "A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment," 85 Yale L.J. 170 (1975); Bowers & Pierce, "The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment," 85 Yale L.J. 187 (1975); McGahey, "Dr. Ehrlich's Magic Bullet: Economic Theory,

Econometrics, and the Death Penalty," 26 Crime & Delinquency 485 (1980).

State v. Ramseur at 179-180. [Citations omitted.]

The Commission also notes that, as a practical matter, the length of time that convicted murderers in New Jersey serve on death row argues against the usefulness of the death penalty as a deterrent. For example, Robert Marshall spent 22 years on death row after his 1984 conviction for the murder of his wife (before his death sentence was overturned and he was re-sentenced to a 30-year term); Marko Bey has been on death row since 1983; Nathaniel Harvey since 1986. When defendants spend decade after decade following a murder conviction waiting for a death penalty that may never be carried out, deterrence is obviated.

Retribution

Proponents of retribution argue that it upholds the dignity of a civil society and is useful to prevent people from being retributive on their own, according to the testimony of Professor Lillquist[8]. The retributivist viewpoint is in accordance with the philosophy of Immanuel Kant that, for the most heinous forms of wrongdoing, the penalty of death is morally justified or perhaps even required.[9] The Commission also heard testimony from Professor Robert Blecker[10] of New York Law School that retribution is a legitimate societal function which is served by the death penalty. Professor Blecker stated that retribution should not be equated with revenge, which is not proportional and is unlimited. Rather, he said, retribution is proportional to the crime of murder. Retribution is based on the principle

[8] Oral testimony of Prof. Erik Lillquist to the New Jersey Death Penalty Study Commission. 16 August 2006. Pages 27-51 of hearing transcript.

[9] See Sunstein, Cass R., Adrian Vermeule, Carol S. Steiker, John J. Donohue and Justin Wolfers. "The Ethics and Empirics of Capital Punishment." 58 Stanford Law Review 701, 704, December 2005.

[10] Oral testimony of Prof. Robert Blecker to the New Jersey Death Penalty Study Commission. 11 October 2006. Pages 32-72 of hearing transcript.

of *lex talionis*, or "an eye for an eye" – the belief that punishment should fit the crime.

In the words of Professor Blecker:

> Naturally grateful, we reward those who bring us pleasure. Instinctively resentful, we punish those who cause us pain. Retributively, society intentionally inflicts pain and suffering on criminals because and to the extent that they deserve it. But only to the extent they deserve it.... Justice, a moral imperative in itself, requires deserved punishment.[11]

The commission was divided about whether retribution is an appropriate penological intent. Of the commission members who felt that retribution is an appropriate penological intent, some felt that this intent is achieved by incarceration, so the death penalty is not indispensable for achieving it. Other members felt that the desire for retribution is trumped by the serious problems with the death penalty like cost, irreversible error, and inconsistency with evolving standards of decency.

Incapacitation

Other commission members argued that a death sentence serves the penological purpose of incapacitating an individual from committing further acts of violence against society. They recognized that life imprisonment without the possibility of parole similarly incapacitates an individual from committing further acts of violence outside the prison context.

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[11] Robert Blecker. Letter to the New Jersey Death Penalty Study Commission supplementing previous testimony. October 24, 2006.

ISSUE 2

WHETHER THERE IS A SIGNIFICANT DIFFERENCE BETWEEN THE COST OF THE DEATH PENALTY FROM INDICTMENT TO EXECUTION AND THE COST OF LIFE IN PRISON WITHOUT PAROLE

Commission's Finding: The costs of the death penalty are greater than the costs of life in prison without parole, but it is not possible to measure these costs with any degree of precision.

Financial costs of the death penalty

The Office of Legislative Services (OLS) analyzed the issue of death penalty costs in September 2006 but noted that because much data is unavailable, a precise conclusion cannot be reached. Of the four components of the criminal justice system which could potentially benefit from cost savings if the death penalty were to be abolished - the courts, the prosecutors, the Office of the Public Defender and the Department of Corrections - only the last two were able to provide detailed cost estimates to OLS.

The **Office of the Public Defender** estimated that, given its current caseload of 19 death penalty cases (as of August 2006), elimination of the death penalty would result in a cost savings of $1.46 million per year. In testimony to the Commission, Joseph Krakora[12], Director of Capital Litigation in the Office of the Public Defender, noted that the office incurs additional costs in capital murder trials for pretrial preparation and investigation; pretrial motions; jury selection (which takes four to six weeks in a capital case as opposed to one or two days in a noncapital case); additional staff attorneys (because the office provides two attorneys, rather than one, in capital cases) and pool attorneys (outside counsel hired when

[12] Oral testimony of Joseph Krakora to the New Jersey Death Penalty Study Commission. 16 August 2006. Pages 51-73 of hearing transcript.

there is a conflict of interest that prevents the office from using staff attorneys); the penalty phase trial (which does not occur in noncapital cases); the mitigation investigation (a social history investigation of the defendant's background, which provides mitigating evidence for the penalty trial); enhanced costs for appeals (since more issues are raised and the courts conduct a more searching inquiry in an appeal of a defendant who faces death); enhanced costs for transcripts; proportionality reviews; and post-conviction relief.

The **Department of Corrections** estimated that eliminating the death penalty would save the State $974,430 to $1,299,240 per inmate over each inmate's lifetime. The department's figures were based on its estimate that the cost of housing an inmate in the Capital Sentence Unit of the New Jersey State Prison (death row) totals about $72,602 per year. This is $32,481 more per year than the $40,121 cost of housing an inmate in the general population at the New Jersey State Prison, which is a maximum security institution. The department calculated that inmates enter the Capital Sentence Unit at an average age of 32, and estimated that, since no inmate has yet been put to death, each inmate would serve 30 to 40 years within the Unit.

The **Administrative Office of the Courts (AOC)** informed OLS that eliminating the death penalty would generate savings for the Judiciary in two areas: trial court costs and the costs of conducting the proportionality review for each death penalty case. The AOC estimated that each proportionality review costs an average of $93,018 in additional salary costs for court staff. The AOC was unable to compare the cost of a death penalty trial with a non-death penalty murder trial, noting that the many different variables in murder trials preclude such a comparison. These variables include the possibility of plea bargaining (which would negate the need for a trial altogether), the relative aggressiveness of prosecution efforts and the length of jury selection.

The **Office of the Attorney General** informed OLS that there would be little cost savings for prosecutors if the death penalty were to be abolished. Those defendants who are currently death-eligible would still face the possibility of life without parole or, at minimum, a

very lengthy sentence, so a protracted trial to determine guilt would still be necessary. The Commission notes that estimating the cost to the prosecutors is difficult because the issue involves resource allocation. In other words, if prosecutors are no longer involved with a lengthy death penalty case because the death penalty has been eliminated, they will expend their efforts on other types of prosecutions and there will not be measurable cost savings.

The Commission wishes to stress the fact that, although it is not possible to measure many of the cost savings that would result from eliminating the death penalty, these savings nonetheless exist. In capital cases both the prosecution and the defense need to spend additional sums for pretrial investigation and preparation; added fees for experts for penalty phase testimony; enhanced transcript fees and travel expenses, and additional post-conviction litigation. The Office of the Attorney General noted that the State puts significant resources into the appellate practice of death penalty litigation.

The Commission notes that there have been several studies in other states designed to assess the cost of the death penalty. The Commission recognizes that there are a number of factors that affect the conclusions of these studies and the studies do not necessarily correlate directly to the cost of the death penalty in New Jersey.

Nevertheless, consistent with the Commission's finding, recent studies in states such as Tennessee, Kansas, Indiana, Florida and North Carolina have all concluded that the costs associated with death penalty cases are significantly higher than those associated with life without parole cases. These studies can be accessed through the Death Penalty Information Center.

Emotional and psychological costs of the death penalty

The Commission heard from a number of family members of murder victims about the devastating emotional costs of the death penalty. Survivors testified to the pain of being forced to relive the trauma of their loved ones' murders during prolonged appeals. Dr.

Matthew B. Johnson[13], a psychologist and professor at John Jay College of Criminal Justice in New York, testified about the adverse effects of executions on third parties: judges, jurors, judicial staff, correctional staff, journalists, clergy and spiritual advisors, as well as the families of the victim and the families of the condemned inmate. Dr. Johnson quoted a clergy member who told him that "Executions create another set of victims."

The Commission finds that these intangible emotional and psychological costs must also be taken into consideration in weighing the costs of the death penalty.

[13] Oral testimony of Dr. Matthew B. Johnson to the New Jersey Death Penalty Study Commission. 19 July 2006. Pages 40-45 of hearing transcript.

ISSUE 3

WHETHER THE DEATH PENALTY IS CONSISTENT WITH EVOLVING STANDARDS OF DECENCY

Commission's Finding: There is increasing evidence that the death penalty is inconsistent with evolving standards of decency.

Patrick Murray[14], director of the Monmouth University Polling Institute, testified that support for the death penalty has declined in New Jersey in the past seven years. Mr. Murray stated that from the 1970's to 1982 (when the death penalty was reinstated in the State), a limited amount of polling conducted in the State showed that support for the death penalty ranged from 70 to 75% among New Jersey residents. Data could not be obtained for the 16-year period from 1982 to 1998, since there was no publicly available polling during that time, he stated. Since 1999, support for the death penalty "in principle" has consistently been in the range of 60%; in other words, when asked "Do you support or oppose the death penalty?" 6 out of 10 New Jersey residents answer that they support it.

However, support "in principle" does not equate with support as a policy preference, Mr. Murray noted. Thus, when the question is asked of New Jersey residents, "What do you think should be the penalty for murder - the death penalty or life imprisonment with no possibility of parole?" the results are markedly different than the figure showing 60% support. In 1999, the Star-Ledger/Eagleton-Rutgers Poll found that 44% supported the death penalty when that same question was asked and 37% preferred life without parole. In 2002, a poll conducted by Rutgers and sponsored by New Jerseyans for Alternatives to the Death Penalty found a significant decrease: only 36% now preferred the death penalty and 48% preferred life without parole. A 2005 Rutgers poll sponsored by the same group found similar results.

[14]Oral testimony of Patrick Murray to the New Jersey Death Penalty Study Commission. 13 September 2006. Pages 66-86 of hearing transcript.

Mr. Murray pointed out that this shift - the drop from 44% preferring the death penalty in 1999, to 36% preferring it in 2002 and 2005 - correlated with opinion polls during that time on other issues related to the death penalty. Those polls showed an increase of 10%, from 1999 to 2002, in the number of respondents who felt that the death penalty was unfairly applied to minorities and a decline in the number of New Jersey residents who believe that the death penalty serves as a deterrent. A 2000 poll conducted by Quinnipiac University found that only 40% of State residents believed that the death penalty deters other potential murderers.

A number of witnesses from the religious community testified before the Commission and they uniformly urged abolishing the death penalty. Most Rev. John M. Smith[15], Bishop of the Catholic Diocese of Trenton, stated that the death penalty is not consistent with evolving standards of decency. He noted that the United States Conference of Catholic Bishops recently launched a campaign to end capital punishment, and provided a statement by the Catholic Bishops of New Jersey urging the State to abolish the death penalty.

Rabbi Gerald Zelizer[16] of Congregation Neve Shalom in Metuchen testified that the Conservative and Reform movements of Judaism have passed several resolutions in the last 10 years advocating the elimination of the death penalty as violative of their religious principles. Rabbi Zelizer noted that Judaism went through a process of evolving standards of decency historically. During the First and Second Centuries, at the time of the Roman Empire, the possibility of execution was fundamentally eliminated. He noted that standards of decency have evolved in the State as well, and gave two reasons for this evolution: "One, the fear of executing innocent people; and, secondly, the fact that there are other ways to deal with criminals."

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[15] Oral testimony of Most Rev. John M. Smith to the New Jersey Death Penalty Study Commission. 19 July 2006. Pages 4-9 of hearing transcript.

[16] Oral testimony of Rabbi Gerald Zelizer to the New Jersey Death Penalty Study Commission. 19 July 2006. Pages 24-27 of hearing transcript.

The United States Supreme Court has noted an emerging national consensus against executing certain defendants convicted of murder: the mentally retarded and juveniles. In 2002 the Court ruled that executing the mentally retarded constitutes cruel and unusual punishment in violation of the Eighth Amendment of the U.S. Constitution. Atkins v. Virginia, 536 U.S. 304 (2002). That case overruled Penry v Lynaugh, 492 U.S. 302 (1989), where the Court had ruled that the Eighth Amendment did not prohibit the execution of the mentally retarded. However, 13 years after the Penry ruling, the Court recognized the emergence of a new consensus on the issue.

> A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the "Bloody Assizes" or when the Bill of Rights was adopted, but rather by those that currently prevail. As Chief Justice Warren explained in his opinion in *Trop* v. *Dulles*, 356 U.S. 86, 78 S. Ct. 590 (1958): "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.*, at 100-101.
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> . . . . We have pinpointed that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Penry*, 492 U.S. at 331, 109 S. Ct. 2934. Relying in part on such legislative evidence, we have held that death is an impermissibly excessive punishment for the rape of an adult woman, *Coker* v. *Georgia*, 433 U.S. 584, 593-596, 53 L. Ed. 2d 982, 97 S. Ct. 2861 (1977), or for a defendant who neither took life, attempted to take life, nor intended to take life, *Enmund* v. *Florida*, 458 U.S. 782, 789-793, 73 L. Ed. 2d 1140, 102 S. Ct. 3368 (1982). In *Coker*, we focused primarily on the then-recent legislation that had been

> enacted in response to our decision 10 years earlier in *Furman* v. *Georgia*, 408 U.S. 238, 92 S. Ct. 2726 (1972) (*per curiam*), to support the conclusion that the "current judgment," though "not wholly unanimous," weighed very heavily on the side of rejecting capital punishment as a "suitable penalty for raping an adult woman." . . . .
>
> We also acknowledged in *Coker* that the objective evidence, though of great importance, did not "wholly determine" the controversy, "for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."
>
> Atkins at 311-312 (2002).

In 2005, the Supreme Court held that murderers who were juveniles at the time of the crime may not be executed. Roper v. Simmons 543 U.S. 551 (2005). That case overruled Stanford v. Kentucky, 492 U.S. 361 (1989), where the Court had rejected the proposition that the Constitution bars capital punishment for juvenile offenders ages 15 to 17 at the time of the murder. Again, as in Atkins, the Court found an emerging consensus against the execution of this particular group of defendants:

> The evidence of national consensus against the death penalty for juveniles is similar, and in some respects parallel, to the evidence *Atkins* held sufficient to demonstrate a national consensus against the death penalty for the mentally retarded. When *Atkins* was decided, 30 States prohibited the death penalty for the mentally retarded. This number comprised 12 that had abandoned the death penalty altogether, and 18 that maintained it but excluded the mentally retarded from its reach. 536 U.S., at 313-315, 122 S. Ct. 2242. By a similar

> calculation in this case, 30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach.
> Roper at 564 (2005)

Although the Commission recognizes that similarly strong evidence of a consensus against the death penalty in general has not yet emerged, there are suggestions of such a trend:

- In January 2000, Illinois Governor George Ryan, after 13 exonerations from death row, became convinced that capital punishment in the state was "fraught with error" and imposed a moratorium on executions. He eventually pardoned four death row inmates and commuted the death sentences of 164 others to life imprisonment. Reforms implemented in 2003 at the urging of a commission created by the governor included changes in police line-up procedures and elimination of time limits on actual innocence claims in state courts. Governor Ryan's successor, Rod R. Blagojevich, has kept the moratorium in effect.

- New York's death penalty statute (enacted in 1995) was struck down by that state's Court of Appeals in 2004 and the New York legislature has thus far failed to act to reinstate it. In its opinion, the state's high court held that a "deadlock" provision in the statute was unconstitutional because it could have coerced some jurors to return a verdict of death. The provision required judges to tell the jury that if they were deadlocked and did not return with a unanimous verdict of death, or with a verdict of life without parole, the judge could impose a lighter sentence. The court called upon the legislature to correct the statute.

- In the past two years legislation to abolish the death penalty has been introduced in the legislatures of 10 states: Illinois, Kansas, Kentucky, Maryland, Missouri, Montana, New Jersey, New Mexico, Tennessee and Washington.

- Both in New Jersey and nationally the number of capital prosecutions has dropped. According to Richard Dieter of the Death Penalty Information Center nationally "since the year 2000 there has been a 60% drop in death sentences, a 40% decline in executions, and a decrease in the size of death row."[17] Similarly, Claudia Van Wyk testified that regarding the death penalty in New Jersey: "prosecutorial charging decisions have dropped off dramatically over time."[18]

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[17] Statement of Richard Dieter to New Jersey Death Penalty Study Commission. 19 July 2006. Page 229x of hearing transcript.

[18] Oral testimony of Claudia Van Wyk to the New Jersey Death Penalty Study Commission. 11 October 2006. Page 100 of hearing transcript.

ISSUE 4

WHETHER THE SELECTION OF DEFENDANTS IN NEW JERSEY FOR CAPITAL TRIALS IS ARBITRARY, UNFAIR, OR DISCRIMINATORY IN ANY WAY AND THERE IS UNFAIR, ARBITRARY, OR DISCRIMINATORY VARIABILITY IN THE SENTENCING PHASE OR AT ANY STAGE OF THE PROCESS

Commission's Finding: The available data do not support a finding of invidious racial bias in the application of the death penalty in New Jersey.

The Commission concludes that the available statistics do not support a finding that there is invidious racial bias in the application of the death penalty in New Jersey. That conclusion is based on the findings of the Supreme Court's Proportionality Review Project provided to the Commission by the special master for proportionality review with regard to capital causes, retired Superior Court Judge David S. Baime.

Subsection e. of New Jersey's death penalty statute, N.J.S.A.2C:11-3, requires the New Jersey Supreme Court to conduct, upon a capital defendant's request, a proportionality review to determine whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. To carry out that review, the Court has developed a system, known as the Proportionality Review Project, for the collection of statistics concerning all cases in New Jersey in which the facts support the legal elements of a capital prosecution.

According to Judge Baime, the objectives of the Proportionality Review Project are twofold. First, the project monitors the administration of the State's capital punishment laws, focusing on the fairness of sentencing with respect to a particular defendant. That aspect of

proportionality review is called *individual* proportionality review.[19] Second, the project seeks to determine whether there are at work in the system influences not germane to the legislative intent and design. To date, the principal effort in this area has been to determine whether race or ethnicity of the offender or victim influences the manner in which potentially capital cases are treated by prosecutors or juries. This aspect of proportionality is called *systemic* proportionality review.

At the Commission's public hearing on October 11, 2006, Judge Baime presented the following findings with respect to systemic proportionality review:

> [T]here is no solid evidence that the race of a defendant affects the outcome of the case.
>
> In a similar vein, there is no solid evidence that the race of the victim is an important factor in determining which defendants are sentenced to death. In terms of actual death verdicts we do not find a consistent statistically significant relationship between the race of the victim and death outcome, i.e., death verdicts.
>
> In contrast, our bivariate studies, multivariate regression runs and case-sorting techniques indicate that white victim cases advance to penalty trial at a higher rate than cases involving African-American or Hispanic victims. We hasten to add that the white victim effect I just noted is not sustained when county variability or county disparity is taken into account. County variability refers to the difference in rates

[19] Individual proportionality review is discussed further in the Commission's findings with respect to issue 5.

> among the counties that death-eligible cases advance to penalty trial.
>
> . . .
>
> . . . In short, we find no consistent, reliable evidence that the race of the victim affects whether a death-eligible case proceeds to the penalty stage when county variability is taken into account.[20]

The Commission heard testimony suggesting the existence of variability among counties in the application of the death penalty which, if true, would be troubling. In his testimony before the Commission, Judge Baime presented the following hypothesis:

> The exact same case of a killing occurs in neighboring counties. All of the circumstances are the same. In one county the defendant is capitally prosecuted, is subject to a penalty trial, and is subject to the ultimate outcome of death. In the other county the defendant is not so treated; either through a plea bargaining or other processes he receives a penalty that is much less harsh.[21]

The apparent county variability referred to by Judge Baime may result from any number of factors. Nevertheless, the Commission is troubled by the degree to which the geographic location where the crime was committed appears to affect the ultimate disposition of the case. The Commission notes the apparent interrelationship between county disparity and statistics showing race of victim disparity. The unevenness with which cases are selected

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[20] Oral testimony of Hon. David S. Baime to the New Jersey Death Penalty Study Commission. 11 October 2006. Pages 9 -11 of hearing transcript.

[21] Id. at 13.

for capital prosecution among counties undermines uniformity in the capital punishment system.

The Commission also notes that the New Jersey Supreme Court, as part of its ongoing proportionality review, is concerned about this very issue. In fact, in response to Judge Baime's finding of county disparity, the Court scheduled oral argument on the issue for October 18, 2006. At that time, it heard oral argument from the Attorney General's Office, the Public Defender's Office and New Jerseyans for Alternatives to the Death Penalty as amicus. The Court sought input on the issue generally with an emphasis on whether the problem could be addressed by the implementation of a centralized decision making procedure for determining which cases should be prosecuted capitally. The Court has not issued an opinion since the argument but this is a complicated issue. Abolishing the death penalty would moot that issue and at the same time solve the race of victim disparity that Judge Baime attributes to the county disparity problem.

Although the statistics compiled by the Judiciary's Proportionality Review Project do not demonstrate racial bias in the administration of the death penalty in New Jersey, the Commission recognizes that statistical evidence must be viewed in light of the reality that racial discrimination is part of the history of the death penalty in the 20th century. In Furman v. Georgia, 408 U.S. 238 (1972), Justice Thurgood Marshall discussed the relationship between racial discrimination and capital punishment in his concurring opinion:

> Regarding discrimination, it has been said that 'it is usually the poor, the illiterate, the underprivileged, the member of the minority group - the man who, because he is without means, and is defended by a court appointed attorney - who becomes society's sacrificial lamb . . . .' Indeed, a look at the bare statistics regarding executions is enough to betray much of the discrimination. A total of 3,859 persons have been executed since 1930, of whom 1,751 were white and 2,066 were Negro.

> Of the executions, 3,334 were for murder; 1,664 of the executed murderers were white and 1,630 were Negro; 455 persons, including 48 whites and 405 Negroes, were executed for rape. It is immediately apparent that Negroes were executed far more often than whites in proportion to their percentage of the population. Studies indicate that while the higher rate of execution among Negroes is partially due to a higher rate of crime, there is evidence of racial discrimination. Id. at 364 (1972) (citations omitted).

In addition, testimony about the historical link between racial discrimination and capital punishment was submitted to the Commission from Professor Charles J. Ogletree, Jr, who stated: "[R]ace has had a profound and disturbing history in the application of capital punishment in this country."[22]

The Commission also notes with concern that although there is no demonstrated racial bias in the administration of the capital punishment system in New Jersey, the percentage of African American persons in New Jersey's correctional institutions far exceeds the percentage of African Americans in the general population.[23]

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[22] Oral testimony of Charles J. Ogletree, Jr, to the New Jersey Death Penalty Study Commission. 25 October 2006. Page 30 of hearing transcript.

[23] New Jersey State Department of Corrections. "Offenders in New Jersey Correctional Institutions on January 9, 2006, By Race/Ethnic Identification." 2006.

ISSUE 5

WHETHER THERE IS A SIGNIFICANT DIFFERENCE IN THE CRIMES OF THOSE SELECTED FOR THE PUNISHMENT OF DEATH AS OPPOSED TO THOSE WHO RECEIVE LIFE IN PRISON

Commission's Finding: Abolition of the death penalty will eliminate the risk of disproportionality in capital sentencing.

The Commission finds that there may not be a significant difference in the crimes of those selected for the punishment of death as opposed to those who receive life in prison. On October 11, 2006, the Commission heard testimony from Ms. Robin Glenn, who reviewed the nearly 600 narrative summaries prepared by New Jersey's Administrative Office of the Courts for the Supreme Court's proportionality reviews. The purpose of the narrative summaries is to permit comparison of the various murders and outcomes. Her conclusions are troubling:

> Despite a numbing similarity in the circumstances of the large number of [murder] cases involving burglaries, in-home robberies, and predatory behavior against homeowners, particularly the elderly, there is no uniformity in the way the cases are charged and prosecuted. The resulting unfairness leaves one defendant on death row while others, having committed very similar offenses, were sentenced to life in prison or were not even prosecuted capitally.
>
> . . . .
>
> . . . It is not just that there is no significant difference between the crimes to be punished by death and the crimes to be

> punished by life in prison; sometimes the crime for which defendants spend life in prison, are worse. [24]

The State has developed a process to ensure that death sentences are not disproportionate. As stated in the Commission's findings with respect to issue 4, the State's death penalty statute permits each defendant sentenced to death to request and receive both an individualized and a systemic review of the proportionality of his or her death sentence by the New Jersey Supreme Court. That provision was initially included in response to the United States Supreme Court's decision in Furman and was intended to determine each defendant's death worthiness as a protection against the arbitrary and capricious application of the death penalty. A defendant's death sentence is considered "disproportionate" if other defendants in the jurisdiction who have similar characteristics commit similar offenses and receive life sentences.

To determine whether a death sentence is disproportionate, the Court has adopted a system of statistical collection and analysis known as individual proportionality review, which can be briefly summarized as follows:

> The system consists of two parts. The first part is frequency analysis, a statistical measure of the numerical frequency with which similar cases have resulted in sentences of death. The second part is precedent-seeking review, a traditional judicial way of comparing the files in similar cases to determine whether a defendant's death sentence is freakish or

[24]Report entitled "A Review of the New Jersey AOC Narrative Case Summaries" prepared and submitted by Robin Glenn. The report can be found in the appendix to the transcript of the Commission's public hearing on October 11, 2006. Pages 2 and 5.

aberrational or the result of impermissible influences. In Re Proportionality Review Project, 161 N.J. 71,77 (1991).[25]

The Court's individual proportionality review methodology is designed to diminish the extent to which subjectivity is part of the analysis of the case; however, the system does not alleviate the need for human judgment. As retired Superior Court Judge David S. Baime stated during his testimony before the Commission: "I don't want to leave the impression that the application of social science techniques is a silver bullet . . . In the end we have to expect that human judgment will come to bear."[26]

To date, the Court has vacated two death sentences on the basis of individual disproportionality. In State v. Papasavvas, 170 N.J. 462 (2002), the Court vacated the death sentence of Peter Papasavvas, concluding after analyzing similar cases that Mr. Papasavvas was "'singled out unfairly' for the death penalty." Id. at 495. Also, in State v. DiFrisco, 187 N.J. 156 (2006), the Court vacated the death sentence of Anthony DiFrisco in part based on proportionality review.

The effectiveness of the Court's individual proportionality review system has been questioned. In his prepared statement received by the Commission on August 16, 2006, retired Third Circuit Court of Appeals Chief Judge John J. Gibbons suggested that in the individual proportionality review context the Court's decisions are arbitrary: "[D]espite the court's effort to objectively quantify the process by what it calls (A) frequency analysis, and

[25] For a more detailed description of the Court's individual proportionality review methodology see Judge Baime's prepared statement submitted to the Commission which can be found in the appendix to the transcript of the Commission's Public Hearing on October 11, 2006.

[26] Oral testimony of Hon. David S. Baime to the New Jersey Death Penalty Study Commission. 11 October 2006. Pages 25 -26 of hearing transcript.

(B) precedent-seeking review, can the comparative selection on the basis of death worthiness ever be anything but arbitrarily comparative?"[27]

Moreover, two members of the New Jersey Supreme Court have questioned whether the Court's proportionality review jurisprudence adequately achieves the goal of consistency with respect to the application of the death penalty. Justice Alan B. Handler stated in his dissenting opinion in State v. Martini, 139 N.J. 3 (1994):

> The deficiencies of design and application deprive proportionality review of whatever faint chance it might otherwise have had to provide constitutional legitimacy to the imposition of a death sentence. In short, as measured by notions of proportionality, the project of fairly and justly sentencing a defendant to death is doomed to failure. The Court's proportionality review has, despite good intentions and prodigious work, become so unprincipled that its result--affirming a sentence of death--is intolerable in a society committed to procedural fairness and due process. Id. at 81-82.

After the Court modified the proportionality review model, Justice Virginia Long observed similar deficiencies in the Court's newer approach to proportionality review in her dissenting opinion in State v. Timmendequas, 168 N.J. 20 (2001):

> [O]ur proportionality review has fallen short of guaranteeing that the death penalty is fairly administered.
>
> It is time for the members of this Court to accept that there is simply no meaningful way to distinguish between one

[27] Statement of Hon. John J. Gibbons to New Jersey Death Penalty Study Commission on August 16, 2006, which can be found in the appendix to the transcript of the Commission's August 16, 2006 meeting. Pages 26-27 of hearing transcript.

> grotesque murder and another for the purpose of determining why one defendant has been granted a life sentence and another is awaiting execution. The very exercise of individual proportionality review stands on a fundamentally unstable pediment. Id. at 52.

Based on the forgoing the Commission finds that despite the best efforts of the State, the risk remains that similar murder cases are being treated differently in the death penalty context thereby elevating the probability that the death penalty is being administered "freakishly" and arbitrarily. Given the finality of the punishment of death, this risk is unacceptable.

ISSUE 6

WHETHER THE PENOLOGICAL INTEREST IN EXECUTING SOME OF THOSE GUILTY OF MURDER IS SUFFICIENTLY COMPELLING THAT THE RISK OF AN IRREVERSIBLE MISTAKE IS ACCEPTABLE

Commission's Finding: The penological interest in executing a small number of persons guilty of murder is not sufficiently compelling to justify the risk of making an irreversible mistake.

The Commission notes that there have been no exonerations from death row in New Jersey in the 24-year history of the State's modern death penalty law. However, numerous exonerations in other states and exonerations in New Jersey in non-capital cases must be taken into consideration in weighing the risk of a mistaken conviction here.

Attorney Barry Scheck[28], Co-Director of the Innocence Project at Cardozo School of Law in New York, testified before the Commission that 182 individuals in the United States have been exonerated with post-conviction DNA testing, 14 of whom had been sentenced to death. Mr. Scheck noted that DNA testing cannot exonerate all innocent defendants, because it is available in only 10% of serious criminal cases. Other exonerations have been based on problems with other forms of forensic evidence which were ultimately found to not be valid, mistaken eyewitness identification, and false confessions.

[28] Oral testimony of Barry Scheck to the New Jersey Death Penalty Study Commission. 19 July 2006. Pages 17-24 of hearing transcript.

Kate Hill Germond[29], Assistant Director of Centurion Ministries in Princeton, testified that her organization has freed 35 innocent people from prison, including seven in New Jersey. She noted that "New Jersey has been at the forefront in protecting the rights of its citizens by evolving the way it examines, assesses and tries criminal cases" and urged the abolition of the death penalty as the next step in implementing protections for the innocent:

> Abolishing the death penalty will not ensure [that] no innocent person will be convicted, but it would ensure that no innocent person will be killed by the State.

Larry Peterson[30] of Pemberton Township testified about his 1989 conviction for the brutal rape and murder of his neighbor, 25-year-old Jacqueline Harrison. Mr. Peterson was tried capitally and sentenced to life plus 20 years in prison. Although DNA testing was not available at the time of the murder, Mr. Peterson repeatedly sought the testing from prison after it became available. He finally prevailed when the Appellate Division ordered the testing in 2003. Based on DNA test results, Mr. Peterson was released from prison in 2005. On May 27, 2006, the prosecutor's office announced that the State would not be able to sustain its burden of proof in a retrial and requested a dismissal of the indictment. According to press reports, Mr. Peterson was the 180th prison inmate nationwide to be released because of DNA testing, and his case is the first homicide conviction in New Jersey to be overturned on the basis of DNA evidence. He had spent 18 years in prison.

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[29] Oral testimony of Kate Hill Germond to the New Jersey Death Penalty Study Commission. 19 July 2006. Pages 30-31 of hearing transcript.

[30] Oral testimony of Larry Peterson to the New Jersey Death Penalty Study Commission. 19 July 2006. Pages 16-17 of hearing transcript.

As Professor Lillquist[31] noted:

> The criminal justice system is a human system. It . . . involves decisions made by human beings, not by computers. And, inevitably, we make mistakes. Those who argue that we will never make a mistake in the criminal justice system in general and the death penalty process in general . . . are fooling themselves. Any criminal justice system, including the death penalty system, no matter how carefully we draw it, is going to make a mistake at some point.

Jennifer Thompson[32] of Winston-Salem, North Carolina testified about her experience as a rape victim who wrongly identified her attacker. She was raped at knifepoint by an intruder in 1984 and during the rape made a conscious effort to memorize her attacker's face so that she could later identify him. Despite these efforts she mistakenly identified a man named Ronald Cotton as her assailant. Mr. Cotton was convicted and sentenced to life plus 50 years. He was exonerated in 1995 when DNA tests found that he could not have committed the assault; the DNA belonged to another man, Bobby Poole. According to Ms. Thompson, her mistake occurred because of a "contamination of memory": the composite sketch prepared by the police did not closely resemble her real assailant, but she became convinced that it depicted him accurately. When she was asked to choose from a photo line-up, she chose the photograph that best resembled the sketch, and it was a photograph of Mr. Cotton.

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[31] Oral testimony of Prof. Erik Lillquist to the New Jersey Death Penalty Study Commission. 16 August 2006. Pages 30-31 of hearing transcript.

[32] Oral testimony of Jennifer Thompson to the New Jersey Death Penalty Study Commission. 27 September 2006. Pages 8-22 of hearing transcript.

She then chose Mr. Cotton from a physical line-up. Ms. Thompson told the Commission:

> Some say that death row exonerations are rare enough that we should not end the death penalty because of innocence. Some say that with the proper procedures for eyewitness lineups and other precautions against wrongful convictions, you can reduce the risk to an acceptable rate. But I ask you: What is acceptable? . . . You can reduce, but you cannot eliminate, the risk of error in the death penalty system. No set of procedures can completely guard against human error.

The Commission notes that a similar eyewitness misidentification occurred in New Jersey. A black defendant was convicted of sexual assault of a white victim based solely on the victim's eyewitness identification of him eight months after the attack, when she happened to see him walking down the street. [State v. Cromedy, 158 N.J. 112 (1999).] No fingerprint evidence, DNA evidence or other forensic evidence linked him to the crime. The Supreme Court reversed the defendant's conviction, concluding that it was error to refuse a jury instruction on cross-racial identification when identification was the critical issue in the case. At trial the defendant's attorney had requested that the following language be included in the instructions to the jury: "[Y]ou know that the identifying witness is of a different race than the defendant. When a witness who is a member of one race identifies a member who is of another race we say there has been a cross-racial identification. You may consider, if you think it is appropriate to do so, whether the cross-racial nature of the identification has affected the accuracy of the witness's original perception and/or accuracy of a subsequent identification." The Supreme Court agreed, holding that a cross-racial jury instruction should be given when, as here, identification is a critical issue and an eyewitness's cross-racial identification is not corroborated by other evidence. The defendant had served five years in jail and was released after DNA testing excluded him.

In New Jersey, courts have recognized that a convicted person has the right to request DNA testing. See State v. Cann, 342 N.J. Super. 93, 103 (App. Div. 2001). The Legislature has also provided a procedure for DNA testing of defendants convicted in State court. See N.J.S.A. 2A:84A-32a. The statute provides mechanisms for a convicted person who can make the required showing to obtain a court order mandating DNA testing.

In recognition of the large number of exonerations across the country due to DNA evidence, Congress enacted the "Innocence Protection Act of 2004" (Title IV of the "Justice for All Act of 2004," P.L.108-405) on October 30, 2004. The act establishes rules and procedures governing applications for DNA testing by inmates in the Federal system, requiring courts to order the testing if it has the scientific potential to produce new exculpatory evidence for the inmate's claim of innocence. The act also created the "Kirk Bloodsworth Post-Conviction DNA Testing Program," which authorized $25 million to the states over five years to defray the costs of post-conviction DNA testing. (The program is named for Kirk Bloodsworth, the first death row inmate to be exonerated by DNA testing. Mr. Bloodsworth testified before the Commission about his experience[33].)

[33] Oral testimony of Kirk Bloodsworth to the New Jersey Death Penalty Study Commission. 27 September 2006. Pages 59-68 of hearing transcript.

ISSUE 7

WHETHER ALTERNATIVES TO THE DEATH PENALTY EXIST THAT WOULD SUFFICIENTLY ENSURE PUBLIC SAFETY AND ADDRESS OTHER LEGITIMATE SOCIAL AND PENOLOGICAL INTERESTS, INCLUDING THE INTERESTS OF FAMILIES OF VICTIMS

Commission's Finding: The alternative of life imprisonment in a maximum security institution without the possibility of parole would sufficiently ensure public safety and address other legitimate social and penological interests, including the interests of the families of murder victims.

Family members of murder victims and other witnesses expressed a wide range of views in their testimony before the Commission. The overwhelming majority of witnesses testified that life without parole is the appropriate alternative to the death penalty.

Survivors who testified that they strongly support the death penalty included Marilyn Flax[34], whose husband Irving Flax was kidnapped and murdered by John Martini; Sharon Hazard-Johnson[35], whose parents Richard and Shirley Hazard were both murdered by Brian Wakefield in a home-invasion robbery; and Patricia Harrison[36], whose sister Jacqueline was murdered. (Martini and Wakefield are both on death row; Larry Peterson was convicted of Jacqueline Harrison's murder in 1989 and released in 2005 after DNA testing. Mr. Peterson also testified before the Commission.)

[34] Oral testimony of Marilyn Flax to the New Jersey Death Penalty Study Commission. 13 September 2006. Pages 134-136 of hearing transcript.

[35] Oral testimony of Sharon Hazard-Johnson to the New Jersey Death Penalty Study Commission. 19 July 2006, pages 9-15 and 13 September 2006, pages 172-185 of hearing transcript.

[36] Oral testimony of Patricia Harrison to the New Jersey Death Penalty Study Commission. 13 September 2006. Pages 17-20 of hearing transcript.

Marilyn Flax observed that the death penalty is intended only for "a select few" of the worst murderers, and stated that her husband's killer is one of them. She requested that the Commission take note that anti-death penalty organizations do not speak for all victims.

> What I would like this Commission to do is not change the law, but enforce the law. . . . The frustration [of] victims of crime is that it's taking so long.

Sharon Hazard-Johnson stated that, because the death penalty has not been implemented in New Jersey, murderers in the State are making a mockery of the justice system. She noted that there is no doubt that the man convicted of her parents' murders is guilty, as shown by the substantial DNA evidence, physical evidence, witness testimony and confessions in the case, and said that his execution should be carried out.

Patricia Harrison testified that the victims of her sister's murder include herself, her five siblings, her parents, and her sister's two daughters, and that their grieving will likely never end. She stated that the people who commit murder, including those in prison, continue to receive some enjoyment from life while her sister was denied that opportunity 19 years ago.

> Those of you who are trying to be objective today should walk in my shoes or the shoes of the many living victims of this crime. Only then could you experience the unfairness and grief caused by missing a loved one while having the knowledge that the killer continues to enjoy life.

Several family members of murder victims shared the views of Jo Anne Barlieb[37], who testified before the Commission that she supports capital punishment for her mother's killer but reluctantly recognizes that a death sentence is unlikely to be carried out:

> I'd support the death penalty if the State of New Jersey could limit the appeals process and actually utilize it. Unfortunately, I sit here following a more realistic approach in favor of abolition. I can testify from experience that our current system is most unjust for the victims and their loved ones. I can only hope to save other families from the grief of the never-ending appellate process.

Richard Pompelio[38], founder of the New Jersey Crime Victims' Law Center and father of a murder victim, testified that the death penalty is the greatest failing of the justice system in the State and that it revictimizes victims. He stated that the death penalty should be abolished in favor of life in prison without parole, and that the funds spent on the death penalty be used for services for homicide victims and funding for law enforcement.

> I have absolutely no doubt that there will never be an execution in the State of New Jersey. . . . We are just sitting here playing with words and playing with taxpayers' dollars.

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[37] Oral testimony of Jo Anne Barlieb to the New Jersey Death Penalty Study Commission. 13 September 2006. Pages 20-27 of hearing transcript.

[38] Oral testimony of Richard Pompelio to the New Jersey Death Penalty Study Commission. 13 September 2006. Pages 27-40 of hearing transcript.

A large number of family members testified that they oppose the death penalty on moral grounds. Lorry Post[39], the father of a murder victim, stated that life without parole should be substituted for the death penalty. The death penalty, he averred, just creates more killing, "and is a horrible thing which almost matches the horror of what some of us have lost by murder."

Similarly, Molly Wiegel and her husband Bill Piper[40] testified that the issue of whether their mother's killer should be executed caused conflict between family members and victimized them a second time. Mr. Piper specifically noted that he:

> [S]pent three years in the emotionally untenable position of not only being opposed to and traumatized by the murder while being asked to participate in a state execution, but also of being morally obligated to speak out against the execution as a benefactor of the person who raped and murdered my 74-year-old mother. Not only did I feel violated by having been given both the responsibilities of executioner and rescuer, I can also say that giving victims the indirect power of revenge undermines the principle of government by law.

Vicki Schieber,[41] mother of Shannon Schieber, a University of Pennsylvania graduate student murdered by a serial rapist, testified that there is a widespread assumption that victims' families believe that only the death penalty can provide justice:

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[39] Oral testimony of Lorry Post to the New Jersey Death Penalty Study Commission. 19 July 2006. Pages 27-30 of hearing transcript.

[40] Oral testimony of Molly Wiegel and William Post to the New Jersey Death Penalty Study Commission. 25 October 2006. Pages 78-84 of hearing transcript.

[41] Oral testimony of Vicki Schieber to the New Jersey Death Penalty Study Commission. 13 September 2006. Pages 86-102 of hearing transcript.

> These assumptions are so widespread and so unquestioned, that survivors who oppose the death penalty are sometimes questioned about their beliefs in a way that suggests, well, don't you want to have justice for your loved one?
>
> I'm here to tell you that these assumptions are false. Many victims' family members oppose the death penalty for a variety of reasons. My husband and family represent this growing, and for the most part, underserved segment of the crime victim population. We believe the death penalty is harmful and already interferes with a difficult healing process. For us, that harm is exacerbated by our belief that responding to one killing with another does not honor our loved ones.

Honorable John J. Gibbons[42], former Chief Justice of the United States Court of Appeals for the Third Circuit, concisely summarized the situation of the death penalty in New Jersey:

> Twenty-four years after the enactment of the New Jersey death penalty statute, no one has been executed by the State of New Jersey, and there are only nine people on death row. The result in this state is that a sentence of death is in reality a sentence to incarceration in death row for decades, with the threat of execution overhanging the prisoner at all times, and the prolongation of painful uncertainty for the families of victims.

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[42] Oral testimony of Hon. John J. Gibbons to the New Jersey Death Penalty Study Commission. 16 August 2006. Pages 5-26 of hearing transcript.

The Commission agrees with the words of Mr. Post, who stated that the non-finality of death penalty appeals hurts victims, drains resources and creates a false sense of justice. Replacing the death penalty with life without parole would be a certain punishment, not subject to the lengthy delays of capital cases; it would incapacitate the offenders; and it would provide finality for victims' families.

ADDITIONAL FINDING

Sufficient funds should be dedicated to ensure adequate services and advocacy for the families of murder victims.

The Commission heard testimony about the trauma suffered by family members. Not only are survivors suddenly forced to deal with the shock of their loved ones' murders, but they must also navigate the criminal justice system. According to Kathleen M. Hiltner,[43] Executive Director for the Center for Traumatic Grief and Victims' Services in Moorestown:

> The process is harmful and it's totally out of their control. Many become so focused on the criminal justice system in the trial that they do not even address their own or their families' needs until the trial is over. It's not uncommon for co-victims to fall apart emotionally and physically after the trial is over and justice is served. While many believe that the end of the trial brings closure, in reality, there is no closure. There is only the end of the trial. The grief continues.
>
> For many, the future brings appeals and retrials and retraumatization. For co-victims in capital trials, experience tells us this is guaranteed to them. When a sentence is reduced or reversed, the survivor is again retraumatized. The criminal justice system focuses on the rights of the accused, not the survivor. As a result, survivors feel left out of the process and revictimized by the focus on the accused. They feel helpless . . .
>
> . .

[43] Oral testimony of Kathleen M. Hiltner to the New Jersey Death Penalty Study Commission. 25 October 2006. Pages 92-96 of hearing transcript.

Ms. Hiltner stated that financial constraints made it impossible to assist all of the survivors who need counseling.

> There are approximately 400 homicides every year in New Jersey, leaving an average of seven to 10 family members behind to endure its aftermath, yet our state lacks consistent long-term services for survivors.

Ms. Hiltner noted the shortage of services for homicide survivors:

> Fortunately, throughout the 21 counties in New Jersey, there are state-mandated services available through agencies for all victims of sexual assault and domestic violence. Regrettably, similar services do not exist for survivors of homicide.

Janet Poinsett,[44] a therapist at the Center, testified that the trauma of losing a loved one to murder is persistent:

> My focus is on the families and loved ones of the victim. Although trauma can be processed to lessen the effects of PTS, or post-traumatic stress, or PTSD, post-traumatic stress disorder, it does not go away. We at the center do speak of the '*new normal.*' Survivors are never the same but they can move on in their lives with the memories that they choose to hold near to them. It is an individual path and an individualized process . . . . A simple thing like picking up a newspaper can become a reinjury, possibly causing a panic attack or worse,

[44] Oral testimony of Janet Poinsett to the New Jersey Death Penalty Study Commission. 25 October 2006. Pages 96-102 of hearing transcript.

because an article highlights an upcoming trial or some reminder of the original trauma.

Ms. Poinsett noted that some victims may deny the extent of their own suffering.

> [E]ven when individuals are traumatized and they are symptomatic, they quite often deny it. They wonder: 'What is wrong with me? Why can't I get over this?' - and other statements which minimize the impact of trauma. This is why I feel it is important to speak about trauma . . . But there is a difference between having gone through something horrible and being traumatized. There is a tendency, even for the loved ones who come to our center or call, to expect themselves to be able to move on, or get back to normal, or get closure. Their trauma is often disguised as lack of focus, lack of energy - 'I just can't seem to get it together.'
>
> Reports range from full-blown panic attacks, startle responses or what is termed hyper-vigilance, to anger on a scale from mild to rage. There are many faces to the trauma and all of them hurt.

The Commission notes that a 1990 study conducted by the Medical University of South Carolina and funded by the National Institute of Justice[45] found that one in 10 adults in the United States has lost a family member, other relative or close friend to homicide. The study set out recommendations to reduce the likelihood that survivors would develop post-traumatic stress disorder, such as allowing survivors greater input into the criminal justice

[45] Kilpatrick, D.G., A. Amick, and H.S. Resnick: "Impact of Homicide on Surviving Family Members." Medical University of South Carolina, Department of Psychiatry and Behavioral Sciences. 1990. National Criminal Justice Reference Service. NCJ No. 130823.

system, providing appropriate training for mental health professionals and others who have contact with family members, and increasing the availability of peer support groups.

RECOMMENDATIONS

RECOMMENDATIONS

Based on our findings, the Commission recommends that the death penalty in New Jersey be abolished and replaced with life imprisonment without the possibility of parole, to be served in a maximum security facility. The Commission also recommends that any cost savings resulting from the abolition of the death penalty be used for benefits and services for survivors of victims of homicide.

Pursuant to subsection c. of section 2 of P.L.2005, c.321, the Commission has attached draft legislation embodying these recommendations.

As all of you surely know, December 30th, 2006 was a monumental day in Iraq. It was the day that the late-Iraqi dictator, Saddam Hussein, was publicly executed in downtown Baghdad. The scene was a grisly and utterly savage one: As masked executioners secured the noose around Hussein's neck, some of those in attendance mocked and ridiculed him, shouting Moqtada al-Sadr's name (who was one of Saddam's many enemies) and telling Saddam to "go to hell." Some members of the crowd even began to shout out the Shia version of an Islamic prayer, which was undoubtedly meant to be a sectarian insult toward Saddam, who was a Sunni Muslim. In his final moments, Hussein attempted to mutter a prayer of his own, but an executioner pulled the lever and the trap door opened before he could finish the word "Muhammed." Saddam plunged to his instantaneous death.

And that, ladies and gentlemen, is what they're calling "justice."

To be certain, Saddam Hussein was a corrupt, deplorable and utterly disgusting individual who committed countless atrocities against thousands of innocent people. In fact, under Saddam's own regime, prisoners were often mistreated and taunted in the hours before their own executions, and many likely regarded death as a relief. Some might see justice in the fact that such a brutal dictator died in the same way he killed thousands of others. But how is it that we can deplore a man for his atrocities, and then turn and use those very same atrocities on him and call it "justice?" The sword of the devil can never be used as a tool of the righteous.

Executions here in North Carolina are carried out differently from those in Iraq, but they are no different in principle. The death penalty—whether utilized here or abroad—is barbaric, inhumane, illegal, and utterly outdated. Even if you do not agree with this, you must at least come to recognize that, in practice, North Carolina's capital punishment system is riddled with flaws, inconsistencies and outright injustices. You need only look at the cases of former, present, and past death row inmates to recognize this fact.

We all know the stories of Alan Gell and Darryl Hunt, who spent years of their lives in prison for crimes they did not commit because the state made gargantuan errors in the handling of their cases. The cases of other death row inmates (who have either been executed or are scheduled to be executed) are polluted with similar errors. Jerry Hamilton, a current death row inmate accused of murder in 1997, was sentenced to death by the state solely on the testimony of his nephew, who originally confessed to the murder but would later change his story to implicate Hamilton. Further, there is absolutely *no forensic evidence* linking Hamilton to the crime. His retrial is currently pending in the state court system.

The state has managed to catch the mistakes in the latter cases. But what of those who had similar glaring prejudicial and investigatory errors in their case, but have already been executed? What of those such as Henry Lee Hunt, who was executed 09/12/03 for two murders, but had key state records that would have indicated his innocence destroyed by both the SBI and the Lumberton Police Department. Further, there is even an affidavit in which Hunt's alleged co-conspirator claims that Hunt had nothing to do with the crimes; he—Hunt's co-conspirator—instead indicated that he and his brother were guilty of the murders. Folks, let's call a spade a spade—that's not just an error; ***it's outright corruption.***

In the case of John Daniels, executed 11/14/03, the state's chief witness was Cynthia White, a psychiatrist who made (in her words) an "erroneous" testimony with "gross errors" because the state did not provide her with adequate information. White had no no forensic training or expertise in criminal cases; both the American Psychiatric Association and the ABA regard relying on testimony from such an individual as unethical and unreliable.

But capital punishment cases are not only riddled with corruption and prejudicial error, they are also arbitrarily pursued by state attorneys. Out of all the murder cases in the state, only a fraction of

defendant's are actually sentenced to death. Between 1983 and 2005, there were approximately 13,747 murders in North Carolina; however, during that same time period, the state executed 43 people. This would indicate that out of all the criminals who committed murder between 1983 and 2005, only 0.3% were put to death. How is that fair? How is that just?

Further, the defendants who are executed are most often those who are poor and unable to afford decent representation. Simply look at the polar opposite cases of Ann Miller Kontz and executed inmate Steven McHone. If you'll remember, in November of 2005, Kontz admitted to poisoning her husband with arsenic, but because of her world-class defense team, she was only sentenced to 25 to 31 years in prison.

Steven McHone, executed 11/11/05, was not as lucky. His state-appointed lawyer—who has since been disbarred—failed to conduct a meaningful or effective investigation into the murder case. He failed to inform the jury that the victim, McHone's own mother, said as she was dying "He didn't mean it. Don't hurt him." The point is this: The death penalty is arbitrarily administered to the poorest defendant's because they are unable to afford decent representation. I ask you again: in what way is that justice?

The errors, the iniquity, the corruption—it goes on and on. In spite of all these problems, the state has *still* been reluctant to change the status quo on the death penalty issue. However, as the facts indicate, this state's capital punishment system is long overdue for a review—as this moratorium proposes—if not outright abolition.

After all, capital punishment is an issue that, in principle, should be a no brainier. As a government instituted and run by men, ours is one that makes mistakes—many mistakes. It is therefore impossible to institute a system of capital punishment that is foolproof—that is to say, one in which there is no chance of executing an innocent person. The system of capital punishment here in N Carolina has already demonstrated its extreme fallibility; the only question you legislators should be asking yourselves right now is, "Why haven't we taken action already?"

Some of you fear that the moratorium will only lead to the abolition of the death penalty. I should certainly hope it does. But whether that happens now or later—it's going to happen. The fact of the matter is that this country is decades behind the international community in its stance on capital punishment. Since Post World War-II, countries in Europe have been abolishing their own death penalty statutes. Hundreds of years of ethnic tension, social strife and war have led those people to understand this fact: You cannot reconcile a murder with another murder.

And what of the nations that do still condone capital punishment? China, Syria, North Korea, Iran and Saudi-Arabia are among the nations that are in the United States' company. Obviously, these are not governments we want to be sharing ideologies with.

Though political movements (especially those regarding capital punishment) are slow, sooner or later, this country will come to realize that fact as well. Because if you all fail to act, then ten, twenty, thirty years down the line—when my peers and I are elected to this legislature, and the Virginia legislature, and the South Carolina legislature, and all the other legislatures around the country—we will have come to our senses on this delicate issue of justice. Posterity will then look back with shame upon these days, when the wayward practice of capital punishment stained our judicial system. And we will look at your names in the history books, and we will ask ourselves, "Why didn't they do anything sooner?"

Thank you for your time.

NORTH CAROLINA GENERAL ASSEMBLY

HOUSE INTERIM STUDY COMMITTEE ON CAPITAL PUNISHMENT

AGENDA

Monday, February 5, 2007
1:00 PM
Room 643, LOB

I. Welcome

Speaker Joe Hackney, Co-chair
Representative Beverly Earle, Co-chair

II. North Carolina Victim Assistance Network

Mel L. Chilton, Executive Director
Dick Adams, President
Ramona Stafford, Member, Board of Directors

III. Committee Discussion – Possible Recommendations

IV. Instructions to Staff

V. Adjourn

NORTH CAROLINA GENERAL ASSEMBLY

House Interim Study Committee
On Capital Punishment

Minutes
February 5, 2007
10:00 am
Room 643

The House Interim Study Committee on Capital Punishment was opened by Speaker Joe Hackney. He began by thanking all the formers members for returning for the meeting and asked, Representative Beverly Earle, Co-Chair if she had any opening remarks. She declined making remarks. Speaker Hackney stated that he had re-constituted the committee exactly as it had been appointed by Speaker Black with no changes so that the committee could finish their work.

North Carolina Victim Assistance Network

Speaker Hackney asked the first presenter to come before the committee to present for fifteen minutes. The presenter was Ms. Mel L. Chilton, Executive Director of the North Carolina Victim Assistance Network began by introducing herself. She thanked the committee for the opportunity to come before them to present her issues that began over 32 years ago, and how it has been a life sentence for her and her family. She talked about two points of concerns.

- **Each of the topics of concern raised by this committee is addressed and is dealt with by the courts on a case by case basis: Prosecutorial Misconduct, Racial Bias, Ineffective Assistance of Counsel, Felony murder**
- **It has also been my observation the agenda has contained a two to one ratio of supporters for a moratorium in each meeting.**

NCVAN strongly opposes a moratorium on capital punishment and adopted a Resolution on May 12, 2003. ((See Attachment II). The North Carolina Department of Correction Public Access Information on Mr. James Primes, offender in the case of Ms. Mel Chilton's mother. (See Attachment III).

Recommendations from the North Carolina Victims Assistance Network:

- Funding NCVAN recommends the committee focus providing law enforcement, prosecutors, and judges with the resources they need to ensure the investigations, prosecution and justice is served. The disproportion in funding of the Indigent Defense Fund vs. the State is unacceptable.
- Additionally, we recommend committee the review the Deterrent Studies from universities across the United States in regard to saving innocent lives.

Mr. Dick Adams, President of the NCVAN and advocate for victims of violent crimes. He stated that he spoke with Speaker Hackney at the beginning of the Study Commission on the Death Penalty Moratorium and expressed a desire to speak at the conclusion of the study. He thanked the Speaker for this opportunity. He spoke of a young man who worked hard to receive a four-year college degree and just three months after turning twenty-one years old, he was gunned down for a few hundred dollars. He stated that each of you were elected to serve the state by your constituents and then selectively appointed to serve on the commission prompted by a very small percentage of anti-death penalty advocates whose ultimate goal is to abolish the death penalty in North Carolina. He stated that a two-year moratorium would indeed accomplish the mission of the very small percentage of active anti-death penalty advocates. Again, he thanked the commission for allowing him to speak.

Ramona Stafford, Member, Board of Directors, of NCVAN, thanked the committee for allowing her to share why she believes a moratorium would be a major miscarriage of justice for crime victims. Her voice is in loving memory of Steve Stafford, and it speaks for a growing number of crime victims across North Carolina. Briefly, she stated that she was a homicide survivor fro Forsyth County. Her husband was murdered in 1993 by en evil individual, Robbie Lyons in an attempted armed robbery of their business. Twelve jurors sentenced Lyons to death. Her mission was to see that Lyons was executed, and speak against Hall's release in parole hearings each year. Hall was a co-defendant that made sure the cash drawer was open why Lyons rushed in shooting. She stated that Lyons had no remorse for his crimes and that his only concern was for himself and his insatiable appetite for violence. Lyons attempted to attack the trial judge in Forsyth by throwing a rolodex at him. He also attacked a guard and had some seventy infractions while on death row.

In closing remarks, she stated that the majority of the people of NC support the death penalty. Citizens of this state and crime victims want justice and punishment for murderers who commit heinous acts against an innocent person. Crime victims need a conclusion to the criminal process.

At this time the Speaker stated that the committee move to discuss possible recommendations. Here are the recommendations:

Recommendation #1
Short Title: proportionality review
A BILL TO BE ENTITLED
AN ACT TO PROVIDE THAT THE SUPREME COURT IN CONDUCTING THE PROPORTIONALITY REVIEW REQUIRED BY LAW SHALL CONSIDER NOT ONLY THOSE CAPITAL CASES IN WHICH THE DEATH PENALTY WAS IMPOSED BUT ALSO FACTUALLY SIMILAR CASES IN WHICH THE SENTENCE OF LIFE IMPRISONMENT WAS IMPOSED.

Representative Rick Glazier moved for adoption of the Proportionality Review recommendation. A few more comments were made and a vote was taken at this time. By a showing of hands, the draft bill failed and will not be recommended.

Recommendation #2
Short Title: report new trial to state bar
A BILL TO BE ENTITLED
AN ACT TO REQUIRE THE CLERK OF COURT TO REPORT CERTAIN ORDERS TO THE NORTH CAROLINA STATE BAR.

Representative Ronnie Sutton move to adopt this recommendation. By a showing of hands the bill was recommended.

Recommendation #3
Short Title: LEO provide info to DA for discovery
A BILL TO BE ENTITLED
AN ACT INSURE DISTRICT ATTORNEYS RECEIVE ALL NECESSARY INFORMATION FROM LAW ENFORCEMENT AGENCIES.

Representative Wilma Sherrill moved to recommend this draft bill. By a showing of hands the recommendation was recommended.

Recommendation #4
Short Title: racial discrimination vacate death sentence
A BILL TO BE ENTITLED
AN ACT TO CLARIFY THAT RACIAL DISCRIMINATION IS A PERMISSIBLE GROUNDS FOR APPEAL AT ANY TIME IN A CAPITAL CASE.

Representative Earline Parmon moved that this recommendation be adopted.

By a showing of hands the recommendation was adopted for recommendation.

Recommendation #5
Short Title: Capital Murder Statue.

A BILL TO BE ENTITLED

AN ACT TO CREATE A CAPITAL MURDER STATUTE, TO AMEND THE HOMICIDE STATUTES, AND TO AMEND THE CAPITAL SENTENCING LAWS.

Representative Ronnie Sutton stated that this bill is not ready to become law, and should be recommended that this recommendation be sent to a judiciary committee for the purpose of further discussion and modification. It was so noted by the Speaker that this is an incomplete draft. With comments made by Representative Wilkins that this recommendation be studied, Representative Sutton withdrew his original motion, and accepted the motion by Representative Wilkins for this recommendation to be studied. The motion was adopted. Representative Rick Glazier made a motion to take out a portion of the bill to become a separate bill. On page 3 lines 14,15, 16, to be taken out so that we may be incompliance with a US Supreme Court decision. The motion was adopted, by a showing of hands.

Recommendation #6
Short Title: Felony Murder

A BILL TO BE ENTITLED

AN ACT TO CREATE THE STATUTORY OFFENSE OF FELONY MURDER.

Representative Pricey Harrison moved to approve this recommendation. After further discussion, Representative Harrison withdrew her motion. A new motion was made by Representative Paul Lueke. The motion was for this recommendation to be added to the study agenda to be studied by a committee. The motion was adopted by a showing of hands.

Recommendation #7
Short Title: Amend MAR procedure.

A BILL TO BE ENTITLED

AN ACT TO AMEND THE PROCEDURE FOR MOTIONS FOR APPROPRIATE RELIEF IN CAPITAL CASES.

Representative Ronnie Sutton made a motion to adopt this recommendation, but on line 17, page 2, after the word rulings, to insert "without unnecessary delay, and in no case, no more than 180 days upon receipt". The motion was adopted as amended.

General Study Recommendations

The House Select Committee on Capital Punishment recommends that a committee be appointed to study the following issues:

a) **How juries are selected in capital cases and ways to insure minority representation on a jury when the defendant belongs to a minority race;**
b) **Mental competency issues related to capital cases;**
c) **Racial discrimination in capital sentencing.**
d) **Capital Murder; and**
e) **Felony Murder Rule**

The House Select Committee on Capital Punishment recommends that the Sentencing Commission study possible changes to the laws regarding what offenses are subject to capital punishment, and the effect to such changes on the criminal justice system of the State.

The House Select Committee on Capital Punishment recommends that appropriations be made by the General Assembly for the following purposes:

a) **To raise the hourly rate paid by the State for post-conviction defense counsel from $95 per hour to $105 per hour;**
b) **To increase the salaries of assistant district attorneys;**
c) **To provide more support staff to district attorneys; and**
d) **To expedite the implementation of automated discovered**

A motion was made by Representative Ronnie Sutton to accept these recommendations with a change to add assistant public defenders on line b. With a voice vote, the motion was adopted.

Note: For a list of all recommendations, and recommendations to be studied, see attachments 5 thru 15.

Lethal Injection

With much decision on the lethal injection issue, it was agreed upon by the committee to let the process go through the courts waiting their decision.

Speaker Hackney thanked the committee for all their hard works doing this process. He declared this process complete and the meeting was adjourned.

Speaker Joe Hackney, Chair
Representative Beverly Earle, Co-Chair

Ann Raeford, Committee Assistant

Attachments

Attachment 1	Agenda
Attachment 2	Remarks, Ms. Chilton
Attachment 3	Remarks, Mr. Adams
Attachment 4	Remarks, Ms. Stafford
Attachments 5-14	Recommendations
Attachment 15	Recommendations for Study
Attachment 16	Visitor's Registration
Attachment 17	House Pages

#2

February 6, 2007

To: House Select Committee on Capital Punishment
Co- Chairs, Rep. Joe Hackney and Rep. Beverly Earle

From: Mel L. Chilton, Executive Director
North Carolina Victim Assistance Network (NCVAN)

I would like to thank you for the opportunity to address the Select Committee on Capital Punishment. After observing all of meetings throughout the year, I am compelled to address the committee to express concerns on behalf of the NC Victim Assistance Network (NCVAN), crime victims in North Carolina and share my personal story. My experience with this issue began over 32 year ago, and is a "life sentence" for me and my family (documents attached).

Points of Concern:

- Each of the topics of concern raised by this Committee is addressed and is dealt with by the courts on a case by case basis: Prosecutorial Misconduct, Racial Bias, Ineffective Assistance of Counsel, Felony murder.
- It has also been my observation the agenda has contained a two to one ratio of supporters for a moratorium in each meeting.

Restating the process: Through a 10-step process that takes an average of 10 years to complete, a series of judges evaluates the trial process looking for any miscarriage of justice or error. In the appellate process, new evidence, prosecutorial misconduct, ineffective assistance of counsel, and racial bias are specifically evaluated. The findings of any one court can then be reviewed and analyzed by the next higher court. At any time a court can, and very often does, send a case back to be retried or re-sentenced. After every aspect of a case has been carefully scrutinized by a minimum of 47 judges and one or more juries, the governor then reviews it as well. The governor has multiple options including upholding or reducing a sentence or granting a full pardon without explanation. North Carolina has the additional safeguards of DNA evidence, Open file discovery and most recently with the establishment of the Innocence Inquiry Commission to further protect an innocent person from prosecution.

NCVAN strongly opposes a moratorium on capital punishment and adopted a Resolution on May 12, 2003 (attached).

- The establishment of a death penalty moratorium would only serve to undermine the public's confidence in our judicial system. A moratorium is simply a prelude to abolishing the death penalty and denying justice to victims of the worst of all crimes.

- Most important of all is it is a public safety issue. In my on case, the inmate was serving a life sentence when he strangled my mother to death. Thirty two years later, we are still dealing with the threat of this inmate. Rapist and murderers serving life sentences do gain access to human beings again and commit violent acts against innocent citizens of this state.
- We believe the safeguards are in place and the system is working.

Recommendation:

- Funding -NCVAN recommends the Committee focus providing law enforcement, prosecutors, and judges with the resources they need to ensure the investigations, prosecution and justice is served. The disproportion in funding of the Indigent Defense Fund vs. the State is unacceptable.
- Additionally, we recommend Committee the review the Deterrent Studies from universities across the United States in regard to saving innocent lives.



Bringing Balance To The System

RESOLUTION IN OPPOSITION OF A MORATORIUM OF THE DEATH PENALTY IN THE STATE OF NORTH CAROLINA

WHEREAS, the safeguards provided for the accused in the North Carolina Criminal Justice System include the right of an automatic appeal to the North Carolina Supreme Court and access to the Federal Courts, and these processes assure that the rights of all defendants convicted in every capital case will be fairly reviewed before the ultimate punishment is imposed; and

WHEREAS, the establishment of a moratorium of the death penalty would only serve to undermine the public's confidence in our judicial system and would be an injustice to those individuals who have had a loved one murdered; and

WHEREAS, we know of no credible evidence that the death penalty is administered unfairly in the State of North Carolina since its reinstitution in 1978; and

WHEREAS, we believe that the establishment of a moratorium of the death penalty is a precursor to the abolition of the death penalty, and the denial of justice to the victims of these most heinous of all crimes;

WHEREAS, justice delayed is actually justice denied.

NOW, THEREFORE, BE IT RESOLVED that the Board of Directors of the North Carolina Victim Assistance Network strongly opposes a moratorium of the death penalty in the State of North Carolina because the imposition of a moratorium on the death penalty in North Carolina would be an unwarranted and unjustified attack on our judicial system as it relates to this issue.

Adopted this the 12th day of May, 2003.

North Carolina Department of Correction
Public Access Information System

W3C WAI-A WCAG 1.0

Instructions: Here is the information you have requested for this offender.
(*Note: Click here to view an Explanation of Terms and Data Elements used in the summary boxes.*)

Data current as of 2:00 AM EST on: 02/03/2007

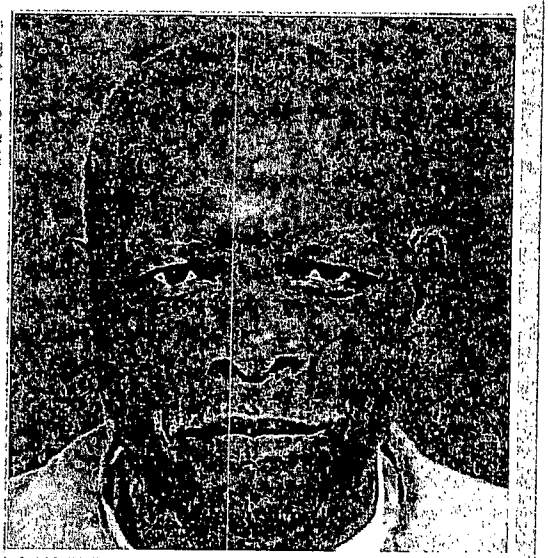
General Summary Information

DOC Number: 0331278 **Inmate Status:** ACTIVE

Name(s): PRIMES, JAMES L.

Demographics

Gender: MALE **Race:** BLACK
Age: 60 **Birth Date:** 07/31/1946



Most Recent Incarceration Summary

Conviction Date: 02/04/1969
Total Term: LIFE
Projected Release Date: LIFE
Primary Offense: MURDER FIRST DEGREE (PRINCIPAL)
Admission Date: 02/07/1969
Admitting Location: CENTRAL PRISON
Special Characteristics: LIFE
Custody Classification: MEDIUM
Next Custody Review Date: 03/01/2007
Control Status: REGULAR POPULATION
Next Control Review: UNKNOWN
Number of Infractions: 7
Last Infraction On: 01/26/2007
Current Location: AVERY MITCHELL

Previous Location: CENTRAL PRISON

Last Movement: RECEIVED FROM CENTRAL PRISON **On:** 07/08/2003

Detainers? N **Escapes?** N

The sentence history for the offender follows.
Incarceration records are light blue; Supervision records are light green

Incarceration Record for Sentence Number: BA-001

Commitment Type: INMATE
Conviction Date: 02/04/1969 **County of Conviction:** WAKE
Service Status: ACTIVE **Sentence Status:** CORRECT
Projected Release Date: LIFE **Sentence Begin Date:** 02/04/1969
Actual Release Date:
Punishment Type: PRE-FAIR
Sentence Type 1: DEPT OF CORR DIV OF PRISONS
Sentence Type 2: LIFE SENTENCE
Minimum Term: LIFE **Maximum Term:** LIFE

Commitment	Docket#	Offense (Qualifier)	Offense Date	Type	Sentencing Penalty Class Code
INITIAL	68014445	RAPE SECOND DEGREE (PRINCIPAL)	10/09/1967	FELON	FELONS (PREFAIR)

Incarceration Record for Sentence Number: BA-002

Commitment Type: INMATE
Conviction Date: 04/21/1976 **County of Conviction:** WAKE
Service Status: ACTIVE **Sentence Status:** ACTIVE
Projected Release Date: LIFE **Sentence Begin Date:** 04/21/1976
Actual Release Date:
Punishment Type: PRE-FAIR
Sentence Type 1: DEPT OF CORR DIV OF PRISONS
Sentence Type 2: LIFE SENTENCE
Minimum Term: LIFE **Maximum Term:** LIFE

Commitment	Docket#	Offense (Qualifier)	Offense Date	Type	Sentencing Penalty Class Code
CONCURRENT TO SENTENCE NUMBER BA-001	75034659	MURDER FIRST DEGREE (PRINCIPAL)	05/19/1975	FELON	FELONS (PREFAIR)

LEXSEE 314 N.C. 202

STATE OF NORTH CAROLINA v. JAMES LEE PRIMES

No. 694A84

SUPREME COURT OF NORTH CAROLINA

314 N.C. 202; 333 S.E.2d 278; 1985 N.C. LEXIS 1787

August 13, 1985, Filed

PRIOR HISTORY: [*1]**

On appeal from defendant's conviction of first degree murder, entered at the 21 April 1976 Criminal Session of Wake County Superior Court, *Judge Godwin* presiding. Defendant initially received the death penalty but was resentenced to life imprisonment on 15 October 1979 upon defendant's motion following the United States Supreme Court's decision in *Woodson v. North Carolina, 428 U.S. 280 (1976),* declaring the state's mandatory death penalty statute unconstitutional.

DISPOSITION:

No error in the trial. Life sentence reinstated.

HEADNOTES: 1. Searches and Seizures § 3; Convicts and Prisoners § 2 -- detention of inmate and seizure of clothing -- no violation of Fourth Amendment

In a prosecution for first degree murder, the seizure of defendant's clothing was not unlawful as being a product of an unconstitutional detention where defendant was a prison inmate. Within prison walls, the Fourth Amendment inquiry is whether the detention and questioning is reasonable given the particular facts and circumstances; here, there was a real need and ample justification for every action taken against defendant; the invasion of defendant's personal rights at each stage was minimal and escalated [***2] only as the need for more intrusive invasions escalated. Fourth Amendment to the United States Constitution.

2. Jails and Jailers § 1; Convicts and Prisoners § 2 -- correctional superintendent's authority to detain inmate

In a prosecution for the murder of a dental technician by a prison inmate, articles of clothing seized from defendant after he was detained by a correctional superintendent were not inadmissible on the grounds that the superintendent lacked authority to arrest defendant. Whether defendant was arrested when he was detained by the superintendent was immaterial, given his status as an inmate and the superintendent's reasonableness in detaining him. A correctional superintendent has the inherent authority to help control the prison environment and maintain security. *G.S. 15A-401.*

3. Criminal Law § 128.2 -- S.B.I. chemist testified out of order -- chain of possession later ruled insufficient -- no mistrial

In a prosecution for first degree murder, the trial court did not abuse its discretion by refusing to grant a mistrial where the court allowed an S.B.I. chemist to testify out of order concerning hair and fiber found on trousers seized [***3] from defendant, the court warned the jury that the chemist's testimony could later be stricken, the court later ruled that the State had not established a sufficient chain of custody to permit introduction of the trousers, and the court gave a very thorough and explicit instruction to the jury reminding them not to consider the testimony for any purpose. Moreover, there was substantial additional evidence establishing defendant's presence at the crime scene.

4. Homicide § 21.5 -- evidence of first degree murder sufficient -- felony murder

The State's evidence was sufficient to go to the jury on the theory of first degree murder despite defendant's statements to a fellow inmate which tended to show that defendant acted in the heat of passion where the State sought a first degree murder conviction under the felony murder rule based on defendant's alleged attempted rape of the victim; the victim was discovered on the floor with her clothes partially displaced; the pathologist who examined the body concluded that his findings were consistent with a homicidal strangulation and attempted rape; three inmates testified that defendant on different occasions had expressed either [***4] an intent or a desire to have sexual relations with the victim; and another inmate

testified that defendant had told him after the killing that he had gone to the victim's office, made sexual advances, and been ordered out.

5. Criminal Law § 181 -- sentence of life imprisonment after mandatory death sentence ruled unconstitutional -- life sentence erroneously declared a nullity

The trial court erred by declaring a life sentence a nullity where defendant was initially sentenced to death on 21 April 1976 as mandated by the then existing statute and gave notice of appeal; the United States Supreme Court declared North Carolina's mandatory death penalty statute unconstitutional; the State sought dismissal of the appeal because it was not perfected and resentencing of defendant; defendant's counsel informed the court that defendant did not wish to perfect his appeal; the State's motion to dismiss was granted and defendant was sentenced to life imprisonment in 1979; defendant filed a motion for a new trial alleging ineffective assistance of counsel; and defendant's right to appeal was reinstated and the life sentence was declared a nullity by a different judge in 1984. The [***5] actions of the trial judge in entering a sentence of life imprisonment was in accord with the directives issued by the North Carolina Supreme Court in similar cases.

COUNSEL:

Lacy H. Thornburg, Attorney General, by J. Michael Carpenter, Special Deputy Attorney General, for the state.

L. Michael Dodd for defendant appellant.

JUDGES:

James G. Exum, Jr., Associate Justice, wrote the opinion. Justice Burley B. Mitchell, Jr., Associate took no part in the consideration or decision of this case.

OPINIONBY:

EXUM

OPINION:

[*204] [**279] Defendant by this appeal presents three issues for determination: (1) Whether certain evidence was seized from defendant, a prisoner, during a period in which he was unlawfully detained, in violation of the Fourth Amendment of the Federal Constitution n1 or in violation of certain North Carolina statutes; (2) whether the court erred in denying defendant's motion for mistrial, and (3) whether the court erred in denying defendant's motion to dismiss. We answer these questions in the negative and find no error in defendant's trial.

n1 Defendant makes no argument resting on any provision of the North Carolina Constitution; consequently we address this issue only in terms of Fourth Amendment jurisprudence developed by the United States Supreme Court.

[***6]

I.

The evidence offered by the state tended to show the following:

On 19 May 1975, Jennette Fish was employed as a dental assistant at the Triangle Correctional Center, a minimum custody facility adjacent to Central Prison in Raleigh. Defendant was an inmate at the Triangle facility assigned to work duty in the dental [*205] clinic. Fish was working alone in the dental clinic on 19 May, since her supervisor was attending a conference, and had been instructed not to see patients but to prepare paper work.

Two coworkers of Fish were with her until approximately 2 p.m., at which time they observed her unlocking and entering her office. One of them, Jacob Lane, warned Fish that she was alone on the hall.

Louis Smith, a dental technician at Triangle, escorted defendant and another inmate to the dental lab shortly after 12:30 p.m. Approximately an hour later, defendant [**280] complained that he was sick and returned to the Triangle facility. Defendant was seen entering the dental office where Fish worked at approximately 3:45 p.m. by honor grade inmate James Brooks.

At approximately 4:55 p.m., J. R. Inscoe, a correctional superintendent at Triangle, encountered defendant [***7] in the hallway as Inscoe moved toward the restroom. Defendant was perspiring and said he wished to speak with Inscoe. Inscoe asked him to wait. When Inscoe returned, defendant informed him that something was wrong with "the lady in the dental clinic." Defendant said she was lying on the floor and that he tried putting water on her but she didn't move.

Inscoe escorted defendant to the nearby control center and left him there. He then entered the dental clinic and discovered the body of Fish. Her face and neck were swollen and discolored and her clothes partially displaced. Inscoe then returned to defendant and removed him to an inner office. After calling an ambulance, Inscoe later returned to defendant and, for the first time, noticed scratches on defendant's neck. At this point, Inscoe placed a guard outside the office containing defendant. State Bureau of Investigation agents later seized several articles of clothing from defendant, including a pair of white socks containing a hair similar in color, racial origin and microscopic details to the victim's.

The pathologist's report concluded that Fish's death was consistent with a homicidal strangulation and attempted rape, [***8] occurring some four to six hours prior to his examination at 9:05 p.m.

Several of defendant's fellow inmates testified that defendant approached them at various times between 2:30 and 4 p.m. and stated that he was in trouble and needed money with which to escape. [*206] In addition, three inmates testified that defendant, on various occasions prior to Fish's death, expressed sexual desires for the victim and his intent to approach her sexually.

Richard Crisp, a cellmate of defendant's after Fish's death, testified that defendant said he didn't mean to hurt Fish or to kill her. He approached her sexually and when she ordered him to get out and threatened to "put the man on him," he began "working up on her." When Fish hit defendant in the neck, he strangled and killed her.

Defendant presented no evidence at trial.

II.

Defendant contends the trial court erred by admitting into evidence a pair of white socks worn by defendant at the time he was detained by Correction Superintendent Inscoe on 19 May 1975 and subsequently seized from his person by SBI agents. Examination of the socks disclosed presence of a hair similar in color, racial origin and certain microscopic details [***9] to that of the victim, thus tending to place defendant near the victim at some point.

Defendant contends the socks were inadmissible as evidence because they were obtained during an illegal search and seizure. He contends that he encountered Corrections Superintendent Inscoe in the hall around 4:55 p.m. and commented to Inscoe that something was wrong with the lady in the dental clinic. Inscoe told defendant to wait and proceeded en route to the restroom. Inscoe then returned, took defendant to the control center and told him to remain there. Defendant contends that he was under arrest from this point on. Only at this point, after defendant was already in custody, did Inscoe proceed to the dental clinic where he discovered the body of Fish.

Defendant argues that he was arrested by Superintendent Inscoe at a time when Inscoe possessed neither an arrest warrant nor sufficient information to support probable cause to believe that a crime had been committed and that defendant committed it. Thus, his entire detention was illegal and under *Henry v. United States, 361 U.S. 98 (1959)*, the search conducted pursuant to it was illegal and any evidence seized during it was inadmissible. [***10]

[*207] In support of his argument, defendant relies heavily upon Inscoe's testimony that [**281] "prior to going to the dental office, I had him [defendant] seated at the control center, in custody of the officer at that location." He also relies upon the trial court's conclusion of law, made following voir dire on the motion to suppress, that "the defendant was in actual custody of Superintendent Inscoe in connection with the death of Mrs. Fish from about 4:55 o'clock p.m. on May 19th, 1975, until after his clothing, . . . [was] seized by Agent Davenport; . . ."

The state responds that despite Inscoe's testimony and the trial court's conclusion of law, defendant was not under arrest at 4:55 p.m. when Inscoe asked him to remain at the control center. Rather, he was merely the subject of an administrative detention, a device recognized by the United States Supreme Court in *Hewitt v. Helms, 459 U.S. 460 (1983)*, as appropriate in circumstances involving possible inmate misconduct. Defendant was not under arrest, the state contends, until much later when Inscoe removed him to a private office under guard. By this time, Inscoe knew: (1) he had encountered defendant [***11] perspiring and in an agitated condition in the hall outside the dental clinic; (2) Fish had been killed; (3) defendant had admitted being with the victim and trying to rouse her with water and (4) defendant had visible scratches on his neck. These circumstances taken together were clearly sufficient to justify Inscoe in arresting defendant without a warrant, the state contends.

While both parties apparently assume the resolution of this issue turns upon whether defendant was "under arrest" when first detained by Superintendent Inscoe at 4:55 p.m., or merely under administrative segregation, we take a somewhat different tack.

The more fundamental question is whether the Fourth Amendment requires probable cause before prison officials could detain defendant, an inmate in the state prison system, within the confines of the prison where defendant was already in custody. If, in this context, no such arrest was required, then whether Inscoe "arrested" defendant by asking him to remain at the control center is immaterial.

The issue of constitutional rights and protections vis-a-vis the prison environment is not a new one. The United States Supreme [*208] Court in a number of opinions [***12] has examined the effect upon an individual's constitutional rights of being incarcerated for the commission of crimes. That Court has held that persons sentenced to prison are not stripped of all constitutional rights at the prison gate. Rather, basic constitutional rights adhere inside as well as outside the prison walls. *See, Wolff v. McDonnell, 418 U.S. 539 (1974); Lee v.*

Washington, 390 U.S. 333 (1968) (*per curiam*) (invidious discrimination is as intolerable within a prison as without); *Johnson v. Avery, 393 U.S. 483 (1969)* (prisoners retain constitutional rights to petition government for redress of grievances, including a reasonable right of access to the courts); *Pell v. Procunier, 417 U.S. 817 (1974)* (prisoners retain First Amendment rights not inconsistent with status as prisoners or objectives of system); *Haines v. Kerner, 404 U.S. 519 (1972)* (prisoners retain the protections of due process); *Cruz v. Beto, 405 U.S. 319 (1972)* (*per curiam*) (prisoners retain the right to a reasonable opportunity to exercise religious freedom).

However, the Supreme Court has also stressed that incarceration "carries with it the circumscription or loss of many **[***13]** significant rights." *Hudson v. Palmer, U.S. , 82 L.Ed. 2d 393, 401 (1984).* The Court's insistence that prisoners be accorded basic constitutional rights extends only to "those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration." *Id.*

> [S]imply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations. 'Lawful incarceration **[**282]** brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.' *Price v. Johnston, 334 U.S. 266, 285 (1948);* see *Jones v. North Carolina Prisoners' Labor Union, supra,* at 125; *Wolff v. McDonnell, supra, at 555; Pell v. Procunier, supra, at 822.* The fact of confinement as well as the legitimate goals and policies of the penal institution limits these retained constitutional rights. *Jones v. North Carolina Prisoners' Labor Union, supra,* at 125; *Pell v. Procunier, supra, at 822.* There must be a 'mutual accommodation between institutional needs and objectives and the provisions **[***14]** of the Constitution that are of general application.' *Wolff v. McDonnell, supra, at 556.*

[*209] *Bell v. Wolfish, 441 U.S. 520, 545-46 (1979).* The restriction of certain rights is justified by the need to maintain an orderly and secure prison environment, *id.*, and also serves as a reminder "that under our system of justice, deterrence and retribution are factors in addition to correction." *Hudson v. Palmer, U.S. , 82 L.Ed. 2d 393, 401-02.* Thus, the curtailment of certain rights is justified simply by an inmate's status as prisoner as well as by institutional needs.

Applying these general principles to the present case, we are guided by several decisions of the United States Supreme Court wherein appellant prisoners alleged that certain practices of prison officials violated the Fourth Amendment prohibition against unreasonable searches and seizures.

In *Hudson v. Palmer, U.S. , 82 L.Ed. 2d 393 (1984),* an inmate at Bland Correctional Center in Bland, Virginia, charged that an unannounced "shake-down" search of his cell by prison officials was conducted solely to harass him and was unreasonable under the Fourth Amendment. The district **[***15]** court granted summary judgment in favor of prison officials. The Fourth Circuit Court of Appeals reversed on this point, however, holding that a prisoner enjoys a "limited privacy right" in his cell entitling him to protection against searches designed solely to harass or humiliate. Thus, the shake-down of a single prisoner's cell was permissible only if done pursuant to an established plan reasonably designed to deter or discover possession of contraband or on reasonable belief that the particular prisoner possessed contraband. The Supreme Court reversed, holding that:

> [S]ociety is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell. The recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions.

Id. at 402-03.

The *Hudson* Court stressed the volatile nature of the prison environment and the duty of prison officials to assure **[***16]** the safety **[*210]** of prison staff, administrative personnel, and visitors. *Id. at 403.* It reasoned:

> Determining whether an expectation of privacy is 'legitimate' or 'reasonable' necessarily entails a balancing of interests. The two interests here are the interest of society in the security of its penal institutions and the interest of the prisoner in privacy within his cell. . . . We strike

> the balance in favor of institutional security, which we have noted is 'central to all other corrections goals,' *Pell v. Procunier, 417 U.S. at 823, 41 L.Ed. 2d 495, 94 S.Ct. 2800, 71 Ohio Ops. 2d 195.* **[**283]** A right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order. We are satisfied that society would insist that the prisoner's expectation of privacy always yield to what must be considered the paramount interest in institutional security. We believe that it is accepted by our society that '[l]oss of freedom of choice and privacy are inherent incidents of confinement.' *Bell v. Wolfish, 441 U.S. at 537, 60 L.Ed.* **[***17]** *2d 447, 99 S.Ct. 1861.*

Id. at 403-04. Finally, the Court rejected the lower court's holding that unannounced individual cell searches must be pursuant to a central plan. "A requirement that even random searches be conducted pursuant to an established plan would seriously undermine the effectiveness of this weapon. . . . We share the . . . view that wholly random searches are essential to the effective security of penal institutions." *Id.* at 404-05.

In *Bell v. Wolfish, 441 U.S. 520 (1979),* the Court examined the scope of constitutional rights guaranteed to pretrial detainees during their confinement prior to trial. The case began as a class action on behalf of detainees at the Metropolitan Correctional Center, a short-term custodial facility in New York City primarily designed to house pretrial detainees. The facility also housed some convicted inmates, primarily those awaiting sentencing or transfer to other facilities and those whose presence was required at trial or were sentenced for contempt. A number of inmates filed an action on behalf of convicted inmates and pretrial detainees protesting many practices of prison officials. The complaint alleged, **[***18]** among other things, violations of statutory and **[*211]** constitutional rights arising from overcrowding, lengthy confinement, lack of sufficient facilities and staff, etc. Among the practices challenged was the prison's policy of requiring inmates to expose their body cavities for visual inspection as part of strip searches conducted after every contact visit with a person from outside the institution. Prison officials argued that cavity searches were necessary to discover and deter smuggling of drugs, weapons and other contraband into the facility.

Both the district court and the Court of Appeals disapproved the strip searches, absent probable cause to believe the particular inmate was concealing contraband. The court of appeals labeled the searches a "gross violation of personal privacy" which "cannot be outweighed by the government's security interest in maintaining a practice of so little actual utility." *Id. at 558.*

The Supreme Court reversed, holding that while body cavity searches, of all the practices challenged by appellants, gave the most cause for concern, these searches did not violate the Fourth Amendment. The Court phrased the issue as whether visual body **[***19]** cavity searches could ever be conducted on less than probable cause of persons already lawfully in custody. The Court expressly assumed that both convicted prisoners and pretrial detainees retain some Fourth Amendment rights. It stressed, however, that the Fourth Amendment prohibits only unreasonable searches and the searches at issue, in the context of the prison environment, were not unreasonable. The Court reasoned:

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. *E.g., United States v. Ramsey, 431 U.S. 606 (1977); United States v. Martinez-Fuerte, 428 U.S. 543 (1976); United States v. Brignoni-* **[**284]** *Ponce, 422 U.S. 873 (1975); Terry v. Ohio, 392 U.S. 1 (1968); Katz v. United States, 389 U.S. 347 (1967); Schmerber v. California, 384 U.S. 757 (1966).* A detention facility **[***20]** is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband **[*212]** is all too common an occurrence. And inmate attempts to secrete these items into the facility by concealing them in body cavities are documented in this record, App. 71-76, and in other cases. *E.g., Ferraro v. United States, 590 F. 2d 335* (CA6, 1978); *United States v. Park, 521 F. 2d 1381, 1382 (CA9 1975).* That there has been only one instance where an MCC inmate was discovered attempting to smuggle contraband into the institution on his person may be more a testament to the

> effectiveness of this search technique as a deterrent than to any lack of interest on the part of the inmates to secrete and import such items when the opportunity arises.

Id. at 559. The Court concluded that a balancing of "the significant and legitimate security interests of the institution against the privacy interests of the inmates," justified the searches at issue. *Id.* at 560.

These authorities demonstrate that application of the Fourth Amendment prohibition on unreasonable searches and seizures within prison walls is not necessarily identical to its application [***21] in society at large. It is beyond dispute that an ordinary citizen may not be detained against his will for questioning or search in connection with a crime absent a valid arrest warrant or the existence of probable cause. As both *Hudson* and *Bell* instruct, however, in the prison context the inquiry is not necessarily whether sufficient grounds exist to search and seize, but whether the search and detention are reasonable given the particular facts and circumstances of the situation. That is, our courts have determined that search and seizure grounded upon less than probable cause is *per se* unreasonable in society at large. The same is not necessarily true in every search and seizure case within the prison environment. Defendant's argument in the present case, therefore, may fail even if we accept, arguendo, his contention that he was detained by Superintendent Inscoe at 4:55 p.m. before Inscoe possessed sufficient information regarding Fish's death to constitute probable cause. Resolution of the question presented depends rather on "a balancing of the need for the particular search [and detention] against the invasion of personal rights that the search [and detention] [***22] entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Bell v. Wolfish, 441 U.S. 520, 559 (1979).* When all the circumstances [*213] of this case are put on the scales and balanced according to the foregoing principles, we are satisfied that defendant's detention was well within the Fourth Amendment's reasonableness requirement.

Superintendent Inscoe encountered defendant in the hall outside the dental clinic. Defendant appeared agitated and was perspiring. He informed Inscoe "there's something bad wrong with the lady in the dental office . . . Well, she's lying on the floor and I went over and put some water on her but she didn't move." At this point Inscoe instructed defendant to have a seat at the control center. He then entered the dental clinic and discovered the victim's body. After some lapse of time, Inscoe returned to the control center, inquired whether defendant was hungry and asked him to move to Inscoe's office. No guard was posted. After a further period of time, Inscoe returned to his office to check on defendant. Defendant [***23] was leaning forward with his elbows on his knees. The neck of defendant's shirt was dropped open and as Inscoe approached to speak with defendant, he noticed two scratches on defendant's neck. At this point, Inscoe stationed a guard outside the office door with [**285] instructions to keep defendant therein. Defendant's clothes were thereafter seized by SBI agents.

The initial actions of Inscoe in asking defendant to remain at the control center were reasonable. Defendant had apprised Inscoe in very general terms of a problem in the dental clinic. Defendant's statement suggests he was with the victim at some point. Inscoe acted reasonably in keeping defendant close by while he investigated the situation. Inscoe's first responsibility was to offer aid, if possible, to the victim. This he tried to do. However, it was reasonable to detain defendant during this period lest more information become necessary from defendant. Later, after discovery of the brutal scene in the clinic, Inscoe acted reasonably in continuing to detain defendant. Defendant had reported what turned out to be a murder. He had admitted his presence there. His appearance when first encountered by Inscoe [***24] was agitated and nervous. Defendant was at that point at least a possible witness and source of information concerning a criminal act. Later, after discovering the scratches on defendant's neck, Inscoe acted reasonably in viewing defendant as a suspect and placing him under guard.

[*214] Thus on one side of the scale there are facts demonstrating a real need and ample justification for every action taken against defendant at the time it was taken by Superintendent Inscoe. On the other side of the scale there are facts showing that Inscoe's invasion of defendant's personal rights at each stage were minimal, escalating only as the need for more intrusive invasions escalated. We conclude, therefore, that all of Inscoe's actions in detaining defendant met the Fourth Amendment's test of reasonableness. The subsequent search of his person and seizure of his clothes were not, therefore, unlawful as being the product of an unconstitutional detention.

Our decision on this point is supported by *Hayes v. United States, 367 F. 2d 216 (CA10 1966),* which reached the same result as we on facts very much like those before us.

Defendant also contends the state failed to demonstrate [***25] that Inscoe had statutory authority to arrest defendant. *N.C.G.S. § 15A-401* allows a law enforcement officer to arrest a suspect, without a warrant, if

he has probable cause to believe the person has committed an offense. Since the state offered no evidence that Inscoe was empowered to arrest defendant, defendant argues the arrest was invalid and any evidence seized thereby was inadmissible.

We find no merit in this argument. We have already held that whether defendant was arrested or not at 4:55 p.m. is immaterial, given his status as an inmate and our conclusion that Superintendent Inscoe acted reasonably in detaining him. Moreover, Inscoe was a correctional superintendent at the facility. As such, it could hardly be disputed that his position carried with it the inherent authority to help control the prison environment and maintain security, including detaining defendant until prison officials could deal with the extraordinary series of events which unfolded before them.

III.

By his next assignment of error, defendant contends the trial court committed prejudicial error in failing to declare a mistrial after it ruled certain evidence inadmissible which had already been [***26] put before the jury during the testimony of a witness called out of order by the state.

[*215] Upon the state's motion, the trial court exercised its discretion to allow Malcolm Davis, a chemist with the State Bureau of Investigation at the time of Fish's death, to testify out of order since, at the time of trial, he lived in Tennessee. Davis testified regarding his examination of a pair of white trousers seized from defendant upon which were discovered five hairs identical in color and race to the victim's, and a red fiber identical to fibers removed from a sweater the victim was wearing when discovered.

[**286] Later in the trial when the state attempted to introduce the white pants into evidence, the trial court, upon defendant's objection, ruled the evidence inadmissible finding that the state had failed to establish a sufficient chain of custody to permit introduction of the evidence. Defendant thereupon moved for a mistrial, which motion was denied. Defendant now claims the trial court abused its discretion by failing, *ex mero motu*, to require the state to introduce evidence at a voir dire prior to Davis's testimony which would have demonstrated the evidence's [***27] inadmissibility, and in failing to declare a mistrial due to the irreparable injury visited upon defendant via Davis's testimony.

We disagree. The decision whether to grant a motion for mistrial rests within the sound discretion of the trial judge and will not ordinarily be disturbed on appeal absent a showing of abuse of that discretion. *State v. Smith, 301 N.C. 695, 272 S.E. 2d 852 (1981); State v. McLean, 294 N.C. 623, 242 S.E. 2d 814 (1978).* "It is well settled in this jurisdiction that when the court withdraws incompetent evidence and instructs the jury not to consider it, any prejudice is ordinarily cured. *E.g., State v. Perry, 276 N.C. 339, 172 S.E. 2d 541 (1970); State v. Moore, 276 N.C. 142, 171 S.E. 2d 453 (1970)." State v. Smith, 301 N.C. 695, 697, 272 S.E. 2d 852, 855 (1981).* Thus, it follows that where the trial judge withdraws incompetent evidence and issues a cautionary instruction to the jury to disregard it, the court's refusal to grant a mistrial based upon the prior introduction of such evidence to the jury will ordinarily not amount to an abuse of discretion.

Such is the case here. The trial judge in the present case took great care in [***28] allowing Davis to testify out of turn to warn the jury that Davis's testimony could later be stricken and excluded from its consideration if the state failed to lay a proper foundation for its admission. Later, upon determining that the [*216] state failed to meet this burden, the court gave a very thorough and explicit instruction to the jury reminding them of his earlier warning and repeatedly instructing them not to consider the testimony at issue for any purpose.

Under the circumstances of this case we think the curative instruction was sufficient to cure any possible prejudice inuring to defendant by virtue of Davis's earlier testimony. The disputed testimony was, in essence, cumulative. The hair and fiber found upon defendant's pants at most tended to place him in close proximity to the victim at some point. The state eventually produced other competent evidence to this same effect. SBI agents testified that a similar hair was found upon defendant's socks, which were properly admitted into evidence. Also, Superintendent Inscoe testified that defendant admitted having been with the victim and attempting to rouse her by putting water on her. Given the additional substantial [***29] evidence of defendant's presence at the crime scene offered by the state and the court's curative instructions removing Davis's disputed testimony from the jury's consideration, we are satisfied there was no abuse of discretion in the trial court's failure to declare a mistrial.

IV.

Finally, defendant contends that the trial court erred in denying his motion to dismiss the charge of first degree murder made at the close of the state's evidence and the close of all the evidence and in failing to submit the case to the jury only on the lesser included offense of voluntary manslaughter. The state offered the testimony of Richard Elmer Crisp, a fellow inmate who shared a cell with defendant following Fish's death. Crisp testified that he and the defendant discussed the case and defendant told him "I didn't mean to hurt her and I damn sure didn't want to kill her. She made me mad and I

slapped her and then I panicked." Defendant contends that the state's own evidence thus demonstrates that defendant acted in the heat of passion upon adequate provocation rather than with premeditation or malice. We disagree.

[**287] Defendant relies heavily in his argument upon the testimony of [***30] Crisp elicited by the state. While this testimony does tend to support the notion that defendant acted in the heat of passion, this testimony alone does not resolve the issue. The state is not [*217] bound by exculpatory statements elicited by it and attributed to defendant if other competent evidence cast doubt upon its veracity. "The introduction by the state of an exculpatory statement made by a defendant does not preclude the state from showing the facts concerning the crime to be different, and does not necessitate a nonsuit if the state contradicts or rebuts the defendant's exculpatory statement." *State v. May, 292 N.C. 644, 658, 235 S.E. 2d 178, 187, cert. denied, 434 U.S. 928 (1977).* Thus, if the state produced evidence which would support the charge of first degree murder, then the submission of that charge to the jury was proper, notwithstanding Crisp's testimony.

In evaluating the other evidence offered by the state, two points are important. First, on a motion to dismiss, all evidence, whether direct or circumstantial, must be considered in the light most favorable to the state and the state is entitled to every reasonable inference to be drawn from the [***31] evidence. *State v. Earnhardt, 307 N.C. 62, 296 S.E. 2d 649 (1982); State v. Powell, 299 N.C. 95, 261 S.E. 2d 114 (1980).* Second, the state did not proceed under a theory of premeditation and deliberation in this case. The prosecutor announced at the outset of the trial that the state was seeking a first degree murder conviction under the felony murder rule based on defendant's alleged attempted rape of the victim. The trial court so instructed the jury and submitted the case to it only on a felony-murder theory. Thus, Crisp's statement, going as it does to the issue of premeditation and deliberation, would not preclude a conviction of first degree murder, even if believed by the trial jury.

The state's evidence tended to show that the victim was discovered on the floor of the dental clinic with her clothes partially displaced. The pathologist who examined the body concluded that his findings were consistent with a homicidal strangulation and attempted rape. In addition, three inmates testified that defendant on different occasions expressed either an intent or a desire to have sexual relations with the victim. Another inmate, Terry Lee Sykes, testified that he was defendant's [***32] close friend and that defendant told him after he was back in Central Prison for killing Fish that he went to Fish's office and "cracked on her," meaning that he made sexual advances, and she ordered him to get out. When viewed in the light most favorable to the state, this evidence [*218] was clearly sufficient to justify submission of the case to the jury on a theory of first degree felony murder.

We find no merit in defendant's assignments of error regarding the guilt phase of his trial.

We deem it advisable, however, to comment upon the sentencing phase of defendant's case. Defendant was initially sentenced to death on 21 April 1976 as mandated by the then existing statute. Defendant gave notice of appeal in open court. On 2 July 1976, the United States Supreme Court declared North Carolina's mandatory death penalty statute unconstitutional in *Woodson v. North Carolina, 428 U.S. 280 (1976).* On 15 October 1979, the state instituted proceedings before Judge Robert Gaines seeking dismissal of the appeal for defendant's failure to perfect it and resentencing of defendant in light of *Woodson.* Judge Gaines, upon being informed by defendant's counsel that defendant [***33] did not wish to perfect the appeal, granted the state's motion to dismiss and resentenced defendant to life imprisonment.

On 25 April 1984, defendant filed a motion for appropriate relief alleging ineffective assistance of counsel and seeking a new trial. After hearing this motion Judge Anthony Brannon found that defendant had never knowingly and willingly waived his right to appeal. He therefore reinstated defendant's right to appeal. He also [**288] declared the life sentence imposed by Judge Gaines a nullity.

This Court was required to respond to the *Woodson* decision in a number of cases wherein the death penalty was imposed at trial. *State v. Woods, 293 N.C. 58, 235 S.E. 2d 47 (1977); State v. Williams, 292 N.C. 391, 233 S.E. 2d 507 (1977); State v. May, 292 N.C. 644, 235 S.E. 2d 178 (1977); State v. Squire, 292 N.C. 494, 234 S.E. 2d 563 (1977); State v. Hopper, 292 N.C. 580, 234 S.E. 2d 580 (1977); State v. Gray, 292 N.C. 270, 233 S.E. 2d 905 (1977); State v. Biggs, 292 N.C. 328, 233 S.E. 2d 512 (1977).* In each of those cases, this Court vacated the death penalty and remanded the case with instructions to the superior court to enter a [***34] judgment of life imprisonment without requiring the presence of defendant. *Id.* The actions of Judge Gaines in entering a sentence of life imprisonment in the present case was in accord with the directives issued by this Court in similar cases. Thus, while Judge Brannon may have properly found that defendant never knowingly and voluntarily [*219] waived his right of appeal, it was error for him to nullify that part of Judge Gaines' order converting defendant's original death sentence to one of life in prison. That portion of Judge Brannon's order is therefore reversed and the sentence imposed by Judge Gaines is reinstated.

No error in the trial.

Life sentence reinstated.

Dick Adams 1/5/07

Mr. Speaker --- Co-Chair – Committee Members

I am Dick Adams, an advocate for victims of violent crime. I spoke to Speaker Hackney at the beginning of this Study Commission on the Death Penalty Moratorium and expressed a desire to speak at the conclusion of the study. I thank you, sir, for this opportunity. I come here not to bring crime victim sob stories, but rather, hopefully, to point out some little publicized and sobering facts. I come here not by choice but as the result of an aspiring young man who worked hard and received a four year college degree just three months after turning twenty-one years old and was gunned down shortly after for a few hundred dollars. According to the law at that time, the killer should have been confined for many more years, having had two years earlier been convicted of armed robbery which carried a mandatory seven year sentence. Due to overcrowded prisons he was released.

Each of you were elected to serve the State by your constituents and then selectively appointed to serve on this Study Commission prompted by a very small percentage of anti-death penalty advocates whose ultimate goal is to abolish the death penalty in NC.

I was told several years ago by a former member and leader of this body that we know we cannot abolish the law in one session and the plan is to do it a bite at a time—like eating an elephant. He then moved to the Senate and from there to a higher political victory.

He had a vision. The plan is gaining momentum. Even though seventy percent plus of the citizens of NC strongly support the death penalty. Alarmingly – that percentage does not understand the plan and the true reason behind the two year moratorium.

I would like to assure you—not one of you – not one of your family members – not one of your friends or neighbors – not one of your constituents is EXEMPT from becoming the next victim to join the swiftly growing ranks of violent crime victims. I quote, "CRIME EXPANDS ACCORDING TO OUR WILLINGNESS TO PUT UP WITH IT."

The safety of the law abiding citizens of this State is in your hands.

The first major bite to the elephant was the so-called Mental Retardation Bill which actually should have been titled IQ Bill. Since 1978 and the passage of the Mental Retardation Bill, no one can name a truly mentally retarded person being tried and convicted of a capital crime and received the death penalty, then came the Discretionary Bill, then the Open File Discovery Bill. The elephant now is well aware of the attack. The three afore-mentioned bills have had a profound effect. The number of killers that are being charged with a capital crime that ask for the DP has been significantly reduced. The annual average of death sentences has been reduced even though the homicide rate continues to climb.

A two year moratorium will in deed accomplish the mission of the very small percentage of active anti-death penalty advocates.

Since the average time for death row inmates to get from the courtroom to the death chamber is 10 years and 7 months of appeal after appeal, it is far beyond my comprehension to understand just what kind of revealing study can take place. I think the law abiding, tax paying citizens of this great state needs and deserves an answer long before any action takes place on this issue.

To: Members of the House Select Committee on Capital Punishment

Thank you for allowing me to share with you today why I believe a moratorium would be a major miscarriage of justice for crime victims. My voice today is in loving memory of Steve Stafford, and it speaks for a growing number of crime victims across North Carolina.

Briefly, I am a homicide survivor from Forsyth County. My husband, Steve was murdered in 1993 by an evil individual, Robbie Lyons in an attempted armed robbery of our business. Derrick Hall, co-defendant made sure the cash drawer was open when Lyons rushed in shooting as he approached my husband behind the check-out counter. Lyons did not stop until he had emptied the gun, and my husband lay wounded with three gunshots and one of those in his back which pierced his aorta. Steve was able to press the alarm, and the murderers would flee without even a penny.

I am unable to describe the despair myself, our son, and our daughter went through along with other family members. You would only understand if you had walked in our shoes. Imagine for a moment saying goodbye to your loved one as they left for work. Some hours later you receive a phone call, and the voice says, "your husband is deceased." No chance to say your goodbyes.

We have been from trial to execution as Lyons was sentenced to death by twelve jurors. Hall was sentenced to second degree life through a plea bargain. I also received a life sentence to see that Lyons was executed, and speak against Hall's release in parole hearings each year.

Lyons wrote the "Jungle Creed" awaiting trial in 1994. It reads:

Yes, I'm from the jungles of stone
And it's where the beasts roam
Searching for myself a prey every day
In order to quiet my stomach's growl
For a prey I went on the prowl
And became satisfied after I made my slay

Yeah, the jungle creed
Said the strong must feed
On any prey at hand

So all take heed
As a beast I uphold this creed
Straight from the start
I would never change
Because to me it would be so strange
So forever I'll stay a beast in soul and heart

Lyons had no remorse for his crimes; his only concern was for himself and his insatiable appetite for violence. He was one of the few felony first degree murderers on death row, because the jury saw a life of violence and crime. Lyons attempted to attack the trial judge in Forsyth by throwing a rolodex at him. He also attacked a guard and had some seventy infractions while on death row.

Opponents of the death penalty and some legislators are leading an effort for a moratorium but in reality, it is to do away with the death penalty. Please be aware of the following:

1. Each case is studied for ten years or more by appellate courts.

2. The appellate process which every person sentenced to death must go through, provides the most in-depth scrupulous study of the participants and the process on a case by case basis.

3. By the point of execution, the case has been thoroughly analyzed and reviewed by a minimum of 12 jurors, a minimum of 47 judges, and the Governor.

4. The NC Supreme Court reviews every death penalty case for passion or prejudice, and the appellate process continues to review for racial bias.

Laws have been passed to insure procedural protections. They are:

1. Open-file discovery in post-conviction.

2. No execution of a mentally retarded defendant.
3. At state expense the defendant has two trial attorneys and two in post conviction.
4. The Innocence Commission may provide relief for those who claim to be factually innocent.

Three other issues this committee has been studying are racial bias, deterrence, and felony murder. Since 1984 to present **13 black defendants** have been executed to **30 white defendants.** Do you think that our family would have grieved less if Steve's murderer had been white? The answer is no; it is the heinous crime by the murderer not his race.

This committee has been given a copy of a number of studies done in the US which clearly indicates that homicides increase during a moratorium on capital punishment and executions result in fewer murders. Crime victims know that the executed murderer will never hurt anyone again. These murderers are too dangerous in our prisons and should never be trusted to be free in our society.

Under current law a person who murders while committing rape, murders a store clerk during robbery, murders a bank teller during a robbery, or murders a kidnap victim during a kidnapping can be tried for first degree murder. Opponents' efforts are to do away with the felony murder rule in an attempt to eliminate the death penalty. This is not justice for victims or our state.

My final comments to this committee today are on executions. My family and I were witnesses to Lyons' execution in 2003. The opponents to the death penalty would have you believe that the defendants suffer cruel pain. It is not true. Lyons did not move or show any bodily stress as his life ended. Innocent people die with excruciating pain and the unborn from partial-birth abortions. Murderers should be no exception. Their victims died a horrible death.

The majority of the people of NC support the death penalty. Citizens of this state and crime victims want justice and punishment for murderers who commit heinous acts against an innocent person. Crime victims need a conclusion to the criminal process.

Ramona Stafford, NC VAN Board Member

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2007

H D

BILL DRAFT 2007-SA-13 [v.2] (02/01)

(THIS IS A DRAFT AND IS NOT READY FOR INTRODUCTION)
2/4/2007 7:21:02 PM

Short Title: Proportionality Review.	(Public)
Sponsors: Representative.	
Referred to:	

A BILL TO BE ENTITLED

AN ACT TO PROVIDE THAT THE SUPREME COURT IN CONDUCTING THE PROPORTIONALITY REVIEW REQUIRED BY LAW SHALL CONSIDER NOT ONLY THOSE CAPITAL CASES IN WHICH THE DEATH PENALTY WAS IMPOSED BUT ALSO FACTUALLY SIMILAR CASES IN WHICH THE SENTENCE OF LIFE IMPRISONMENT WAS IMPOSED.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 15A-2000(d) is amended by adding a new subdivision to read:

"(2a) In determining whether a sentence of death imposed under this section is disproportionate, the Supreme Court shall consider and compare factually similar capital cases that have been reviewed on appeal by the Supreme Court or the Court of Appeals. The reported cases compared by the Supreme Court shall include both those in which the jury recommended life imprisonment, with or without parole, and those in which the jury recommended the death penalty."

SECTION 2. This act is effective when it becomes law and applies to all capital cases not yet decided by the Supreme Court on direct appeal.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2007

H D

BILL DRAFT 2007-SA-17 [v.2] (01/31)

(THIS IS A DRAFT AND IS NOT READY FOR INTRODUCTION)
2/4/2007 7:17:35 PM

Short Title:	report new trial to state bar.	(Public)
Sponsors:	Representative.	
Referred to:		

A BILL TO BE ENTITLED

AN ACT TO REQUIRE THE CLERK OF COURT TO REPORT CERTAIN ORDERS TO THE NORTH CAROLINA STATE BAR.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 15A of the General Statutes is amended by adding a new section 15A-1384 to read:

"**§ 15A-1384. Reports of certain orders in capital case.**

When the court orders a new hearing or new trial in a capital case due to the misconduct of the prosecution or defense counsel, the clerk of court shall insure that a written copy of that order is given to the North Carolina State Bar."

SECTION 2. This act becomes effective December 1, 2007, and applies to orders of a new hearing or new trial occurring on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2007

H D

BILL DRAFT 2007-SA-14 [v.2] (02/01)

(THIS IS A DRAFT AND IS NOT READY FOR INTRODUCTION)
2/4/2007 7:20:37 PM

Short Title: LEO provide info to DA for discovery. (Public)

Sponsors: Representative.

Referred to:

A BILL TO BE ENTITLED

AN ACT INSURE DISTRICT ATTORNEYS RECEIVE ALL NECESSARY INFORMATION FROM LAW ENFORCEMENT AGENCIES .

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 15A-903 reads as rewritten:

"**§ 15A-903. Disclosure of evidence by the State – Information subject to disclosure.**

(a) Upon motion of the defendant, the court must order the State to:

(1) Make available to the defendant the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant. The term "file" includes the defendant's statements, the codefendants' statements, witness statements, investigating officers' notes, results of tests and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant. Oral statements shall be in written or recorded form. The defendant shall have the right to inspect and copy or photograph any materials contained therein and, under appropriate safeguards, to inspect, examine, and test any physical evidence or sample contained therein.

(2) Give notice to the defendant of any expert witnesses that the State reasonably expects to call as a witness at trial. Each such witness shall prepare, and the State shall furnish to the defendant, a report of the results of any examinations or tests conducted by the expert. The State shall also furnish to the defendant the expert's curriculum vitae, the expert's opinion, and the underlying basis for that opinion. The State shall give the notice and furnish the materials required by this

subsection within a reasonable time prior to trial, as specified by the court.

(3) Give the defendant, at the beginning of jury selection, a written list of the names of all other witnesses whom the State reasonably expects to call during the trial. Names of witnesses shall not be subject to disclosure if the State certifies in writing and under seal to the court that to do so may subject the witnesses or others to physical or substantial economic harm or coercion, or that there is other particularized, compelling need not to disclose. If there are witnesses that the State did not reasonably expect to call at the time of the provision of the witness list, and as a result are not listed, the court upon a good faith showing shall allow the witnesses to be called. Additionally, in the interest of justice, the court may in its discretion permit any undisclosed witness to testify.

(b) If the State voluntarily provides disclosure under G.S. 15A-902(a), the disclosure shall be to the same extent as required by subsection (a) of this section.

(c) A law enforcement agency shall make all information, related directly or indirectly to the prosecution of the defendant, available to the State for compliance with this section and any disclosure under G.S. 15A-902(a)."

SECTION 2. This act becomes effective December 1, 2007, and applies to cases where the trial date set pursuant to G.S. 7A-49.4 is on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2007

H D

BILL DRAFT 2007-SA-15 [v.3] (02/01)

(THIS IS A DRAFT AND IS NOT READY FOR INTRODUCTION)
2/4/2007 7:19:37 PM

Short Title: racial discrimination vacate death sentence. (Public)

Sponsors: Representative.

Referred to:

A BILL TO BE ENTITLED

AN ACT TO CLARIFY THAT RACIAL DISCRIMINATION IS A PERMISSIBLE GROUNDS FOR APPEAL AT ANY TIME IN A CAPITAL CASE.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 15A-1446(d) reads as rewritten:

"(d) Errors based upon any of the following grounds, which are asserted to have occurred, may be the subject of appellate review even though no objection, exception or motion has been made in the trial division.

(1) Lack of jurisdiction of the trial court over the offense of which the defendant was convicted.

(2) Lack of jurisdiction of the trial court over the person of the defendant.

(3) The criminal pleading charged acts which, at the time they were committed, did not constitute a violation of criminal law.

(4) The pleading fails to state essential elements of an alleged violation, as required by G.S. 15A-924(a)(5).

(5) The evidence was insufficient as a matter of law.

(6) The defendant was convicted under a statute that is in violation of the Constitution of the United States or the Constitution of North Carolina.

(7) Repealed by Session Laws 1977, 2nd Sess., c. 1147, s. 28.

(8) The conduct for which the defendant was prosecuted was protected by the Constitution of the United States or the Constitution of North Carolina.

(9) Subsequent admission of evidence from a witness when there has been an improperly overruled objection to the admission of evidence on the ground that the witness is for a specified reason incompetent or not qualified or disqualified.

(10) Subsequent admission of evidence involving a specified line of questioning when there has been an improperly overruled objection to the admission of evidence involving that line of questioning.

(11) Questions propounded to a witness by the court or a juror.

(12) Rulings and orders of the court, not directed to the admissibility of evidence during trial, when there has been no opportunity to make an objection or motion.

(13) Error of law in the charge to the jury.

(14) The court has expressed to the jury an opinion as to whether a fact is fully or sufficiently proved.

(15) The defendant was not present at any proceeding at which his presence was required.

(16) Error occurred in the entry of the plea.

(17) The form of the verdict was erroneous.

(18) The sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law.

(19) A significant change in law, either substantive or procedural, applies to the proceedings leading to the defendant's conviction or sentence, and retroactive application of the changed legal standard is required.

(20) A sentence of death was imposed and there is evidence that racial discrimination occurred in:

a. The decision by the district attorney to seek the death penalty;

b. The decision by the jury to impose the death penalty; or

c. Any other portion of the trial or sentencing phase resulting in the imposition of the death penalty.

SECTION 2. This act becomes effective December 1, 2007 and applies to all appeals filed on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2007

H D

BILL DRAFT 2007-RK-22 [v.4] (01/31)

(THIS IS A DRAFT AND IS NOT READY FOR INTRODUCTION)
2/4/2007 3:12:00 PM

Short Title: Capital Murder Statute. (Public)

Sponsors: Representative.

Referred to:

A BILL TO BE ENTITLED

AN ACT TO CREATE A CAPITAL MURDER STATUTE, TO AMEND THE HOMICIDE STATUTES, AND TO AMEND THE CAPITAL SENTENCING LAWS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-17 is repealed.

SECTION 2. Article 6 of Chapter 14 of the General Statutes is amended by adding a new section to read:

"**§ 14-17.2 Capital Murder; punishment.**

(a) The following offenses shall constitute capital murder:

(1) The willful, deliberate, and premeditated killing of any person for pecuniary benefit, or in the commission of a kidnapping, when the kidnapping was committed with the intent to extort money or a pecuniary benefit.

(2) The willful, deliberate, and premeditated killing of any person by another for hire.

(3) The willful, deliberate, and premeditated killing of any person by a person in the custody of a law enforcement officer, the Department of Correcton, the Department of Juvenile Justice and Delinquency Prevention, or any local confinement facility as defined in G.S. 153A-217 or G.S. 153A-230.1, or while in the custody of an employee thereof.

(4) The willful, deliberate, and premeditated killing of any person in the commission of robbery or attempted robbery.

(5) The willful, deliberate, and premeditated killing of any person in the commission of, or subsequent to, an offense in violation of Article 7A

of Chapter 14 of the General Statutes, or in attempting to commit such offense.

(6) The willful, deliberate, and premeditated killing of a State or local law enforcement officer, or any law-enforcement officer of another state or the United States, 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 official duties.

(7) The willful, deliberate, and premeditated killing of more than one person as a part of the same act or transaction or more than one person within a three-year period.

(8) The willful, deliberate, and premeditated killing of any person in the commission of, or attempted commission of, the trafficking of a controlled substance, in violation of Chapter 90 of the General Statutes, when such killing is for the purpose of furthering the commission, or attempted commission, of such offense.

(9) The willful, deliberate, and premeditated killing of any person by another pursuant to the direction or order of one who is engaged in a continuing criminal enterprise, as defined in G.S. 90-95.1.

(10) The willful, deliberate and premeditated killing of a pregnant woman by one who knows that the woman is pregnant and has the intent to cause the involuntary termination of the woman's pregnancy without a live birth.

(11) The willful, deliberate and premeditated killing of a person under the age of fourteen by a person age twenty-one or older.

(12) The willful, deliberate and premeditated killing of any person by another in the commission of or attempted commission of an act of terrorism as defined in 18 U.S.C. § 2331(5).

(13) The willful, deliberate, and premeditated killing of any person committed by a person who had been previously convicted of another capital felony or had been previously adjudicated delinquent in a juvenile proceeding for committing an offense that would be a capital felony if committed by an adult.

(14) The willful, deliberate, and premeditated killing of any person committed by a person who had been previously convicted of a felony involving the use or threat of violence to the person or had been previously adjudicated delinquent in a juvenile proceeding for committing an offense that would be a Class A, B1, B2, C, D, or E felony involving the use or threat of violence to the person if the offense had been committed by an adult.

(15) The willful, deliberate, and premeditated killing of any person where the murder is especially heinous, atrocious, or cruel.

(16) The willful, deliberate, and premeditated killing of any person where 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.

(17) The willful, deliberate, and premeditated killing of any person where 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.

(b) An offense under this section shall be deemed to be a Class A felony, and any person who commits capital murder shall be punished with death or imprisonment in the State's prison for life without parole, as the court shall determine pursuant to G.S. 15A-2000, except as provided in subsection (c) of this section.

(c) Any person who commits an offense in violation of this section who was under 18 years of age at the time of the capital murder shall be punished with imprisonment in the State's prison for life without parole."

SECTION 2. Article 6 of Chapter 14 of the General Statutes is amended by adding a new section to read:

"**§ 14-17.3. First degree murder; punishment.**

(a) Murder, other than capital murder, by means of a nuclear, biological, or chemical weapon of mass destruction as defined in G.S. 14-288.21, poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon, except as provided in G.S. 14-17.2, shall be deemed murder in the first degree.

(b) An offense under this section shall be a Class A felony, and any person who commits first degree murder shall be punished with imprisonment in the State's prison for life without parole."

SECTION 3. Article 6 of Chapter 14 of the General Statutes is amended by adding a new section to read:

"**§ 14-17.4. Second degree murder; punishment.**

Any murder other than capital murder or first degree murder, including that which shall be proximately caused by the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium, or cocaine or other substance described in G.S. 90-90(1)d., or methamphetamine, when the ingestion of such substance causes the death of the user, shall be deemed murder in the second degree, and any person who commits such murder shall be punished as a Class B2 felon."

SECTION 4. G.S. 15A-2000(e) reads as rewritten:

"(e) Aggravating Circumstances. – Aggravating circumstances which may be considered shall be limited to the ~~following:~~ factors enumerated in this subsection. The

penalty of death shall not be imposed unless the State shall prove beyond a reasonable doubt at least one of the following:

(1) There is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society.

(2) The defendant's conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

~~(1) The capital felony was committed by a person lawfully incarcerated.~~

~~(2) The defendant had been previously convicted of another capital felony or had been previously adjudicated delinquent in a juvenile proceeding for committing an offense that would be a capital felony if committed by an adult.~~

~~(3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person or had been previously adjudicated delinquent in a juvenile proceeding for committing an offense that would be a Class A, B1, B2, C, D, or E felony involving the use or threat of violence to the person if the offense had been committed by an adult.~~

~~(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 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.~~

~~(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.~~"

SECTION 5. G.S. 15A-2005(h) reads as rewritten:

"(h) The provisions of this section do not preclude the sentencing of a mentally retarded offender to any other sentence authorized by ~~G.S. 14-17~~ 14-17.2 for the crime of ~~murder in the first degree.~~ capital murder."

SECTION 6. This act becomes effective December 1, 2007, and applies to offenses committed on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions. If any provision of this act or its application is held invalid, the invalidity does not affect other provisions or applications of this act that can be given effect without the invalid provisions or application, and to this end the provisions of this act are severable.

HOUSE DRAFT:
Capital Murder Statute.

BILL ANALYSIS

Committee:	House Interim Study on Capital Punishment	**Date:**	February 5, 2007
Introduced by:		**Summary by:**	Hal Pell
Version:			Committee Co-Counsel
	2007-RK-22		

SUMMARY: ***This act would create a capital murder statute, listing specific types of offenses that would qualify for capital punishment. It would amend the crime of first degree murder to make the penalty life in prison without parole. The act would be effective for offenses committed on or after December 1, 2007.***

CURRENT LAW: North Carolina allows for the imposition of the death penalty for two types of offenses: willful, deliberate, and premeditated murders, and murders committed during the course of offenses listed in the statute. If a defendant is convicted of the offense, a separate sentencing hearing is held. There are eleven aggravating circumstances. If the State proves one or more aggravating factors, and the jury finds that any aggravating factor is not outweighed by mitigating factors, then the death penalty can be imposed.

BACKGROUND: During committee discussions, several speakers advocated a system that reserved the death penalty for the "worst of the worst" murders. The stated rationale included reasons based upon both efficiency and policy. For example, it was noted that 1200 cases initially charged as 1st degree murder have been closed since July 1, 2001, and "less than one percent (1%) have resulted in the death sentence." Other stated rationales included: (1) tremendous expenditure of scarce judicial, prosecutorial and defense resources; (2) the opportunity for arbitrariness and bias in the determination of who is capitally charged, and who receives the death sentence; and (3) the fact that similar cases occurring in different counties or jurisdictions receive different results. The capital murder statute in Virginia was suggested as an example of a statute that limited the imposition of the death penalty to the "worst of the worst" murders.

BILL ANALYSIS:

Section 1

The act creates the offense of "capital murder," and would limit the imposition of the death penalty to the willful, deliberate, and premeditated murders committed under the circumstances listed in the statute.

The 17 listed offenses are an amalgam of the 13 substantive offenses that constitute capital murder in Virginia, and the current 11 aggravating circumstances under North Carolina which, if found, would allow for the imposition of the death penalty. The North Carolina aggravating circumstances were included as they indicate past policy decisions by the General Assembly as to what circumstances would justify the imposition of capital punishment. Where the Virginia offenses and the North Carolina circumstances overlapped, they were combined into a single offense.

Conviction of a capital murder offense would result in a sentencing hearing, which is similar to current North Carolina law. (See Section 4, below).

In 2005, the United States Supreme Court (*Roper v. Simmons)* held that it is unconstitutional to impose the death penalty on a defendant who was less than 18 years of age at the time of the murder. This section (subsection (c)) has been drafted to comport with the Supreme Court's ruling.

Section 2

This section of the act would provide a sentence of life in prison without parole for murders that are currently subject to the death penalty in North Carolina, but are not included in the capital murder statute.

Section 3

This section duplicates the current law in North Carolina on the offenses deemed to be second degree murder, i.e., those murders that are not first degree murder.

Section 4

This section amends the list of aggravating factors that a jury could consider in the sentencing hearing. The two listed factors are identical to the aggravating factors in the Virginia statute. In Virginia, the jury must find at least one of the two aggravating factors in order to impose the death sentence. The jury may conclude that the death sentence is not "justified," based upon any mitigating factors found.

The amendment would not change the current law to the Virginia method. It would retain North Carolina's current method of weighing aggravating and mitigating factors. If the State proves at least one of the two aggravating factors listed in the statute, and the jury finds that it was not outweighed by any mitigating factors found, then the death penalty could be imposed. If an aggravating factor could not be proven, or if it was found to be outweighed by mitigating factors, then the sentence would be life in prison without parole.

The terms used in the aggravating factors have been interpreted by case law. The Virginia courts have defined "depravity of mind" as "a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation."

The courts have also defined "aggravated battery" as "a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder." The infliction of multiple wounds is an example of "aggravated battery," and it was immaterial whether the victim remained conscious during the course of several attacks.

Section 5

This section makes a necessary conforming change to the statute authorizing life imprisonment in a death penalty case if the defendant proves mental retardation.

Section 6: The act would be effective for offenses committed on or after December 1, 2007.

2007-RK-22-SMRK

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2007

H D

BILL DRAFT 2007-RK-21 [v.3] (01/31)

(THIS IS A DRAFT AND IS NOT READY FOR INTRODUCTION)
1/31/2007 11:23:18 AM

Short Title:	Felony Murder.	(Public)
Sponsors:	Representative.	
Referred to:		

A BILL TO BE ENTITLED

AN ACT TO CREATE THE STATUTORY OFFENSE OF FELONY MURDER.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 14-17 reads as rewritten:

"**§ 14-17. Murder in the first and second degree defined; felony murder; punishment.**

(a) A murder which shall be perpetrated by means of a nuclear, biological, or chemical weapon of mass destruction as defined in G.S. 14-288.21, poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated ~~killing,~~ killing ~~or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon~~ shall be deemed to be murder in the first degree, a Class A felony, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life without parole as the court shall determine pursuant to G.S. 15A-2000, except that any such person who was under ~~17~~18 years of age at the time of the murder shall be punished with imprisonment in the State's prison for life without parole. ~~Provided, however, any person under the age of 17 who commits murder in the first degree while serving a prison sentence imposed for a prior murder or while on escape from a prison sentence imposed for a prior murder shall be punished with death or imprisonment in the State's prison for life without parole as the court shall determine pursuant to G.S. 15A-2000.~~

(b) Unless a person's conduct is covered under some other provision of law providing greater punishment, a murder which shall be committed in the perpetration or attempted perpetration of any arson, rape or sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be

deemed to be felony murder, and any person who commits such murder shall be punished with imprisonment in the State's prison for life without parole.

(c) ~~All other kinds of murder,~~ A murder not described in subsections (a) or (b) of this section, including that which shall be proximately caused by the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium, or cocaine or other substance described in G.S. 90-90(1)d., or methamphetamine, when the ingestion of such substance causes the death of the user, shall be deemed murder in the second degree, and any person who commits such murder shall be punished as a Class B2 felon."

SECTION 2. This act becomes effective December 1, 2007, and applies to offenses committed on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions.

HOUSE DRAFT: Felony Murder.

BILL ANALYSIS

Committee:	House Interim Study Committee on Capital Punishment.	**Date:**	February 5, 2007
Introduced by:		**Summary by:**	Hal Pell Committee Co-Counsel
Version:	2007-RK-21		

SUMMARY: This act would create the statutory offense of felony murder, with the punishment of life in prison without parole. The act would be effective for offenses committed on or after December 1, 2007.

CURRENT LAW: The first degree murder statute allows, as punishment, the imposition of the death penalty or life in prison without parole. A first degree murder includes premeditated murders and murders committed during the perpetration of listed criminal offenses. The State does not need to prove that a person committed willful, deliberate, and premeditated murder to obtain a first degree murder conviction if the murder was committed in the perpetration of the offenses listed in the statute.

The United States Supreme Court (*Roper*) has held that it is unconstitutional to execute a person who commits a murder at age 17 or under.

BILL ANALYSIS:

This act would designate a murder committed during the perpetration of other offenses as "felony murder." It would remain first degree murder, but with life in prison without parole as the designated penalty.

The act would also change, from 17 to 18, the age at which a person committing a murder would be subject to the death penalty.

EFFECTIVE DATE: The act would be effective for offenses committed on or after December 1, 2007.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2007

H D

BILL DRAFT 2007-RK-23 [v.3] (01/02)

(THIS IS A DRAFT AND IS NOT READY FOR INTRODUCTION)
2/5/2007 9:47:00 AM

Short Title:	Amend MAR procedure.	(Public)
Sponsors:	Representative.	
Referred to:		

A BILL TO BE ENTITLED

AN ACT TO AMEND THE PROCEDURE FOR MOTIONS FOR APPROPRIATE RELIEF IN CAPITAL CASES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 15A-1420(b1) reads as rewritten:

"(b1) Filing Motion With Clerk; Review of Motion by Judge.

(1) The proceeding shall be commenced by filing with the clerk of superior court of the district wherein the defendant was indicted a motion, with service on the district attorney in noncapital cases, and service on both the district attorney and Attorney General in capital cases.

(2) The clerk, upon receipt of the motion, shall place the motion on the criminal docket.

a. In noncapital cases, ~~The~~ the clerk shall promptly bring the motion, or a copy of the motion, to the attention of the resident judge or any judge holding court in the county or district.

b. In capital cases, the clerk shall bring the motion, or a copy of the motion, to the attention of the senior resident superior court judge or his designee within five days of the filing of the motion. The senior resident superior court judge is authorized to assign the motion to any superior court judge, in accordance with G.S. 15A-1413(a). The assigned superior court judge shall hold all hearings and make all rulings in the case, unless the senior resident superior court judge reassigns the motion to another superior court judge.

c. In capital cases, not withstanding any other provision of law, the judge assigned to the motion shall be empowered to issue any orders or rulings in the matter while out of term, session, or county, and may hold a hearing in the superior court district during any regular session of the court, or a special session of the court, ordered pursuant to G.S. 7A-46.

(3) In noncapital cases, the judge shall review the motion and enter an order whether the defendant should be allowed to proceed without the payment of costs, with respect to the appointment of counsel, and directing the State, if necessary, to file an answer.

(4) In capital cases, the judge assigned pursuant to subsection (b1)(2) of this section shall review the motion and enter an order within twenty days of the filing of the motion that ~~directing~~ directs the State to file its answer within 60 days of the date of the order. If a hearing is necessary, the judge shall calendar the case for ~~hearing~~ hearing, and issue any orders or rulings, without unnecessary delay."

SECTION 2. This act becomes effective December 1, 2007, and applies to motions for appropriate relief filed on or after that date.

HOUSE DRAFT:
Amend MAR Procedure.

BILL ANALYSIS

Committee:	House Interim Study Committee on Capital Punishment.	**Date:**	February 5, 2007
Introduced by:		**Summary by:**	Hal Pell Committee Co-Counsel
Version:	2007-RK-23		

SUMMARY: ***This act would amend the procedure for responsive filing to motions for appropriate relief in capital cases, and authorize assigned judges to take action on cases when the judge is out of term and out of session. The act would be effective for motions for appropriate relief filed on or after December 1, 2007.***

CURRENT LAW:

The State must respond to a motion for appropriate relief (MAR) upon receiving an order from the judge assigned to the MAR. When an MAR is filed, the Attorney General's Office receives a copy of the motion.

The senior resident superior court judge assigns the MAR to a superior court judge in the district. The State must file a response to the MAR within 60 days of receiving an order from the court. However, there is no time limit requiring the assigned judge to issue an order requiring the State to file a responsive pleading. There are no time limits on ordering any hearing on the motion, or upon filing of any order on the merits of the motion.

Motions for appropriate relief are filed in the judicial district where the capital trial was held. In *State v. Trent*, the North Carolina Supreme Court ruled that the denial of a motion to suppress was entered out of term, session and county from the district where the trial was being held. Consequently, it found that the order was a nullity. There are no provisions that would allow a judge assigned to an MAR the jurisdiction to issue orders or rulings when the judge is not in the judicial district, and in session in the superior court district, where the case was tried.

BILL ANALYSIS:

This act would require the clerk to bring an MAR to the attention of the senior resident superior court judge within five days of its filing. Within twenty days of the filing of the MAR, the assigned judge must order the State to file a response to the motion.

The act would also authorize the MAR judge to issue any orders or rulings out of term, session, or county, and to issue any rulings following a hearing without unnecessary delay.

EFFECTIVE DATE: The act would be effective for motions for appropriate relief filed on or after December 1, 2007.

House Select Committee on Capital Punishment

Recommendations

1.The House Select Committee on Capital Punishment recommends that a committee be appointed to study the following issues:

a) How juries are selected in capital cases and ways to insure minority representation on a jury when the defendant belongs to a minority race;
b) Mental competency issues related to capital cases; and
c) Racial discrimination in capital sentencing.

2. The House Select Committee on Capital Punishment recommends that the Sentencing Commission study possible changes to the laws regarding what offenses are subject to capital punishment, and the effect of such changes on the criminal justice system of the State.

3. The House Select Committee on Capital Punishment recommends that appropriations be made by the General Assembly for the following purposes:

a) To raise the hourly rate paid by the State for post-conviction defense counsel from $95 per hour to $105 per hour;
b) To increase the salaries of assistant district attorneys;
c) To provide more support staff to district attorneys; and
d) To expedite the implementation of automated discovery systems.

VISITOR REGISTRATION SHEET

Joint Select Comm. on Capital Punishment 2-5-07

Name of Committee **Date**

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Howard Lee	NC House
Ramona Hafford	NC VAN
Mel Chilton	NCVAN
Margaret Wiggins	AOC
Leah Bryant	AOC
Stan Moore	3604 Penhurst Place Ral. NC 27613 (citizen/voter) Opposed To Waste
Jim Culberson	citizen - Asheboro, NC
Ted Frazer	Citizen - Durham, N.C
Kimberly N Overton	NC Conf. of DAs
Peg Dorer	Conference of District Attorneys
John Madler	NC Sentencing Commission

VISITOR REGISTRATION SHEET

Name of Committee _____ Date _____

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Troy Page	NC Sentencing Commission
Jill Goins	Former Rep Nilma Sherrill's Daughter
Michael Healey	PFADP / Sacred Heart Cathedral
Megan Smith	Murder Victims' Families for Reconciliation
Tina Walker	Murder Victims Families For Reconciliation
Jeremy Collins	NC Moratorium Coalition
Tom Fowel	PFADP/MVFR
Gerda Stein	CDPL
Megan Nerz	Franciscan Coalition for Justice & Peace
Mike Hauber	Franciscan Coalition for Justice & Peace
Eleanor Ivy	Common Sense Foundation

VISITOR REGISTRATION SHEET

Name of Committee | Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Mark Kleinschmidt	Fair Trial Initiative, Durham NC
Scott Bass	Nazareth House, Raleigh
Stephen Dear	People of Faith against the Death Penalty
Katie Maslanka	PFADP
Megan Sheridan	People of Faith Against the Death Penalty
C Pillow	NCATL
C Sweet	CJPC
The Hutton	IDS
Amy McConkey	Smith Anderson
John McM	Bouvier
Cliff Sobel	Law office

VISITOR REGISTRATION SHEET

Name of Committee | Date

VISITORS: PLEASE SIGN IN BELOW AND RETURN TO COMMITTEE CLERK

NAME	FIRM OR AGENCY AND ADDRESS
Brian Elderbroom	Common Sense Foundation
Sarah Preston	ACLU-DC

House Pages

House Select Comm. on Capital Punishment

Name Of Committee: _____ Date: 2-5-07

1. Name: _____

   County: _____

   Sponsor: _____

2. Name: _____

   County: _____

   Sponsor: _____

3. Name: _____

   County: _____

   Sponsor: _____

4. Name: _____

   County: _____

   Sponsor: _____

5. Name: _____

   County: _____

   Sponsor: _____

Sgt-At-Arms

1. Name: Martha Parrish
2. Name: Marvin Lee
3. Name: Reggie Sills
4. Name: John Brandon
5. Name: Victor Womack
6. Frank Prevo