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NC Death Penalty:

History &

Overview

The Death Penalty in North Carolina: History and Overview

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This paper provides a brief history of the death penalty in North Carolina, a snapshot of the death penalty today, and an overview of the steps in a capital case.

The History of the Death Penalty in North Carolina

The death penalty has been a part of North Carolina law since the state was a British colony. The first known execution by colonial authorities was the hanging of a Native American man in 1726. In colonial times, the death penalty was available as a punishment for an array of different crimes.¹ Until the second half of the twentieth century, the death penalty was a permissible, and sometimes mandatory, punishment for crimes including murder, rape, burglary, and arson.

From colonial times through statehood and the civil war, the death penalty was carried out by local officials, usually by hanging. Racial prejudice permeated society at that time, and the criminal justice system, including the death penalty, was no exception. Historical evidence indicates that the death penalty was imposed disproportionately on blacks, especially for rape and burglary.

A significant change took place in 1910, when the state assumed responsibility for executions in an effort to make them more consistent and humane. "On March 18, 1910, Walter Morrison, a laborer from Robeson County, became the first man to die in the state's electric chair at Central Prison."² This made North Carolina a national leader in "delocalization."³

The next major development took place when the Supreme Court decided *Furman v. Georgia*, 408 U.S. 238 (1972). The Court ruled that the imposition of the death penalty was arbitrary and therefore violated the Eighth Amendment when the decision whether to impose the death penalty was left to the unbridled discretion of the judge or jury. *Furman* effectively invalidated all existing death penalty laws nationwide. In North Carolina, it led to the decision in *State v. Waddell*, 282 N.C. 431 (1973), which reasoned that if a discretionary death penalty was unconstitutional, the statutes authorizing the death penalty for murder, rape, arson, and burglary would be interpreted as mandatory. After *Waddell*, the number of inmates on death row ballooned to 120, making North Carolina's death row the largest in the nation at the time.⁴

¹ North Carolina History Project, *Capital Punishment*, <http://www.northcarolinahistory.org/encyclopedia/488/entry> ("As late as 1817, twenty-eight crimes including burglary and counterfeiting could warrant the death penalty in the Tar Heel State.")

² North Carolina Department of Public Safety, *History of Capital Punishment in North Carolina*, <http://www.doc.state.nc.us/dop/deathpenalty/DPhistory.htm>.

³ Seth Kotch & Robert P. Mosteller, *The Racial Justice Act*, 88 N.C. L. Rev. 2031 (2010).

⁴ North Carolina Department of Public Safety, *History of Capital Punishment in North Carolina*, <http://www.doc.state.nc.us/dop/deathpenalty/DPhistory.htm>.

Waddell's mandatory death penalty regime was challenged and struck down in *Woodson v. North Carolina*, 428 U.S. 280 (1976), which held that the death penalty could be imposed only after particularized consideration of each defendant, his crimes, and his character. However, the Supreme Court charted a new way forward in *Gregg v. Georgia*, 428 U.S. 153 (1976). In that case, the Court upheld the constitutionality of Georgia's death penalty statute, which provided for bifurcated guilt and penalty phases, required the jury to find statutory aggravating and mitigating circumstances to guide its decision regarding the imposition of the death penalty, and guaranteed subsequent proportionality review by the state supreme court.

Subsequently, in 1977, North Carolina enacted a new death penalty statute. With some modifications, it remains the law today. *See generally* G.S. 15A-2000 *et seq.* Like the Georgia statute at issue in *Gregg*, it provides for a separate penalty phase and uses enumerated aggravating and mitigating circumstances to guide the jury's discretion.

At that point, North Carolina continued to authorize the death penalty as a punishment for some non-homicide offenses. However, the Supreme Court held in *Coker v. Georgia*, 433 U.S. 584 (1977), that the Eighth Amendment prohibited the imposition of the death penalty as a punishment for the rape of an adult woman. (It later held, in *Kennedy v. Louisiana*, 554 U.S. 407 (2008), that the death penalty may not be imposed for the rape of a child.) In 1979, the General Assembly rewrote the state's sexual assault laws, removing the possibility of the death penalty. *In re R.L.C.*, 179 N.C. App. 311 (2006) ("The death penalty was not completely removed from the [rape] statute until 1979 when all sex offenses were clarified, modernized, and consolidated"); S.L. 1979-682.

Major decisions in the 1980s and 1990s included the Court's rulings in *Enmund v. Florida*, 458 U.S. 782 (1982) (prohibiting the application of the death penalty to certain defendants who are guilty only as accomplices to felony murder), and *McKoy v. North Carolina*, 494 U.S. 433 (1990) (invalidating North Carolina's rule that a mitigating circumstance must be found unanimously in order to be considered by the jury). In 1994, North Carolina enacted Structured Sentencing, which made life imprisonment without parole the sole alternative to the death penalty. 1998, North Carolina made lethal injection the exclusive method of execution.

In 2001, the General Assembly modified the death penalty statute in two significant ways. First, it enacted G.S. 15A-2004, which gives prosecutors the discretion to decline to seek the death penalty; prior law had required prosecutors to pursue the death penalty when there was evidence of at least one aggravating circumstance. Second, it prohibited the imposition of the death penalty on intellectually disabled (formerly called mentally retarded) defendants, a prohibition that was later constitutionalized in *Atkins v. Virginia*, 536 U.S. 304 (2002).

Recent years have continued to see important changes in the death penalty process. In 2005, the Supreme Court decided *Roper v. Simmons*, 543 U.S. 551 (2005), which made juveniles ineligible for the death penalty. In *Baze v. Rees*, 553 U.S. 35 (2008), the Court rejected an Eighth Amendment challenge to lethal injection as a method of execution. In 2009, the General Assembly enacted the Racial Justice Act, G.S. 15A-2010 *et seq.* It was designed to remove racial discrimination from the death penalty system,

but critics contended that it was drafted too broadly and invited endless litigation based on statistical correlations not indicative of discrimination. It was narrowed by amendment in 2012, S.L. 2012-136, and was repealed in 2013, S.L. 2013-154, though litigation about the effect of the repeal on the claims of inmates who had already filed under the Act remains pending.

The Death Penalty Today

For nearly two decades, the number of capital trials, death sentences, and executions have been falling compared to historical levels. The chart below shows the number of capital trials and death sentences in North Carolina since 2000.⁵

| Year | Capital Trials | Death Sentences |
|------|----------------|-----------------|
| 2000 | 57 | 18 |
| 2001 | 50 | 14 |
| 2002 | 37 | 7 |
| 2003 | 30 | 6 |
| 2004 | 29 | 4 |
| 2005 | 10 | 6 |
| 2006 | 24 | 5 |
| 2007 | 15 | 3 |
| 2008 | 25 | 1 |
| 2009 | 12 | 2 |
| 2010 | 16 | 4 |
| 2011 | 14 | 3 |
| 2012 | 14 | 0 |
| 2013 | 4 | 1 |
| 2014 | 5 | 3 |
| 2015 | 4 | 0 |
| 2016 | Not available | 1 |

The last person to be executed in North Carolina was Samuel Flippen, who was put to death on August 18, 2006.⁶ Since that time, there has been a *de facto* moratorium on executions, as a result of several related challenges to the death penalty system, some of which have now been resolved.

⁵ Data regarding death sentences are from the Death Penalty Information Center, <https://deathpenaltyinfo.org/death-sentences-1977-present>. Data regarding capital trials are drawn primarily from N.C. Office of Indigent Defense Services, *FY15 Capital Trial Case Study 11*, <http://www.ncids.org/Reports%20&%20Data/Latest%20Releases/FY15CapitalCaseStudy.pdf>, and N.C. Office of Indigent Defense Services, *FY07 Capital Trial Case Study 2*, <http://www.ncids.org/Reports%20&%20Data/Latest%20Releases/FY07CapitalStudyFinal.pdf>. Both reports use fiscal year reporting. Data regarding capital trials in years 2000, 2001, and 2006 are from the North Carolina Capital Defender.

⁶ North Carolina Department of Public Safety, *News Regarding Scheduled Executions*, http://www.doc.state.nc.us/dop/deathpenalty/execution_news.htm.

- First, North Carolina death row inmates, like condemned inmates across the country, began to raise Eighth Amendment challenges to lethal injection. Generally, death-sentenced defendants began to argue that many states' execution protocols could potentially cause severe pain prior to death because they involve poorly-chosen chemicals, or require the chemicals to be administered in the wrong order, or fail to take into account the particular medical conditions of certain inmates, such as inmates whose veins may be difficult to access or fragile. The United States Supreme Court rejected an Eighth Amendment challenge to Kentucky's lethal injection protocol in *Baze v. Rees*, 553 U.S. 35 (2008). That protocol is broadly similar to North Carolina's, but as of early 2017, challenges to North Carolina's lethal injection procedures remain pending in both state and federal court.
- Second, the North Carolina Medical Board announced that doctors could not ethically participate in executions, beyond certifying the inmate's death. The possibility of professional discipline rendered it impossible for the state to procure a physician to oversee executions, yet G.S. 15-190 at that time mandated the presence of "the surgeon or physician of the penitentiary,"⁷ and a federal district judge ruled that Eighth Amendment concerns might be raised if medical personnel did not monitor inmates while they were being executed. The Department of Correction (now part of the Department of Public Safety) sued, arguing that the Board had overstepped its authority by undermining state law. In *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189 (2009), the state supreme court agreed.
- Third, in response to and in anticipation of litigation about its death penalty procedures, North Carolina revised its execution protocol. At that time, G.S. 15-188 required that changes to the protocol be approved by the Council of State.⁸ The Council approved the revision in a non-public meeting, which led to a civil suit in which several death row inmates argued, *inter alia*, that the Council was required to, but did not, follow the process set forth in the Administrative Procedures Act when adopting the new protocol. This argument was rejected by the state supreme court in *Conner v. North Carolina Council of State*, 365 N.C. 242 (2011).
- Fourth, and finally, as noted above, the General Assembly enacted the Racial Justice Act in 2009. Virtually every death-sentenced inmate in North Carolina filed a claim under the Act. It was repealed in 2013, and the repeal bill indicated an intent for the repeal to operate retroactively to eliminate the claims that had been filed.⁹ Litigation regarding the constitutionality of a retroactive appeal followed and remains pending before the Supreme Court of North Carolina.

According to the Division of Adult Correction, as of April 25, 2017, there were 147 inmates on North Carolina's death row.¹⁰ North Carolina has the nation's sixth-largest death row.¹¹ Of the 147 inmates, 144 are men, housed at Central Prison in Raleigh. Three are women, housed at the North Carolina

⁷ The statute has since been amended to allow certain "medical professional[s] other than a physician" to be present. S.L. 2015-198.

⁸ That requirement has since been removed. S.L. 2012-136.

⁹ S.L. 2013-154.

¹⁰ North Carolina Department of Public Safety, *Death Row Roster*, <https://www.ncdps.gov/Adult-Corrections/Prisons/Death-Penalty/Death-Row-Roster>.

¹¹ Death Penalty Information Center, *Death Row Inmates by State*, <https://deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year>.

Correctional Institution for Women (“Women’s Prison”), also in Raleigh. By race, 78 inmates are black, 55 are white, 6 are Native American, and 5 belong to other racial groups. Wayne Laws, from Davidson County, is the longest-serving inmate on death row, having been sentenced to death in 1985. No other current inmate was sentenced to death before 1990, but several have been on death row since the early 1990s.

Steps in a Capital Case

A capital case begins with a murder and an arrest. The first legally distinctive feature of the case arises when the defendant is taken before a magistrate for his initial appearance. In almost all non-capital cases, it is mandatory that the magistrate set conditions of release, but in capital cases, G.S. 15A-533(c) provides that “[a] judge may determine in his discretion whether a defendant charged with a capital offense may be released before trial.” The use of the word “judge” appears to mean that a magistrate may not set release conditions for a defendant charged with first-degree murder, and the use of the word “may” indicates that release is discretionary, not mandatory.

Another unique aspect of capital cases concerns the appointment of counsel. The Office of Indigent Defense Services, rather than the court, appoints counsel for indigent defendants in capital cases – and virtually all capital defendants qualify as indigent, given the prohibitive costs of defending a capital prosecution. IDS appoints one attorney “as soon as feasible after the [defendant] is taken into custody or service is made upon him of the charge.” G.S. 7A-451(b). *See also* IDS, *Rules for Providing Legal Representation in Capital Cases, Part 2, §2A.2(a)*. Thus, a capital defendant normally is represented prior to the defendant’s first appearance before a district court judge. Furthermore, capital defendants are entitled by statute to two lawyers. IDS normally will appoint a second attorney no later than immediately following the Rule 24 hearing, a proceeding discussed below.

Either in lieu of, or after, a probable cause hearing, the defendant will be indicted. (Under G.S. 15A-642, indictment may not be waived in capital cases.) The indictment normally will use the so-called statutory short form charging language, which is set forth in G.S. 15-144 (stating that when charging murder, “it is sufficient . . . to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder” the victim). The adequacy of the short form language has been challenged many times on the ground that it does not specifically state all the elements of first-degree murder, but it has always been upheld. *See, e.g., State v. Hunt*, 357 N.C. 257 (2003).

The pretrial stage of a capital case is generally similar to the pretrial stage of other felony cases, though a greater number of pretrial motions may be filed. One distinctive feature of capital cases is the requirement of a pretrial hearing under Rule 24 of the General Rules of Practice for the Superior and District Courts. That rule requires a pretrial conference in every potentially capital case. At the conference, the court normally will consider a forecast of the state’s evidence. The court may then determine whether there is sufficient evidence of at least one statutory aggravating circumstance for the case to proceed capitally.

There are several unique aspects to capital trials.

- Intellectual disability. Both constitutional and statutory law prohibit the imposition of the death penalty on intellectually disabled (formerly called mentally retarded) defendants. G.S. 15A-2005(c) provides that when the defendant moves to strike the death penalty on the grounds of intellectual disability, and when the motion is supported by appropriate affidavits, the court *may* order a pretrial hearing to determine whether the defendant is intellectually disabled. If the state consents, the court *must* hold a pretrial hearing. If the court holds a hearing and determines that the defendant is intellectually disabled, it must declare the case to be non-capital. If the court determines that the defendant has not established intellectual disability, the defendant has the right to present the issue of intellectual disability to the jury at the capital sentencing hearing.
- Jury selection. Jury selection in capital cases is distinctive in several ways. First, the state and each defendant are entitled to 14 peremptory challenges, rather than 6 as is the norm in non-capital cases. G.S. 15A-1217(a). Second, G.S. 15A-1214(j) expressly recognizes the trial judge's discretion to require jurors to be selected individually in capital cases, and individual jury selection is relatively common in such cases. Third, jurors must be both "death qualified" and "life qualified." That is, any juror who is not able to consider both the death penalty and life without parole as possible sentences in a first-degree murder case must be excused for cause.
- Penalty phase. If the defendant is convicted of first-degree murder, the case continues to a penalty phase. When intellectual disability is at issue, the jury must determine whether the defendant is intellectually disabled. When intellectual disability is not at issue, or if the jury determines that the defendant is not intellectually disabled, the jury is asked to determine (1) whether the state has proven the existence of any aggravating circumstances; (2) whether the defendant has proven any mitigating circumstances; (3) whether the aggravators outweigh the mitigators, and (4) whether the aggravators, weighed against the mitigators, are sufficiently substantial to call for the death penalty.

Although proceedings after the trial are beyond the scope of this course, it is worth briefly describing the process. A defendant who is convicted of first-degree murder and sentenced to death may appeal of right directly to the North Carolina Supreme Court. N.C. R. App. P. 4(d). If that appeal is unsuccessful, the defendant may file a petition for a writ of certiorari with the United States Supreme Court, asking that court to review any claims grounded in federal law.

If the United States Supreme Court denies review, the case enters what are generally called post-conviction proceedings. That term encompasses both state and federal collateral review. State collateral attack proceedings normally come first, and involve the filing of a motion for appropriate relief. If a defendant is denied relief in state court, he then typically files a federal habeas petition seeking review of any collateral review claims that are based in federal law. If the defendant is also unsuccessful in federal court, an execution date may be set.

Once an execution date has been set, the defendant may seek clemency from the governor. If clemency is denied – and if any last-minute motions by the defendant, such as successor motions for appropriate relief, are unsuccessful – the defendant will be executed by lethal injection.