TAB 02: Pretrial Management

CAPITAL CASE MANAGEMENT FOR SUPERIOR COURT JUDGES

May 11-12, 2017

North Carolina Judicial College
University of North Carolina School of Government

W. Osmond Smith III
Senior Resident Superior Court Judge
9A Judicial District (Caswell – Person)

PRETRIAL MANAGEMENT

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PRETRIAL MANAGEMENT

1. INTRODUCTION

In many respects capital cases are the same as noncapital first degree murder cases, but in so many other respects, there is a vast difference besides the obvious difference of a sentencing proceeding:

-of course, the seriousness of the consequences is the greatest;

-the scrutiny of the pretrial and trial proceedings by the appellate courts, including in the event of a death sentence, all the way to the United States Supreme Court; not totally dissimilar to the feelings I had as a defense attorney in defending death penalty cases, that if the defendant received a sentence of death, the review of my performance as a lawyer, now as a judge, would never end;

-fortunately for me (and my clients, as well, of course), I never had the experience of representing and standing with a client that received a death sentence;

-however, I have had the most somber of responsibilities, on six occasions to look a defendant in the eye as I sentenced him and, in one case, her to death;

-the scrutiny of the press and the public;

-the responsibility and stress upon you as the presiding judge to assure the parties a fair trial under the most trying (no pun intended) circumstances;

-it seems as though you are responsible for all that goes on, not only in the courtroom, but in the overall environs of the courthouse; e.g. (1) the issue in my first capital trial related to signs being posted on the courtroom doors …… to the effect of, “do not enter, unless you have business here” without any involvement or knowledge on my part until after the fact, and then reading about it in the opinion of the Supreme Court, (2) protestors outside the courthouse, (3) jurors being excused in another courtroom when they had been summoned for the same week as the capital trial, and (4) various other things that may be taking place without your knowledge.

At the end of this course on capital case management, you will be prepared to address many of the issues that arise in the trial of capital cases. I assure you that you will be much better prepared and more at ease than I was, as I undertook my first capital trial.

I had been on the bench for just a year, and all I knew in advance, was that I had an assignment for a special session in Goldsboro, Wayne County. Well, I had been there before on special assignments on two occasions, once for civil and once for criminal. So I show up on Monday morning with my robe, my pattern jury instructions, and my Crimes Guidebook. And as I am waiting in chambers shortly before 10:00 a.m., the bailiff comes in and asks me how long do I think jury selection will last, where would I like for the overflow of jurors beyond the capacity of the courtroom to be placed, and are the testifying co-defendants that are in custody to

be dressed out or may they come into the courtroom in jail uniforms. So naturally, I ask the bailiff, “What sort of case do we have?” “Oh, you don’t know? It’s the double homicide trial of the kidnapping, robbery, and execution style killing of that couple near Dudley. The DA is seeking the death penalty.” There you have it, six weeks later on a Friday afternoon, I sentenced the defendant to two death sentences.

Since the enactment of N.C.G.S. 15A-2004 in 2001, giving the District Attorney the discretion of whether or not to seek the death penalty in first degree murder cases with the presence of aggravating circumstances and with the prohibition against the death penalty for persons under the age of 18 years at the time of the murder, there are substantially fewer capital cases being tried. But quite naturally, this discretionary selection process, leads to some of the more marginal cases being tried as noncapital cases.

So as I get going here, I have some good news and some bad news. The bad news is, that due to the more in depth discussions by others on our agenda with the specific topics of pretrial matters, I don’t have so much to tell you. The good news is, that it won’t take long for me to do it.

I think we will have ample time for questions and maybe, more importantly, discussions, even as we go along. So, don’t hesitate to jump in with questions and other input. I feel certain that there are qualified people here among us to respond.

2. DETERMINATION OF COUNSEL

The Executive Director of the Office of Indigent Defense Services, Tom Maher, will provide an in depth discussion of this pretrial management topic. And Professor Jessica Smith will be addressing other counsel issues this afternoon as well.

Just remember that when a defendant charged with a capital offense by an indictment has his/her first appearance in the Superior Court, you shall determine whether the defendant already has an attorney of record. If not, upon advising the defendant of his/her rights to counsel, unless the defendant waives his/her right to appointed counsel, you must determine if the defendant is indigent. If the defendant is found to be indigent and qualified for the appointment of counsel, you shall make sure that the IDS Director is notified of the need to appoint a lawyer for the defendant. My practice is to have the Clerk provide the notice by telephone and facsimile transmission.

Promptly upon a determination that the case will proceed as a capital prosecution, if the defendant is an indigent person, make sure that provisions are made for the appointment of assistant counsel. N.C.G.S. 7A-450(b1). The lead appointed counsel usually sees that this is accomplished. Plus, remember that even if the defendant has retained counsel, but is indigent, he/she has the right to the appointment of assistant counsel as well.

The issue of how to proceed when there are already two appointed lawyers for a defendant and the case loses its “capital nature”, and will be proceeding as a noncapital prosecution, will be addressed by Mr. Maher.

3. PRETRIAL RELEASE

Per N.C.G.S. 15A-533(c), it is discretionary whether a defendant charged with a capital offense may be released before trial.

What is a capital offense?

We have only one capital offense in North Carolina; that is, first degree murder, a Class A felony, punishable by death or life imprisonment without parole, except for persons under 18 years of age at the time of the murder who are not eligible for the death penalty regardless of the existence of aggravating circumstances and who shall be sentenced to either life imprisonment with parole or life imprisonment without parole. N.C.G.S. 14-17.

Some argue, and you may be among them, that if there are no aggravating circumstances, or if the State has elected not to seek the death penalty, or if the defendant was under 18 years of age at the time of the alleged murder, that first degree murder in such a situation is no longer a capital offense since the defendant will not face a death sentence.

My position is that first degree murder is a capital offense, because depending upon the circumstances of the particular murder, the defendant is subject to a possible death sentence. And since first degree murder is an offense punishable by death or a life sentence, it nevertheless retains it status as a capital offense even in the absence of aggravating circumstances, or even if the State elects to proceed noncapitally, or even if the defendant was under 18 years of age at the time of the murder.

N.C.G.S. 15A-2000(a)(1) states: A capital felony is one which may be punishable by death.

Though not authority for my position, I find it interesting to note that the Indigent Defense Services rules, dealing with appointment of counsel, state: A "capital offense" means any first-degree murder charge or charge of murder where the degree is undesignated, except cases in which the defendant was under 18 years of age at the time of the offense and not potentially punishable by death.

The cases addressing the issue may be argued to support the position that the crime of first degree murder is a "capital offense", notwithstanding that the trial itself may not be a "capital case." A case loses its "capital" nature if it is determined that while the death penalty is a possible punishment for the crime charged, it may not be imposed in that particular case. A capital felony may be treated as a noncapital case when the State has no evidence of any aggravating circumstances, or if the State has elected not to seek the death penalty, or if the defendant was under 18 years of age at the time of the alleged murder.

See: *State v. Sparks*, 297 N.C. 314 (1979)

State v. Cummings, 352 N.C. 600 (2000)

State v. Hocutt, 177 N.C. App. 341 (2006)

And therefore, in my opinion, pretrial release of persons charged with first degree murder is discretionary.

4. RULE 24 PRETRIAL CONFERENCE

Since the District Attorney now has the discretion to proceed noncapitally in first degree murder cases even if aggravating circumstances exist, is a Rule 24 Pretrial Conference still required?

Absolutely.

Some DA's and defense counsel have suggested otherwise when there are no aggravating circumstances, or the defendant was under 18 years of age at the time of the alleged murder, or the State is electing early on to proceed noncapitally. However, it is clear that a Rule 24 Pretrial Conference is mandatory in all first degree murder cases.

The rule requires that, no later than ten days after the Superior Court obtains jurisdiction in a first degree murder case, the District Attorney shall apply to the Superior Court judge for a Rule 24 Pretrial Conference, and the judge shall enter an order requiring counsel for the prosecution and defense to appear before the court within forty-five days thereafter for the pretrial conference. For good cause shown, upon the request of either party the judge may continue the pretrial conference for a reasonable time.

Though it is not required by the rule, it is my general practice to continue the Rule 24 Pretrial Conference only with the express consent of the defendant. This should eliminate, or at least minimize, any issue that might arise in the future with regards to any delay in conducting the pretrial conference.

As the rule requires, at the pretrial conference, the Court and the parties shall consider:

(1) Simplification and formulation of the issues, including, but not limited to, the nature of the charges against the defendant, and the existence of evidence of aggravating circumstances;

(2) Timely appointment of assistant counsel for an indigent defendant when the State is seeking the death penalty; and

(3) Such other matters as may aid in the disposition of the action.

The judge shall enter an order that recites that the pretrial conference took place, and any other actions taken at the pretrial conference.

So what's a Rule 24 Pretrial Conference really for?

I suggest that primary purposes served by the pretrial conference are:

1. In those cases with the presence of an aggravating circumstance in which the State has already declared its intention to seek the death penalty, for an early determination of the need for appointment of assistant counsel for indigent defendants, and for an order declaring that the case will proceed capitally.

2. In those cases without an aggravating circumstance, or in those cases with an aggravating circumstance in which the State has already declared that it will not proceed capitally, or if the defendant was under 18 years of age at the time of the alleged murder, for an early determination that there is no need for the appointment of second counsel, and for an order declaring that the case will proceed noncapitally.

Another purpose, of course, is for the State to assert its contention as to the existence of an aggravating circumstance or circumstances, without a declaration at that time of whether or not the State will seek the death penalty, and for the case to then proceed as a potential capital case.

There are instances in which the State represents that its investigation is still underway as to the existence of aggravating circumstances, and the case then proceeds without a determination at that time of capital or noncapital.

I went on the bench just three months before the effective date of this rule, and in those 23 years I don't recall any experience in "simplifying or formulating the issues" at a Rule 24 conference other than considering the existence or non-existence of aggravating circumstances and whether the case will proceed capitally or noncapitally.

There is nothing that requires the State to disclose the specific aggravating circumstance or circumstances that it will rely upon; nor can you as a judge require the prosecutor to declare the specific aggravating circumstances.

While capital defendants do not stand to lose or gain any rights at the pretrial conference, *State v. Chapman*, 342 N.C. 330 (1995), the failure of the State to timely request the required pretrial conference can possibly prohibit the State from seeking the death penalty. If the defendant can show sufficient prejudice resulting from the delay in holding the pretrial conference, the Court may prohibit the State from seeking the death penalty and thereby declare the case noncapital. *State v. Defoe*, 364 N.C. 29 (2010).

Even though the defendant's presence is not required at the pretrial

conference and his/her absence is not a violation of a capital defendant's right to be present at every stage of his/her trial, I feel it is helpful to have the defendant present or if not, to obtain his/her consent through counsel not to be present. Often, other things beyond the consideration of aggravating circumstances and appointment of second counsel arise that are considered, planned or unplanned. Frequently, discovery matters, pretrial release/bond matters, scheduling, and other matters are addressed and acted upon. Sometimes the defendant's presence upon consideration of such matters reduces the prospects of complaints by the defendant as to effectiveness of counsel and fosters a better relationship between the defendant and the lawyer.

In some districts, the DA prepares and submits a proposed order on the pretrial conference. In others, there are form orders for filling in the blanks as to what took place. I generally draft my own orders, but on occasion, I sometimes adopt the proposed orders submitted with any amendments that I feel appropriate. The point being, to comply with the rule that requires you to enter the appropriate order.

What a Rule 24 Pretrial Conference is not:

In *State v. Seward*, 362 N.C. 210 (2008), at the Rule 24 Pretrial Conference, the prosecutor offered a brief forecast of the facts of the case. The trial court expressed doubt as to the admissibility of the State's forecasted evidence on the question of the guilt of the defendant to the charge of first-degree murder and entered an order that the State could not proceed capitally against defendant. On appeal, the Supreme Court found that if the prosecution's forecast of evidence at the

Rule 24 conference did not show the existence of at least one aggravating circumstance, the trial court could have properly declared the case noncapital because a defendant could not receive a sentence of death in the absence of an aggravating circumstance. The trial court could not, however, have declared the case noncapital on the basis of the sufficiency of the State's forecast of evidence on the underlying charge of first-degree murder. The record showed that the trial court declared defendant's case noncapital based on the sufficiency of the State's forecast of evidence on the underlying charge of first-degree murder. Accordingly, the trial court exceeded its authority under Rule 24.

So, if the State shows that there is evidence of the existence of at least one of the statutory aggravating circumstances, you may not declare the case noncapital regardless of the weakness of the State’s forecast of the evidence as to the charge of first-degree murder. Of course, the State may choose to proceed noncapitally even with the existence of an aggravating circumstance, and in such an event, you may then declare that the case proceed noncapitally.

5. *WATSON* HEARING

This brings us to discussion of the now seldom used procedure of conducting a *Watson* hearing, so called from the case of *State v. Watson*, 310 N.C. 384 (1984). The Court may, in its discretion, grant a motion of the State or the defendant for a hearing to make a pretrial determination as to the sufficiency of the evidence of an aggravating circumstance. *Watson* preceded the adoption of Rule 24 by some ten years. While, the hearings are somewhat similar, per *State v. Seward*, nothing in Rule 24 supplants the judicial efficiency and efficacy of *Watson* hearings.

While, I am not sure that the consent of the State is necessary, I don't recall a *Watson* hearing being conducted without the prosecutor's request or consent.

At a *Watson* hearing, the Court may declare a case noncapital if it finds that the evidence of an aggravating circumstance is insufficient to go forward. The standard to be used in such determination is, in considering the evidence in the light most favorable to the State and giving the State every reasonable inference therefrom, whether there is substantial evidence of an aggravating circumstance sufficient to be submitted to the jury.

Though there is no right of appeal from the Court's determination, either party may seek review by a petition for a writ of certiorari.

The combination of G.S. 15A-2004 and Rule 24 has now reduced the use, and perhaps the need, of *Watson* hearings.

6. STATE'S NOTICE OF INTENT – CAPITAL / NONCAPITAL 15A-2004

Pursuant to N.C.G.S. 15A-2004, the State has the discretion to try the defendant capitally or noncapitally for first degree murder even if evidence of an aggravating circumstance exists. The State may agree to accept a sentence of life imprisonment at any stage in the prosecution of a first degree murder charge, even if evidence of an aggravating circumstance exists.

Unless the State provides notice of its intent to seek the death penalty on or before the date of the Rule 24 Pretrial Conference or the arraignment, whichever is later, the State may not seek the death penalty, and a sentence of death may not be imposed.

7. PRETRIAL DETERMINATION – INTELLECTUAL DISABILITY 15A-2005

No defendant with an intellectual disability shall be sentenced to death. The condition of "intellectual disability" was formerly referred to in our law as mental retardation. N.C.G.S. 15A-2005(c) provides a procedure for the court to make a pretrial determination on the issue of intellectual disability. Upon motion of the defendant, supported by appropriate affidavits, the court may order and conduct a pretrial hearing to determine if the defendant has an intellectual disability. The court shall order such a hearing with the consent of the State. The burden is upon the defendant to demonstrate intellectual disability by clear and convincing evidence. If the court determines that the defendant has an intellectual disability, then the case shall be declared noncapital and the State may not seek the death penalty.

8. DISCOVERY, COMMON PRETRIAL MOTIONS

With regard to discovery matters in capital cases, generally speaking, the same laws and procedures are applicable for capital and noncapital cases. I would be doing you a disservice and wasting your time to try to improve upon the publications and other writings of the faculty here at the School of Government. So very succinctly, I commend the same to you as the authority on the subject.

Matters relating to expert witnesses, including the process for seeking funding for experts and the regulation of discovery involving experts, are the subject of a separate session on those topics.

Of particular note, you should anticipate motions by the State seeking discovery of information related to defenses and mitigation evidence of intellectual disability and other mental health matters, including requests by the State for mental, physical, and psychological examinations and evaluations of the defendant by State experts.

Other pretrial motions that are likely to arise in capital cases run the gamut of those in noncapital cases as well as some uniquely applicable to capital cases, including:

-Motion raising the question of the capacity to proceed

-Motion for change of venue or special venire

-Motion to prohibit the imposition of the death penalty as unconstitutional

-As cruel and unusual punishment

-As racially biased in trial and sentencing procedures

-As carried out with the lethal injection protocol and procedure

-Motion to prohibit the imposition of the death penalty as being in violation of various international treaties and conventions

-Numerous and various preservation motions related to capital punishment

In many instances you will be assigned to the case for both pretrial and the trial matters. Or you may only be addressing pretrial matters that come before you in your regular assignments. And of course, in some instances you may be assigned to the trial and will address pretrial matters that have been reserved to the trial judge. Make a clear record of the proceedings so that any subsequent review will be based on an accurate reflection of what took place.

9. STATUS CONFERENCES, SCHEDULING ORDERS

I have found it very helpful to have regular status or review conferences at scheduled intervals. It keeps the case moving, it allows for a more efficient way of addressing pretrial matters in a timely fashion, and allows for coordination of scheduling trial and pretrial matters. In some districts, Wake County for example, there are regularly scheduled homicide status conferences. This enables the judge and the lawyers to keep abreast of all scheduling concerns with a target trial date being arrived at fairly early on. With what I call a relatively few defense lawyers involved in capital cases covering a fairly wide geographical area, it is important to know well in advance of other cases and conflicting pretrial and trial schedules. Scheduling orders, in addition to promoting efficiency and timely disposition of matters, sometimes have the effect of giving priority over matters without scheduled dates in place.

10. CONCLUSION

You should strive to preside over a fair trial for the parties. The case should be determined based upon the facts and the law, and not upon the nuances or idiosyncrasies of the particular lawyers or the judges involved. The best way to achieve that is to educate yourself as to the procedural and substantive law, prepare yourself physically and mentally for the inherent stresses in a capital trial, anticipate in advance, and be ready to deal with matters that may come up.

Try to avoid or minimize issues that don't have to be issues. If necessary for an understanding, including appellate review, give a basis or reasoning for your rulings. If it is not necessary for such an understanding, then give further thought as to whether elaboration or reasoning for your rulings should be given. As I stated previously, but again with emphasis, protect the record; that is, make sure that the record is clear and accurately reflects the events occurring in pretrial and trial.

You are not likely to preside over a perfect trial. Early on, I was told by another judge that the only way to avoid error in a capital trial is:

If the State makes a request or puts forth an objection, the ruling is: denied or overruled.

If the defendant makes a request or puts forth an objection, the ruling is: granted or sustained.

Now, I don't ascribe to that theory, nor did that other judge. Besides, with the ever increasing attention to plain error analysis, even that theory will not necessarily produce an error free trial.

To preside over a capital trial which is literally “a matter of life or death”, is unparalleled by anything else we do. Strive for a fair trial for all involved. You owe it to the parties, the victims and their families, the administration of justice, and to the public as well. Your oath requires nothing less. As Alexander Hamilton said, “The first duty of society is justice.”

In addition to all else you may know and may learn here this week, in closing, I commend to you what I call “the Rule of the J’s”; as an elaboration, let me give you four clear and fail-safe tips to assist you and guide you through capital trials:

Jamie Markham, John Rubin, Jessica Smith, and Jeff Welty.

Thank you.