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Criminal Procedure—North Carolina's Capital Sentencing Procedure: The Struggle for an Acceptable Jury Instruction

No right is valued more highly than the right to life, and certainly no right should be more closely guarded and jealously protected by our judicial system. Capital punishment stands apart from other forms of criminal punishment because it deprives the defendant of this precious right to life and because this deprivation is final and irrevocable. As the United States Supreme Court said, "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two."¹ Consequently, any proceeding that concludes with the imposition of the death penalty must be scrutinized carefully. As an influential and important step in such a proceeding, the instruction of the sentencing authority² must reflect the court's commitment to protecting the defendant's right to life.

In the last year and a half the North Carolina Supreme Court has decided several cases determining the appropriate jury instruction in capital sentencing cases under North Carolina's capital sentencing statute, 15A-2000.³ In *State v. Pinch*⁴ and the cases following it⁵ the court approved an instruction to the jury that it has a *duty* to recommend a sentence of death if it found: (1) that one or more statutory aggravating circumstances existed; (2) that the aggravating cir-

1. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

2. In North Carolina the sentencing authority is the trial jury. N.C. GEN. STAT. § 15A-2000(a)(2) (1983).

3. N.C. GEN. STAT. § 15A-2000(a) (1983) provides for a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. Section (b) provides that in this proceeding the trial judge must instruct the jury to consider aggravating and mitigating circumstances:

(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. 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.

4. 306 N.C. 1, 292 S.E.2d 203, *cert. denied*, 103 S. Ct. 474 (1982).

5. *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308 (1983); *State v. Williams*, 305 N.C. 656, 292 S.E.2d 243, *cert. denied*, 103 S. Ct. 474 (1982); *State v. Smith*, 305 N.C. 691, 292 S.E.2d 264, *cert. denied*, 103 S. Ct. 474 (1982); *State v. Brown*, 306 N.C. 151, 293 S.E.2d 569, *cert. denied*, 103 S. Ct. 503 (1982).

cumstances were substantial enough to warrant the death penalty; and (3) that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt.⁶ Prior to *Pinch* the jury usually was instructed that on making these three findings, it "may," but "need not," recommend a sentence of death.⁷ Consequently, the instructions approved in *Pinch* represented a substantial change because they forbid the jury to exercise any discretion after finding these three elements. Defendant in *Pinch* contended that these instructions "prejudicially withdrew from the jury the final option . . . to recommend a life sentence notwithstanding its earlier findings."⁸ Stating that it implicitly had answered this contention in *State v. Goodman*,⁹ the court rejected defendant's argument.

In his dissent in *Pinch* and the four cases following it,¹⁰ Justice Exum voiced his strong opposition to the majority's conclusion that under North Carolina's capital sentencing statute a jury must return the death penalty after making certain findings. First, Exum pointed out that section 15A-2000 does not provide that a jury must return the death penalty,¹¹ but simply ensures that certain prerequisites are met before a sentence of death may be imposed.¹² Second, contending that the majority's interpretation of the statute resulted from a fear of constitutional attack, Exum argued that the majority's construction was not constitutionally required.¹³ Third, he contended that the majority's holding was based on a misreading of *Goodman*.¹⁴

Justice Exum's arguments justify a careful scrutiny of the majority's con-

6. *State v. Brown*, 306 N.C. 151, 184, 293 S.E.2d 569, 590, *cert. denied*, 103 S. Ct. 503 (1982); *Pinch*, 306 N.C. at 32-33, 292 S.E.2d at 227; *State v. Williams*, 305 N.C. 656, 689-90, 292 S.E.2d 243, 263, *cert. denied*, 103 S. Ct. 474 (1982); *State v. Smith*, 305 N.C. 691, 707-09, 292 S.E.2d 264, 274-275, *cert. denied*, 103 S. Ct. 474 (1982). The jury instructions given in *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308 (1983), were slightly different in that the order of issues (2) and (3) were reversed. Record at 119, *McDougall*.

The supreme court did not find prejudicial error in the *McDougall* instructions, but the court did recommend a model charge, discussed *infra* notes 46-48 and accompanying text.

7. NORTH CAROLINA CONFERENCE OF SUPERIOR COURT JUDGES, NORTH CAROLINA PATTERN JURY INSTRUCTIONS FOR CRIMINAL CASES 150.10, at 4 (Replacement May 1979) [hereinafter cited as N.C.P.I. CRIM.].

8. *Pinch*, 306 N.C. at 33, 292 S.E.2d at 227. Defendant argued that N.C. GEN. STAT. § 15A-2000 (1983) and the eighth and fourteenth amendments protect a defendant's right to trial by a jury that has the option to recommend a life sentence notwithstanding its earlier findings. Defendant's Brief at 75.

9. 298 N.C. 1, 257 S.E.2d 569 (1979). In *Goodman* the court overruled an assignment of error based on the trial court's failure to instruct the jury that it could still recommend life imprisonment even though it found that the aggravating circumstances outweighed the mitigating. The *Pinch* majority quoted the following language from *Goodman*: "[I]t would be improper to instruct the jury that they may, as defendant suggests, disregard the procedure outlined by the legislature and impose the sanction of death at their own whim." *Pinch*, 306 N.C. at 34, 292 S.E.2d at 227 (quoting *Goodman*, 298 N.C. at 35, 257 S.E.2d at 590). Apparently, the *Pinch* court felt that this language implied that a jury should not be permitted to recommend life imprisonment if it found the three elements set out in the procedure.

10. See *supra* note 5 (four cases decided after *Pinch* on issue of jury instructions). Justice Exum dissented in all four cases for the same reasons that he dissented in *Pinch*.

11. *Pinch*, 306 N.C. at 38, 292 S.E.2d at 230 (Exum, J., dissenting).

12. *Id.* at 46, 292 S.E.2d at 234 (Exum, J., dissenting).

13. *Id.* at 38, 292 S.E.2d at 230 (Exum, J., dissenting). See *infra* notes 60-66 and accompanying text.

14. *Pinch*, 306 N.C. at 45, 292 S.E.2d at 234 (Exum, J., dissenting).

clusion. This examination is also compelled because the issue involved, whether the jury should be instructed that it "must" or that it "may" recommend death upon making certain findings, raises questions concerning the protection of the defendant's right to life.

During the last decade the courts and the North Carolina legislature have struggled to fashion an acceptable standard for capital sentencing instruction. Any examination of the present controversy, therefore, must begin with the legal history of both the capital sentencing statute and jury instructions. North Carolina's present capital sentencing statute began with *Furman v. Georgia*,¹⁵ in which the United States Supreme Court vacated the defendants' death sentences in cases arising out of Texas and Georgia. In *Furman* the jury had wide discretion in the imposition of the death penalty. This unbridled discretion troubled the Court. "Central to the limited holding in *Furman* was the conviction that the vesting of standardless sentencing power in the jury violated the Eighth and Fourteenth Amendments."¹⁶ In response to this holding, the North Carolina legislature imposed a mandatory sentence of death for first degree murder and first degree rape,¹⁷ leaving the jury no independent sentencing discretion in such cases.

The North Carolina statute reached the United States Supreme Court in *Woodson v. North Carolina*.¹⁸ The Supreme Court struck down the North Carolina mandatory death penalty statute,¹⁹ and the state legislature drafted a new statute substantially identical to the present capital sentencing statute.²⁰ Since this statute was adopted in response to *Woodson* and its companion cases, these cases offer insight into the legislative intent behind the statute.

In *Woodson* the Court held that North Carolina's mandatory death sen-

15. 408 U.S. 238 (1972). Three cases were before the Supreme Court in *Furman*. In one case, the death penalty was imposed for murder, and in the other two, it was imposed for rape. The Supreme Court held that the imposition and carrying out of the death penalty in these cases constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments. *Furman*, 408 U.S. at 238. See generally Wollan, *Death Penalty After Furman*, 4 LOY. U. CHI. L.J. 339 (1974); Note, *Is the Death Penalty Dead?*, 26 BAYLOR L. REV. 114 (1974); Note, *Response to Furman: Can Legislatures Breathe Life Back Into Death?*, 23 CLEV. ST. L. REV. 172 (1974).

16. *Woodson v. North Carolina*, 428 U.S. 280, 302 (1976).

17. See N.C. GEN. STAT. § 14-17 (Cum. Supp. 1975) (amended 1979); N.C. GEN. STAT. § 14-21 (Cum. Supp. 1975) (repealed 1979). Second degree murder was punishable by a term of imprisonment from two years to life, and second degree rape was punishable by life imprisonment or a term of years determined by the court. N.C. GEN. STAT. §§ 14-17, 14-21 (Cum. Supp. 1975).

18. 428 U.S. 280 (1976). The defendants in *Woodson*, whose convictions of first-degree murder and whose death sentences under N.C. GEN. STAT. § 14-17 (Cum. Supp. 1975) (amended 1979) were upheld by the North Carolina Supreme Court, challenged the constitutionality of the mandatory death sentence statute. *Woodson* was decided along with four other cases: *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); and *Gregg v. Georgia*, 428 U.S. 153 (1976), the controlling opinion.

19. The Supreme Court held that North Carolina's mandatory death sentence statute violated the eighth and fourteenth amendments. *Woodson*, 428 U.S. at 280.

20. The statute enacted following *Woodson* was 1977 N.C. Sess. Laws ch. 406, § 2 (1st Sess.) (codified as amended at N.C. GEN. STAT. § 15A-2000 (1983)). With the exception of three minor amendments, it was identical to the present N.C. GEN. STAT. § 15A-2000. One 1979 amendment added subdivision (11) to subsection (e). 1979 N.C. Sess. Laws ch. 565, § 1 (1st Sess.). Near the middle of subdivision (5) of subsection (e), a 1979 amendment inserted "or a sex offense," 1979 N.C. Sess. Laws ch. 652, § 1 (1st Sess.), and a 1981 amendment inserted "homicide," 1981 N.C. Sess. Laws ch. 652, § 1 (1st Sess.).

tence statute failed "to provide a constitutionally tolerable response to *Furman's* rejection of unbridled jury discretion in the imposition of capital sentences."²¹ The Court expounded on this holding in *Gregg v. Georgia*,²² reading *Furman* as mandating "that where 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."²³ With its adoption of section 15A-2000(b), the legislature provided for the direction of jury discretion by requiring that the jury base its sentencing recommendation on a balancing of the aggravating and mitigating circumstances involved.²⁴ *Woodson* also required that the sentencing authority consider "the character and record of the individual offender and the circumstances of the particular offense."²⁵ The North Carolina statute meets this requirement by listing statutory aggravating and mitigating factors that focus on the defendant and the circumstances of his crime.²⁶

The requirements specified in *Gregg* and *Woodson* stemmed from the Supreme Court's concern that the death penalty should be imposed only when the jury followed standardized guidelines. The Court said in *Gregg*:

Nothing in any of our cases suggests that the decision to afford an individual mercy violates the Constitution. *Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.²⁷

In *Woodson* the plurality opinion stated that because of the qualitative difference between death and life imprisonment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."²⁸ Consequently, section 15A-2000(c) requires three findings before a jury may recommend a sentence of death.²⁹ These three findings are nearly identical to those that trigger the jury's duty to recommend the death penalty in the jury instructions approved

21. *Woodson*, 428 U.S. at 302.

22. *Gregg v. Georgia*, 428 U.S. 153 (1976).

23. *Id.* at 189.

24. *See supra* note 3.

25. The *Woodson* court reasoned:

While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

Woodson, 428 U.S. at 304 (citation omitted).

26. *See* N.C. GEN. STAT. §§ 15A-2000(e) & (f) (1983) (listing of statutory aggravating and mitigating circumstances).

27. *Gregg*, 428 U.S. at 199.

28. *Woodson*, 428 U.S. at 305.

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

by the North Carolina Supreme Court in *Pinch*.³⁰

The relevant history of the jury instructions began after the North Carolina legislature's response to *Woodson*. Instruction 150.10 of the *North Carolina Pattern Jury Instructions for Criminal Cases*³¹ was rewritten following the enactment of section 15A-2000 in 1977. The June 1977 draft instructed the jury that to recommend the death penalty, the state had to prove the three elements set out in section 15A-2000(c):³² (1) that one or more statutory aggravating circumstances existed; (2) that they were sufficiently substantial to call for the imposition of the death penalty; and (3) that the mitigating circumstances were insufficient to outweigh the aggravating circumstances. If the jury unanimously made these findings it was instructed that it "may" recommend the death penalty.³³ In 1979 the instructions were revised slightly, so that the jury was instructed, "you may, although you *need not*, recommend that the defendant be sentenced to death."³⁴ Thus, from 1977 until May 1980, when the jury instructions were changed substantially, section 15A-2000 was construed as requiring the jury to make the three findings before it could consider recommending death. During this time, neither the courts nor the legislature indicated that this construction was faulty or that the jury should be required to recommend death upon making the three findings.

In 1980 the jury instructions were revised to impose a *duty* to recommend a sentence of death if a jury makes these three findings.³⁵ The footnote to these instructions cited *State v. Goodman* as the basis for the change in the wording from "may recommend" to "duty to recommend."³⁶ Apparently, the

(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 imposition of the death penalty; and
- (3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

30. *Pinch*, 306 N.C. at 32-33, 292 S.E.2d at 227. See *supra* note 6 and accompanying text. The only difference between the statute and the jury instructions is in the wording of the third issue: the statute reads "that the mitigating circumstances are insufficient to outweigh the aggravating circumstances," N.C. GEN. STAT. § 15-2000(c) (1983), while the instructions state "that the aggravating circumstances outweigh the mitigating circumstances." *Pinch*, 306 N.C. at 32-33, 292 S.E.2d at 222. Presumably, this variation in wording would not significantly affect the jury's decision.

31. The North Carolina Pattern Jury Instructions are prepared by a committee of ten trial judges chaired by the Honorable Thomas W. Seay, Jr. This preparation is considered an ongoing project with two functions: (1) preparation of new instructions in response to new statutes, cases, and requests from members of the bench and bar; and (2) revision of existing instructions in response to changes in law or policy. N.C.P.I. CRIM., *supra* note 7, at preface (December 1982). The instructions are intended to state the law applicable to a fact situation, and a trial judge is to make adaptations if necessary. *Id.*, at xix (Guide to the Use of This Book). The pattern jury instructions do not indicate whether trial judges are required to use these pattern instructions.

32. See *supra* note 3.

33. N.C.P.I. CRIM., *supra* note 7, § 150.10, at 5 (June 1977).

34. *Id.*, § 150-10, at 4 (Replacement, May 1979) (emphasis added).

35. *Id.*, § 150.10, at 3-4 (Replacement, May 1980) (emphasis added).

36. The footnote gave the case name and cite, and referred to *Goodman*, 298 N.C. at 34-35,

drafters of the instructions considered certain language in the *Goodman* opinion as mandating this change.

In *Goodman* the trial court had used the "may recommend" instruction,³⁷ but defendant contended that the court had erred in failing to instruct the jury that it could recommend life imprisonment despite a finding that the aggravating circumstances outweighed the mitigating. Defendant argued that the jury would balance mathematically the two factors and impose death whenever the aggravating circumstances outweighed the mitigating. The supreme court rejected this argument because it felt that a jury would not decide such an important question so mathematically. "Nuances of character and circumstances cannot be weighed in a precise mathematical formula."³⁸ More importantly, the court feared that defendant's suggestion would lead the jury to believe that it could disregard the statutory standards, thus jeopardizing the constitutionality of the instructions:

[W]e believe that it would be improper to instruct the jury that they may, as defendant suggests, disregard the procedure outlined by the legislature and impose the sanction of death at their whim. To do so would be to revert to a system pervaded by arbitrariness and caprice. The exercise of such unbridled discretion by the jury under a court's instruction would be contrary to the rules of *Furman* and the cases which followed it.³⁹

The drafters of pattern instruction 150.10 read this language as *requiring* a jury to recommend death if it found the three elements set out by the legislature in section 15A-2000(c). In *State v. Pinch* the North Carolina Supreme Court upheld the 1980 change in the jury instructions, apparently unwilling to challenge the interpretation of *Goodman* adopted by the drafters of the pattern instruction.

Pinch and its companion cases⁴⁰ were appealed to the United States Supreme Court. Although certiorari was denied, Justice Stevens wrote a memorandum opinion in *Smith v. North Carolina*,⁴¹ questioning the constitutionality of the jury instructions approved by the North Carolina Supreme

257 S.E.2d at 590 (discussion of jury instructions). See *infra* note 39 and accompanying text. N.C.P.I. CRIM., *supra* note 7, § 150.10, at 4 n.7 (Replacement, May 1980) (emphasis added).

37. The *Goodman* instructions were closest to the 1977 pattern jury instructions, since the trial judge in *Goodman* told the jury that it "may recommend" death if it found the necessary elements. Record at 185, *Goodman*, 298 N.C. 1, 257 S.E.2d 569. But the trial judge switched issues two and three, so the jury decided first whether the mitigating circumstances outweighed the aggravating, and then whether the aggravating circumstances warranted death. *Id.* at 174. See *supra* text accompanying notes 32-33. The order of these issues was probably insignificant, especially since the jury still had the discretion to recommend life or death after it answered all the issues.

38. *Goodman*, 298 N.C. at 34-35, 257 S.E.2d at 590.

39. *Id.* at 35, 257 S.E.2d at 590 (citation omitted).

40. *State v. Smith*, 305 N.C. 691, 292 S.E.2d 264 (1982); *State v. Williams*, 305 N.C. 656, 292 S.E.2d 243 (1982). All three cases were decided on September 4, 1982. Defendants in *Smith* and *Williams*, like defendant in *Pinch*, assigned error to the trial court's jury instructions at the sentencing phases. The instructions were substantially the same as those given in *Pinch*, and the North Carolina Supreme Court, citing *Pinch*, upheld these instructions in both cases. *Williams*, 305 N.C. at 689-90, 292 S.E.2d at 262-63; *Smith*, 307 N.C. at 707-09, 292 S.E.2d at 275.

41. 103 S. Ct. 474 (1982) (mem.).

Court in these three cases. "There is an ambiguity in these instructions that may raise a serious question of compliance with this Court's holding in *Lockett v. Ohio*"42 Justice Stevens' reasons for disapproving of the instructions were similar to those expressed by Justice Exum in his dissent in *Pinch*. Both Justices believed a jury might answer issues two and three affirmatively, finding that the aggravating circumstances warranted death and that they outweighed the mitigating circumstances, and yet still feel that death was not the proper penalty.⁴³ Quoting a Utah Supreme Court case that instructed the jury to consider the totality of aggravating and mitigating circumstances, Justice Stevens suggested that the North Carolina judiciary might "make slight changes in the form of its instructions to avoid the ambiguity I have identified."⁴⁴

In response to this memorandum decision, the North Carolina Supreme Court in *State v. McDougall*⁴⁵ suggested a change in the jury instructions, and pattern instruction 150.10 was revised again to correspond with the suggestions in *McDougall*.⁴⁶ These new instructions, which remain valid, still pro-

42. *Id.* at 474. *Lockett* held that, to meet constitutional requirements, "a death penalty statute must not preclude consideration of relevant mitigating circumstances." *Lockett v. Ohio*, 438 U.S. 586, 610 (1978). Footnote one in Justice Stevens' opinion is a quotation from *Lockett*:

"There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments."

Smith v. North Carolina, 103 S. Ct. 474, 474 n.1 (1982) (mem.) (quoting *Lockett*, 438 U.S. at 605).

43. The pertinent part of Justice Stevens' opinion is as follows:

Literally read, however, those instructions may lead the jury to believe that it is required to make two entirely separate inquiries: First, do the aggravating circumstances, considered apart from the mitigating circumstances, warrant the imposition of the death penalty? And second, do the aggravating circumstances outweigh the mitigating factors? It seems to me entirely possible that a jury might answer both of those questions affirmatively and yet feel that a comparison of the totality of the aggravating factors with the totality of mitigating factors leaves it in doubt as to the proper penalty. But the death penalty can be constitutionally imposed only if the procedure assures reliability in the determination that "death is the appropriate punishment in a specific case."

Smith, 103 S. Ct. at 474-75 (quoting *Lockett*, 438 U.S. at 601).

Justice Exum said that:

Conscientious juries may determine that these issues ought to be answered affirmatively and yet, because of circumstances of the case, "nuances," if you will, not subject to articulation in a statute or a verdict and not perhaps articulable by the jurors themselves, feel impelled to recommend that the death penalty not be imposed.

Pinch, 306 N.C. at 45, 292 S.E.2d at 234 (Exum, J., dissenting) (citation omitted).

44. *Smith*, 103 S. Ct. at 475. Pointing out that the Utah Supreme Court "takes a less rigid approach to this issue," Justice Stevens quoted from *State v. Wood*, 648 P.2d 71, 83 (Utah 1982):

"After considering the totality of the aggravating and mitigating circumstances, you must be persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation, and you must further be persuaded, beyond a reasonable doubt, that the imposition of the death penalty is justified and appropriate in the circumstances."

Smith, 103 S. Ct. at 475 (quoting *Wood*, 648 P.2d at 83).

45. 308 N.C. 1, 301 S.E.2d 308 (1983).

46. *Id.* at 32-34, 301 S.E.2d at 327-28. N.C.P.I. CRIM., *supra* note 7, § 150.10, at 5, 36 (Replacement, April 1983).

vide that the jury has a "duty" to recommend death if it answers the three issues affirmatively, but the order and the form of the issues are different. Issues two and three are reversed, so that the jury now decides whether the mitigating circumstances are insufficient to outweigh the aggravating before it decides whether the aggravating circumstances are substantial enough to call for a recommendation of death. The final issue now reads, "Do you find . . . that the aggravating . . . circumstances found by you . . . are sufficiently substantial to call for the imposition of the death penalty *when considered with the mitigating . . . circumstances* found by you?"⁴⁷ Emphasizing this revision, the new instructions recommend that this final issue be accompanied by careful instructions that the jury should consider *all* the circumstances before making its decision. Although the jury still has a duty to recommend the death penalty if it answers this final issue affirmatively, it may not respond to this issue until it has compared the totality of the aggravating circumstances with the totality of the mitigating circumstances.⁴⁸ These new instructions satisfy Jus-

47. *McDougall*, 308 N.C. at 33, 301 S.E.2d at 327 (emphasis added). The complete instructions contain four issues, the second being whether the jury finds any mitigating circumstances. This second issue is omitted in this discussion for the sake of convenience. Consequently, the third and fourth issues of the complete instructions are the second and third issues for the purposes of this discussion.

The order and form of the issues to be submitted to the jury should be substantially as follows:

- (1) Do you find from the evidence beyond a reasonable doubt the existence of one or more of the following aggravating circumstances?
- (2) Do you find from the evidence the existence of one or more of the following mitigating circumstances?
- (3) Do you find beyond a reasonable doubt that the mitigating circumstance or circumstances you have found is, or are, insufficient to outweigh the aggravating circumstance or circumstances you have found?
- (4) Do you find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you?

McDougall, 308 N.C. at 32-33, 301 S.E.2d at 327.

The issues set out in pattern instruction 150.10 are virtually identical to those in *McDougall*. N.C.P.I. CRIM., *supra* note 7, § 150.10, at 4-5 (Replacement, April 1983).

48. The instructions that should accompany the final issues are as follows:

"In deciding this issue, you are not to consider the aggravating circumstances standing alone. You must consider them in connection with any mitigating circumstances found by you. After considering the totality of the aggravating and mitigating circumstances, you must be convinced beyond a reasonable doubt that the imposition of the death penalty is justified and appropriate in this case before you can answer the issue 'yes.' In so doing, you are not applying a mathematical formula. For example, three circumstances of one kind do not automatically and of necessity outweigh one circumstance of another kind. The number of circumstances found is only one consideration in determining which circumstances outweigh others. The jury may very properly emphasize one circumstance more than another in a particular case. You must consider the relative substantiality and persuasiveness of the existing aggravating and mitigating circumstances in making this determination. You, the jury, must determine how compelling and persuasive the totality of the aggravating circumstances are when compared with the totality of the mitigating circumstances found by you. After so doing, if you are satisfied beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the death penalty, it would be your duty to answer the issue 'yes.' If you are not so satisfied or have a reasonable doubt, it would be your duty to answer the issue 'no.'"

tice Stevens' criticism since the jury considers the totality of the circumstances before it has a duty to recommend death. Justice Stevens' criticism could have also been satisfied by simply reverting to the pre-1980 instructions, which had provided that the jury *may*, "on further deliberation," recommend death if it answered the three issues affirmatively.⁴⁹ These "further deliberations" had allowed the jury to consider all circumstances before making a decision.

Although the new instructions substantially improve the 1980 instructions approved in *Pinch*, the North Carolina Supreme Court has refused to find reversible error in these older instructions. In *State v. Kirkley*⁵⁰ the trial court had given the jury the older instructions, asking first whether the jury found the aggravating circumstances substantial enough to impose the death penalty, and then whether the aggravating circumstances outweighed the mitigating.⁵¹ The court told the jury it had a duty to recommend death if it answered these issues affirmatively. On appeal, the supreme court set out the correct form and order for the issues, but did not find reversible error in the trial court's instruction. "Although the jury instructions given during the sentencing procedure were not a model charge, they were free from prejudicial error."⁵² Consequently, and despite Justice Stevens' frank criticism, the faulty instructions approved in *Pinch* still plague North Carolina's judicial system.

Thus, the history of North Carolina's capital sentencing instruction reveals that several changes and much ambiguity could have been avoided had the instructions remained as they were in 1979, providing that the jury *may* recommend death upon making the three findings.⁵³ This observation naturally raises the question why the drafters of pattern instruction 150.10 and the North Carolina Supreme Court felt that the instructions should be changed to provide that the jury *must* recommend death. Both sources cite *Goodman* as the basis for this change.⁵⁴ Perhaps *Goodman* reminded the drafters and the supreme court that they should examine the constitutionality of the jury instructions. In his dissent in *Pinch*, Justice Exum stated, "The majority construes the statute in this way [in the jury instruction] on the sole ground that otherwise the statute would be subject to the constitutional attack that a jury could decide between life and death in its unbridled discretion."⁵⁵

McDougall, 308 N.C. at 34, 301 S.E.2d at 327-28 (citations omitted).

Pattern instruction 150.10 is identical. N.C.P.I. CRIM., *supra* note 7, § 150.10, at 36-37 (Replacement, April 1983).

49. The jury was instructed that "if, having answered [the three issues] 'yes,' you are, on further deliberation, satisfied beyond a reasonable doubt that the only just punishment for the defendant is the death penalty, then you *may* unanimously so recommend." N.C.P.I. CRIM., *supra* note 7, § 150.10, at 4 (Replacement, May 1979) (emphasis added).

50. 308 N.C. 196, 302 S.E.2d 144 (1983).

51. *Id.* at 216-17, 302 S.E.2d at 155-56.

52. *Id.* at 217, 302 S.E.2d at 156. There are problems with the supreme court's refusal to find reversible error in these older instructions. See *infra* notes 109-12 and accompanying text.

53. N.C.P.I. CRIM., *supra* note 7, § 150.10, at 4 (Replacement, May 1979).

54. *Goodman* did not require this change in the instructions. See *supra* notes 37-39 and accompanying text.

55. *Pinch*, 306 N.C. at 38, 292 S.E.2d at 230 (Exum, J., dissenting). In *Furman* the United States Supreme Court held that a statute allowing the jury unbridled discretion to sentence a

Although the majority never specified that this was the reason for its interpretation, it is the only reasonable explanation. The majority did quote *Goodman*, saying that it would be improper to allow the jury to disregard the statutory procedure and "impose death at its whim The exercise of such unbridled discretion by the jury under the court's instruction would be contrary to the rules of *Furman* and the cases which have followed it."⁵⁶ This language suggests that the majority in *Pinch* was concerned with the constitutionality of the jury's discretion. But the majority's interpretation, that the jury must be required to recommend death if it makes certain findings, is not constitutionally required, as Justice Exum explained in his dissent.⁵⁷

In *Goodman* the court stated that it would be unconstitutional to instruct the jury that it could disregard the statutory guidelines and impose death at its own discretion.⁵⁸ The United States Supreme Court would most likely agree with this statment, since "*Furman* held . . . that . . . the decision to impose [death] had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant."⁵⁹ But neither *Furman* nor *Gregg* and its companion cases suggest that the death penalty *must* be imposed when the jury makes certain findings within these standards. As Justice Exum pointed out in his dissent,⁶⁰ the Supreme Court in *Gregg* rejected defendant's argument that the proceeding under which he was convicted was faulty because certain discretionary decisions resulted in some qualified defendants escaping the death penalty.⁶¹

[These decisions are ones] which may remove a defendant from consideration as a candidate for the death penalty. *Furman*, in contrast, dealt with the decision to impose the death penalty on a specified individual Nothing in any of our cases suggests that the decision to afford an individual mercy violates the Constitution. *Furman* held . . . that . . . the decision to impose [death] has to be guided by standards⁶²

The Supreme Court wanted to ensure that certain standards guide the decision to *impose death*. "The jury is not required to find any mitigating circumstances in order to make a recommendation of mercy . . . but it must find a

defendant to death was unconstitutional under the eighth and fourteenth amendments. *Furman v. Georgia*, 408 U.S. 238 (1972).

56. *Pinch*, 306 N.C. at 34, 292 S.E.2d at 227 (quoting *Goodman*, 298 N.C. at 35, 257 S.E.2d at 590).

57. *Id.* at 45-49, 292 S.E.2d at 234-36 (Exum, J., dissenting) (citing *Gregg v. Georgia*, 428 U.S. 153 (1976)). See *infra* text accompanying notes 60-61.

58. *Goodman*, 298 N.C. at 35, 257 S.E.2d at 590.

59. *Gregg*, 428 U.S. at 199.

60. *Pinch*, 306 N.C. at 47, 292 S.E.2d at 235 (Exum, J., dissenting).

61. Defendant argued that the arbitrariness condemned by *Furman v. Georgia*, 408 U.S. 238 (1982), continued to exist in the new sentencing procedures that Georgia had adopted in response to *Furman*. He pointed out the discretion inherent in processing a murder case: the state prosecutor chooses whom he wishes to prosecute for a capital offense; the jury may convict a defendant charged with a capital offense with a lesser included offense; and a defendant sentenced to die may have his sentence commuted by the governor. These factors may cause qualified defendants to escape the death penalty. *Gregg*, 428 U.S. at 198-99.

62. *Gregg*, 428 U.S. at 199.

statutory aggravating circumstance before recommending a sentence of death."⁶³ It was this same concern that the North Carolina Supreme Court voiced in *Goodman* when it refused an instruction that it feared would allow the jury to "impose death at its whim."⁶⁴ The drafters of pattern instruction 150.10 and the North Carolina Supreme Court in *Pinch* misconstrued this concern, by requiring that jury discretion be strictly limited not only in a decision to impose death, but also in a decision to *grant life* by imposing a sentence of life imprisonment. *Goodman* and the United States Supreme Court cases do not suggest that discretion must be so limited when the jury wishes to impose a life sentence rather than death.⁶⁵ They fail to suggest that this is even the preferred view.⁶⁶

If the instructions that a jury must recommend death upon answering the three issues affirmatively are not constitutionally required, the next question is whether they are constitutional at all.⁶⁷ Justice Stevens in his memorandum opinion denying certiorari for *Pinch* raised questions about their constitutionality under *Lockett v. Ohio*.⁶⁸ Justice Stevens did not hold that the instructions are unconstitutional, but he did state that "the question whether the instructions to the juries are consistent with *Lockett* remains open for consid-

63. *Id.* at 197.

64. *Goodman*, 298 N.C. at 35, 257 S.E.2d at 590 (emphasis added).

65. As the United State Supreme Court pointed out in *Woodson*, "Because of [the] qualitative difference [between death and life imprisonment], there is a corresponding difference in the need for reliability in the determination that *death* is the appropriate punishment in a specific case." *Woodson*, 428 U.S. at 305. In *Lockett v. Ohio*, 438 U.S. 586 (1978), the Supreme Court stated, "we are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the sentence is imposed." *Id.* at 604.

66. In *Gregg* the Court specifically rejected defendant's argument that "the requirements of *Furman* are not met . . . because the jury has the power to decline to impose the death penalty even if it finds one or more statutory aggravating circumstances." *Gregg*, 428 U.S. at 203. The Court pointed out that the Supreme Court of Georgia reviewed every death sentence to assure that it was proportional to other sentences for similar crimes. *Id.* at 203. The North Carolina statute provides for a similar review of every death sentence by the North Carolina Supreme Court. See N.C. GEN. STAT. § 15A-2000(d) (1983). This review further confirms that the North Carolina construction requiring the jury to recommend death upon making certain findings is not constitutionally required:

Since the proportionality requirement on review is intended to prevent caprice in the decision to inflict the [death] penalty, *the isolated decision of the jury to afford mercy does not render unconstitutional death sentences* imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice.

Gregg, 428 U.S. at 203 (emphasis added).

According to *Gregg*, then, the instruction that the jury *must* recommend death upon answering the three issues affirmatively is not constitutionally required, and an instruction that the jury *may* recommend death would pass constitutional muster.

67. Both the majority and dissenting opinions in *Pinch* agree that the instructions approved in *Pinch* would pass constitutional muster under the rationale of *Jurek v. Texas*, 428 U.S. 262 (1976). *Pinch*, 306 N.C. at 34 n.17, 292 S.E.2d at 227 n.17; *id.* at 48, 292 S.E.2d at 236 (Exum, J., dissenting). In *Jurek* the United States Supreme Court examined a Texas statute requiring the jury to recommend death if it answered three questions affirmatively. The Court held that the death penalty was not mandatory, and thus subject to constitutional attack, since the Texas procedure allowed for consideration of the mitigating factors. *Jurek*, 428 U.S. at 272. Because the North Carolina instructions approved in *Pinch* also allow for consideration of mitigating factors, they are arguably constitutional under the rationale of *Jurek*.

68. 438 U.S. 586 (1978). See *supra* notes 42-43.

eration in collateral proceedings."⁶⁹ The current North Carolina jury instructions, revised to correct problems that Justice Stevens raised,⁷⁰ almost certainly would be held constitutional by the United States Supreme Court.⁷¹ But since the North Carolina Supreme Court has refused to find reversible error in the *Pinch* instructions,⁷² the constitutionality of these instructions is still undetermined. As it stands today, a trial judge, apparently at his whim, may decide whether to use the new instructions set out in *McDougall*, or the older instructions approved in *Pinch*. Consequently, not all defendants in capital cases may be sentenced under the same instructions. Defendants sentenced under the older instructions may be condemned to death by a jury that has never been given the opportunity to consider the totality of the circumstances involved in the case.⁷³ Juries may feel compelled to sentence such defendants to death, despite doubting that such a sentence is appropriate. These instructions do not ensure that death is an appropriate punishment, as *Lockett* requires.⁷⁴ Thus, while the constitutional rights of defendants sentenced under the new instructions may be protected adequately, the constitutional rights of those sentenced under the older instructions may not be.

Since North Carolina's capital sentencing jury instructions are largely the result of responses to constitutional issues raised in *Furman* and *Gregg* and its companion cases, it is instructive to examine how other states have responded to these issues. A few state legislatures have drafted statutes requiring the sentencing authority to impose the death penalty if it makes certain findings.⁷⁵ Most state legislatures, however, have not imposed such a requirement. Like North Carolina General Statutes section 15A-2000(c),⁷⁶ the capital sentencing statutes in most states merely ensure that the death penalty cannot be imposed unless certain findings are made. The courts in these states have not construed their statutes as the North Carolina Supreme Court has, to require the jury to impose the death penalty if the statutory findings are made.

For example, in *Burrows v. State*⁷⁷ the Oklahoma Supreme Court ruled

69. *Smith v. North Carolina*, 103 S. Ct. 474, 475 (1982) (mem.).

70. See *supra* notes 41-48 and accompanying text.

71. The instructions accompanying the fourth issue of the current instructions, see *supra* note 48, are substantially identical to those suggested by Justice Stevens in his memorandum decision. See *supra* note 44. These instructions require that the jury consider *all* of the circumstances before responding to issue four, thus eliminating the possibility that death will be imposed despite the jury's doubt that it is proper. This possibility led Justice Stevens to question the constitutionality of the earlier instructions. See *supra* note 43.

72. See *supra* notes 50-52 and accompanying text.

73. See *supra* note 44 and accompanying text.

74. See *supra* note 43 and accompanying text.

75. The Texas statute requires a recommendation of death if certain findings are made. See *supra* note 67 and accompanying text. The California and Montana statutes require the sentencing authority to impose a sentence of death if the aggravating circumstances outweigh the mitigating, or if aggravating circumstances are found and the mitigating circumstances are insufficient to call for leniency. See *infra* note 89. The North Carolina jury instructions approved in *Pinch* are similar to these statutes except they additionally require the jury to find that the aggravating circumstances are sufficient to warrant death before it has a duty to recommend death. See *supra* text accompanying note 6.

76. See *supra* note 29 and accompanying text.

77. 640 P.2d 533 (Okla. 1982), *cert. denied*, 103 S. Ct. 1250 (1983). The pertinent part of the

on an issue similar to that raised in *Goodman*.⁷⁸ The *Burrows* jury was instructed first, that it could not impose death unless it found aggravating circumstances; second, that if it found aggravating circumstances it may consider imposing the death penalty; and third, that it could not impose the death penalty if it found that the mitigating circumstances outweighed the aggravating. Defendant contended that the trial court should have added a fourth instruction stating that the jury could decline to impose the death penalty even if it found that the aggravating circumstances outweighed the mitigating.⁷⁹ Ruling as the North Carolina Supreme Court did in *Goodman*,⁸⁰ the Oklahoma Supreme Court did not find this fourth instruction necessary. But the Oklahoma court specifically pointed out that this ruling did not mean that the jury was required to impose the death penalty if it found that the aggravating circumstances outweighed the mitigating. "The fourth instruction was subsumed in the second, since the jurors were told that they could, not that they had to, impose the death sentence."⁸¹

The Missouri Supreme Court has declared explicitly that the jury is not required to impose the death penalty if it makes the findings that the Missouri statute requires for consideration of a sentence of death.⁸² In *State v. Bolder*⁸³ the Missouri court stated: "The jury cannot impose death if it finds that the mitigating circumstances outweigh the aggravating circumstances, but that situation is the only one in which punishment is mandated. Under no circumstances is the jury obliged to impose death."⁸⁴ The court also approved instructions explicitly telling the jury that it was not compelled to impose death if it found that the aggravating circumstances outweighed the mitigating.⁸⁵ These examples and others⁸⁶ demonstrate that other jurisdictions have

Oklahoma capital sentencing statute provides, "[u]nless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed." OKLA. STAT. ANN. tit. 21, § 701.11 (West 1982).

78. See *supra* notes 37-38 and accompanying text.

79. *Burrows*, 640 P.2d at 544.

80. *Goodman*, 298 N.C. at 34-35, 257 S.E.2d at 590.

81. *Burrows*, 640 P.2d at 544.

82. The pertinent part of the Missouri capital sentencing statute provides:

1. [T]he judge shall consider, or he shall include in his instructions to the jury for it to consider:

.....
 (4) Whether a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death or whether a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstance or circumstances found to exist.

.....
 (5) Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed.

MO. ANN. STAT. § 565.012 (Vernon Cum. Supp. 1983).

83. 635 S.W.2d 673 (Mo. 1982) (en banc), *cert. denied*, 103 S. Ct. 770 (1983).

84. *Id.* at 683.

85. *Id.*

86. The Louisiana capital punishment statute provides: "A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed." LA. CODE CRIM. PROC. ANN. art. 905.3 (West Cum. Supp. 1983).

not believed it constitutionally necessary to limit the jury's discretion when it wishes to grant mercy, as North Carolina has done.

There seems, then, to be no compelling basis for the North Carolina Supreme Court's decision to construe section 15A-2000 as requiring the jury to impose the death penalty if it answers the issues in subsection (c) affirmatively. There is no indication in section 15A-2000, or in the *Gregg v. Georgia* or *Woodson v. North Carolina* opinions, which prompted the statute,⁸⁷ that the North Carolina legislature intended this construction. Subsection (c) was written in response to the United States Supreme Court's demand that the imposition of death, or the denial of the defendant's right to life, be reliably justified. The three findings were meant to be a threshold, at which point the jury could consider imposing death.⁸⁸ Nowhere in *Gregg* or *Woodson* did the Supreme Court suggest that a sentence of life imprisonment should not always be an option, and nothing in the North Carolina statute suggests that the three findings in subsection (c) should trigger a duty to recommend death. The United States Supreme Court never implied, and the North Carolina legislature never intended, that the jury should ever be required to recommend a sentence of death. If the North Carolina legislature had intended that the statute be construed to require the jury to recommend death upon making the findings in subsection (c), it could have indicated this intention clearly in the statute, as legislatures in other states have done.⁸⁹ The legislature's intent is further con-

The Louisiana Supreme Court has found reversible error in instructions that the jury *must* recommend death if it finds one or more aggravating circumstances beyond a reasonable doubt. *State v. Brogdon*, 426 So. 2d 158 (La. 1983).

In Mississippi the capital sentencing statute provides that the jury may impose the death penalty only after finding that sufficient aggravating circumstances exist, and finding insufficient mitigating circumstances to outweigh the aggravating. MISS. CODE ANN. § 99-19-101 (Cum. Supp. 1983). The Mississippi Supreme Court has held that "[i]f the state merely proves the existence of an aggravating circumstance, the jury is free to find it insufficient to warrant death and is not required to automatically impose the death penalty." *Coleman v. State*, 378 So. 2d 640, 646 (Miss. 1979).

The Fifth and Eleventh Circuits hold that jury instructions that fail to inform the jury of its option to recommend a life sentence despite a finding that aggravating circumstances exist violate the eighth and fourteenth amendments. *Goodwin v. Balkcom*, 684 F.2d 794, 801-02 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 1798 (1983); *Spivey v. Zant*, 661 F.2d 464, 471 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 3495 (1982). The Georgia and the South Carolina Supreme Courts find reversible error when instructions fail to inform the jury that it may grant mercy despite proof of aggravating circumstances. *See, e.g.*, *Spivey v. Smith*, 241 Ga. 477, 481, 246 S.E.2d 288, 291 (1978); *State v. Copeland*, 278 S.C. 572, 585, 300 S.E.2d 63, 71 (1982), *cert. denied*, 103 S. Ct. 1802 (1983).

The Virginia Supreme Court has said:

Code § 19.2-264.4C provides that the death penalty shall not be imposed unless the Commonwealth proves one of the two aggravating circumstances beyond a reasonable doubt. The statute does not require that, upon such proof, the jury *must* impose the extreme penalty but only that, absent such proof, it shall *not* do so.

Smith v. Commonwealth, 219 Va. 455, 479, 248 S.E.2d 135, 150 (1978), *cert. denied*, 441 U.S. 967 (1979).

87. *See supra* notes 18-29 and accompanying text.

88. This is how the court construed subsection (c) before *Pinch*. The jury instructions read that, upon making the three findings, the jury may, though it need not, recommend death. N.C.P.I. CRIM., *supra* note 7, § 150.10, at 4 (Replacement, May 1979).

89. The capital sentencing statutes in both California and Montana provide that a sentence of death shall be imposed if the mitigating circumstances do not outweigh the aggravating, or are not sufficiently substantial to call for leniency. The California statute provides that "the trier of

firmed by *Model Penal Code* section 210.6, on which the legislature drew heavily in drafting the North Carolina statute.⁹⁰ This section provides that the death sentence shall not be imposed unless the sentencing authority finds that an aggravating circumstance exists and that no mitigating circumstance is sufficiently substantial to call for leniency.⁹¹ The Model Code does not suggest anywhere that the death sentence must be imposed upon these findings.

Although there is no basis for the North Carolina Supreme Court's construction of section 15A-2000, the most important question is not why the Court construes the statute as it does, but, rather, what implications this construction has for a defendant convicted of a capital felony. Does this construction affect the outcome of the sentencing phase of the trial, and, more importantly, does it adequately protect a defendant's right to life?

The North Carolina capital sentencing statute is unique in the findings it requires before the jury can recommend death. Most capital sentencing statutes require only a showing that the aggravating circumstances exist or that they are sufficient to outweigh the mitigating circumstances.⁹² But the North Carolina statute is more lenient toward the defendant in this respect, permitting the jury to impose the death sentence only if it concludes that aggravating circumstances exist which outweigh the mitigating *and* that the aggravating circumstances are sufficiently substantial to warrant death.⁹³ Consequently, even under the North Carolina Supreme Court's statutory construction, the jury is not required to impose the death penalty if it finds that the aggravating circumstances outweigh the mitigating. The jury is always free to grant mercy through a finding that the aggravating circumstances are not sufficiently substantial to warrant death. Nevertheless, even if a North Carolina jury finds that the aggravating circumstances do not warrant death, the instruction im-

fact shall consider, take into account and be guided by the mitigating and aggravating circumstances referred to in this section, and *shall* impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances." CAL. PENAL CODE § 190.3 (West Supp. 1983) (emphasis added). The Montana statute provides that the court "*shall* impose a sentence of death if it finds one or more of the aggravating circumstances and finds that there are no mitigating circumstances sufficiently substantial to call for leniency." MONT. CODE ANN. § 46-18-305 (1981) (emphasis added).

90. For a discussion of the legislature's reliance on the Model Penal Code, see *State v. Johnson*, 298 N.C. 47, 60-63, 257 S.E.2d 597, 608-10 (1979). The drafting of the Model Penal Code of the American Law Institute began in 1952 with a grant from the Rockefeller foundation. The Proposed Official Draft was completed in 1962. As of 1980, 34 states had drawn upon this draft in the codification or revision of their substantive criminal law. MODEL PENAL CODE forward (Proposed Official Draft 1962). Most states have adopted death penalty statutes that draw upon or resemble MODEL PENAL CODE § 210.6. MODEL PENAL CODE § 210.6 note on impact of Model Code (Proposed Official Draft 1962).

91. MODEL PENAL CODE § 210.6 (Proposed Official Draft 1962).

92. See, e.g., OKLA. STAT. ANN. tit. 21, § 701.11 (West 1982); MO. ANN. STAT. § 565.012 (Vernon Cum. Supp. 1983); LA. CODE CRIM. PRO. ANN. art. 905.3 (West Cum. Supp. 1983); MISS. CODE ANN. § 99-19-101 (Cum. Supp. 1983). The Georgia statute provides that "unless at least one of the statutory aggravating circumstances enumerated in subsection (b) of this Code section is found, the death penalty shall not be imposed." GA. CODE ANN. § 17-10-30 (1981). In South Carolina a jury recommending death "shall designate in writing . . . the aggravating circumstance or circumstances which it found beyond a reasonable doubt." S.C. CODE ANN. § 16-3-20(C)(b)(9) (Law. Co-op Cum. Supp. 1983).

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

posing a duty on the jury to recommend death if it answers certain issues affirmatively may still affect jury deliberations and even the outcome of the sentencing phase of the trial. The extent to which the deliberations are affected depends on whether the issues are those approved in *Pinch*,⁹⁴ or those set out in *McDougall*, which followed Justice Stevens' memorandum decision.⁹⁵

The instructions approved in *Pinch* required the jury to determine first whether the aggravating circumstances warranted death, and then whether the aggravating circumstances outweighed the mitigating. If the jury answered both of these questions affirmatively, it was required to recommend death. It is possible, however, that a jury could answer both questions affirmatively and still feel that death was not warranted. The jury considers the aggravating circumstances by themselves, and then, separately, whether the aggravating circumstances outweigh the mitigating. After these considerations a sentence of death or life imprisonment is required. The jury has no discretion to consider the totality of the case before deciding whether death is warranted. The case may arise when the jury feels that although the mitigating circumstances do not outweigh the aggravating, they are still substantial enough to warrant a grant of mercy.⁹⁶ In fact, as Justice Exum pointed out in his dissent in *Pinch*,⁹⁷ juries in two different cases have answered all the issues affirmatively and yet, in apparent disregard of the requirement in the instructions, have recommended life imprisonment.⁹⁸ These two cases illustrate the effect of jury instructions on a jury's sentencing decision. It is entirely possible that a jury could feel as the juries in these two cases did, and yet, because of the "duty" imposed by the instructions, not feel that it had an option to recommend life.

Whether jury instructions that conceivably could lead to such a result adequately protect the defendant's right to life is questionable. And, as Justice Stevens pointed out in his memorandum decision, the constitutionality of such instructions is also questionable. *Lockett* requires that the sentencing procedure ensure the reliability of a determination that death is appropriate.⁹⁹ Because a jury, after considering the statutory issues, may feel forced to impose death despite its desire to bestow mercy, it is questionable whether this reliability is ensured.

The revised instructions set out in *McDougall* still impose a duty on the jury to recommend death if it answers the issues affirmatively. Because of the revised order and form of the issues, however, these instructions allow the jury

94. See *supra* note 6 and accompanying text.

95. See *supra* notes 47-48 and accompanying text.

96. The Nebraska legislature even anticipated such a case by providing that the capital sentencing authority must consider whether the mitigating circumstances "approach or exceed the weight given to the aggravating circumstances." NEB. REV. STAT. § 29-2522(2) (1979) (emphasis added).

97. *Pinch*, 306 N.C. at 45 n.4, 292 S.E.2d at 234 n.4 (Exum, J., dissenting).

98. See *State v. King*, 301 N.C. 186, 270 S.E.2d 98 (1980); *State v. Taylor*, 298 N.C. 405, 259 S.E.2d 502 (1979). The North Carolina Supreme Court later noted that, "[w]hile this was error, it was error favorable to the defendant from which the State could not appeal." *State v. Williams*, 305 N.C. 656, 689, 292 S.E.2d 243, 263 (1982).

99. *Lockett*, 103 S. Ct. at 475.

more discretion to consider the totality of the case before a recommendation is required. The final issue that the jury is to consider is whether the aggravating circumstances, when considered with the mitigating circumstances, are sufficiently substantial to call for death.¹⁰⁰ This issue is to be accompanied by careful instructions which, if properly given, instruct the jury to consider all the circumstances, aggravating and mitigating, and then decide whether the death penalty is justified.¹⁰¹

These revised instructions dispense with the constitutional problems that plague the *Pinch* instructions. Since the jury considers the totality of the circumstances involved in the case, and then decides whether death is appropriate, the *Lockett* reliability test presumably is satisfied.¹⁰² The new instructions also better protect the defendant's right to life since they allow the jury more discretion to grant mercy if it so desires. Presumably, a jury could not consider all the circumstances and decide death was warranted, thus answering the final issue affirmatively, and then still feel that it should return a sentence of life. The final issue considered by the jury provides for a consideration of all circumstances and gives the jury the ultimate discretion to impose the death penalty. In effect, then, these new instructions may be viewed as similar to the pre-*Goodman* instructions providing that the jury may return a sentence of death upon answering the issues affirmatively.¹⁰³ Both sets of instructions allow the jury consideration of all circumstances¹⁰⁴ and, at some point, ultimate discretion to return or refuse to return a sentence of death.¹⁰⁵ Perhaps these new instructions reflect an attempt by the North Carolina Supreme Court and the drafters of pattern instruction 150.10 to return to the jury the discretion to grant mercy allowed in the pre-*Goodman* instructions, but denied in the instructions approved in *Pinch*.

If these new instructions are a substantial improvement over those approved in *Pinch*, and if they are an attempt to return to the jury more discretion to grant mercy, why did Justice Exum dissent in *McDougall*,¹⁰⁶ in which the new instructions were used? There are several possible explanations. Justice Exum finds it bothersome that the jury should ever have a duty to impose the death penalty, no matter how it responds to the issues.¹⁰⁷ Arguably, the word "duty" may have slight psychological effects on some jurors. But since the final issue allows the jury consideration of all circumstances plus the ulti-

100. See *supra* note 47.

101. See *supra* note 48. "After considering the totality of the aggravating and mitigating circumstances, you must be convinced beyond a reasonable doubt that the imposition of the death penalty is justified and appropriate in this case before you can answer the issue 'yes.'"

102. See *supra* note 99 and accompanying text.

103. See *supra* note 7 and accompanying text.

104. See *supra* note 49 and accompanying text.

105. The new instructions allow this discretion in the jury's consideration of the final issue, while the pre-*Goodman* instructions allowed this discretion after the issues had been answered, by instructing the jury that it *may*, not *must*, recommend death.

106. State v. McDougall, 308 N.C. 1, 45, 301 S.E.2d 308, 334 (1983) (Exum, J., dissenting).

107. "I continue to think that a jury never has a duty to recommend death no matter how it answers the issues. It may *not* recommend death unless it answers the issues in a certain way." *Id.*

mate discretion to decide between life and death, imposing a duty on the jury to recommend death if it answers this final issue affirmatively is practically irrelevant. No alert jury could answer this issue affirmatively and still wish to recommend a grant of mercy.

Justice Exum may also have maintained his dissent because he saw no justifiable basis for the original change in the jury instructions, from "may recommend" to "duty to recommend." Exum's dissent in *Pinch* concentrated mainly on demonstrating that neither the statute, the *Goodman* holding, nor the United States Supreme Court cases had required this change.¹⁰⁸ Perhaps because there was no justifiable basis for this change, Justice Exum probably will not be satisfied until the North Carolina Supreme Court returns to the pre-*Goodman* instructions.

Another possible explanation for Exum's continuing dissent is the refusal of the North Carolina Supreme Court to find reversible error in the pre-*McDougall* instructions.¹⁰⁹ In *State v. Kirkley* the supreme court did not find reversible error in these older instructions, although the court admitted they were not a "model charge."¹¹⁰ Exum maintained his dissent in *Kirkley*, "for the same reasons stated in my dissenting opinion in *McDougall*."¹¹¹ Even in *McDougall*, in which the new instructions were stated, the supreme court refused to find prejudicial error in the trial court's use of the *Pinch* instructions. For this reason, Justice Exum's continuing dissent is entirely justified. As long as these older instructions plague the North Carolina judicial system, the state's protection of the defendant's right to life is questionable. The North Carolina Supreme Court has criticized juries that have granted mercy in spite of their duty to recommend death under the older instructions.¹¹² Such criticism hardly protects the defendant's right to life. It even discourages the jury's attempt to provide such protection. As long as a defendant may be sentenced under the older instructions, the North Carolina judicial system will risk condemning men and women to death without adequately protecting their right to live.

With the new jury instructions set out in *McDougall*, the North Carolina Supreme Court has returned to the jury a great deal of discretion to grant mercy. These instructions ensure that a defendant will not be condemned to death unless the jury is certain that such a severe penalty is justified. With such assurance, the instructions adequately protect the defendant's right to life. But a defendant convicted of a capital crime cannot be certain that he will be sentenced under these new instructions. The North Carolina Supreme Court has refused to find reversible error in the constitutionally suspect older instructions. Under these instructions, a defendant may be condemned to death even when the jury doubts that this extreme penalty is justified. Thus, a de-

108. *Pinch*, 306 N.C. at 38-49, 292 S.E.2d at 230-36 (Exum, J., dissenting).

109. N.C.P.I. CRIM., *supra* note 7, § 150.10, at 3-4 (Replacement, May 1980).

110. *State v. Kirkley*, 308 N.C. 196, 217, 302 S.E.2d 144, 156 (1983).

111. *Id.* at 231, 302 S.E.2d at 164 (Exum, J., dissenting).

112. See *supra* note 98 and accompanying text.

defendant sentenced to death under the older instructions has no guarantee that the jury was certain that death was the appropriate penalty. Until these older instructions are swept from the North Carolina judicial system, a defendant convicted of a capital crime may find his right to life unjustly threatened.

VIRGINIA GAYLE MORROW

