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NORTH CAROLINA'S (F)(1) MITIGATING CIRCUMSTANCE: DOES IT TRULY SERVE TO MITIGATE?

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"[A]n individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases."[2]

I. INTRODUCTION

Imagine that a jury has determined you are guilty of committing first-degree murder. You are now facing a Sentencing Proceeding which is truly a life or death situation - life imprisonment or the death penalty. Based upon the information presented before the jury during this Sentencing Proceeding, your fate will be decided. Your attorneys will present evidence in support of mitigating circumstances to suggest that although you are guilty of first-degree murder, the circumstances are such that you should not be sentenced to death. On the other hand, the State will submit evidence in support of aggravating circum-

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2. Lockett v. Ohio, 438 U.S. 586, 605 (1978).

stances in an effort to establish that your crime was so horrendous that it should be punishable by death.

Further imagine that your prior criminal history includes a rape conviction and an addiction to both alcohol and drugs. During the Sentencing Proceeding, the State, in furtherance of its own agenda, argues that the trial court should submit the (f)(1) mitigating circumstance, "no significant history of prior criminal activity."[3] Your attorney argues that a criminal history including a rape conviction and a history of substance abuse *are* "significant." The trial judge agrees with the State's argument and allows for the submission of the (f)(1) mitigating circumstance to the jury.

As unbelievable as it may sound, the facts presented in this scenario were and are a reality in the state of North Carolina. Defendant Iziah Barden faced this travesty when his "significant" prior criminal history was admitted to the jury as evidence supporting the (f)(1) mitigating circumstance.[4]

Under its current application, severe crimes and lengthy criminal histories are presented to juries allegedly in support of the submission of the (f)(1) mitigating circumstance. In reality, the (f)(1) mitigating circumstance was intended to be used by juries to mitigate the capital crime where the defendant truly has an insignificant criminal history. Contrary to the rationale behind the submission of mitigating circumstances, harmful information comes before juries under the guise that it supports submission of the (f)(1) mitigating circumstance.

The purpose of this article is to bring awareness to the misapplication of North Carolina's (f)(1) mitigating circumstance. Part II provides the legal development of the Eighth Amendment in the United States Supreme Court. Part III provides a background on North Carolina's death penalty scheme. Part IV addresses North Carolina law on mitigating circumstances. Finally, Part V provides analogous situations in the criminal law of North Carolina where the same acts admitted under the (f)(1) mitigating circumstance are treated as "significant", including The Structured Sentencing Act, The Habitual Offender Act, and the submission of the (e)(3)[5] aggravating circumstance and the (f)(1) mitigating circumstance in the same case.

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3. N.C. GEN. STAT. § 15A-2000(f)(1) (2003).

4. State v. Barden, 356 N.C. 316 (2002), *cert. denied*, 123 S. Ct. 2087 (2003).

5. "The defendant had been previously convicted of a felony involving the use or threat of violence to the person or had been previously adjudicated delinquent in a juvenile proceeding for committing an offense . . . involving the use or threat of violence to the person if the offense had been committed by an adult." N.C. GEN. STAT. § 15A-2000(e)(3) (2003).

II. HISTORY/BACKGROUND ON THE DEATH PENALTY

As the Europeans came to America, they brought the institution of capital punishment with them.[6] The first known execution in America occurred in 1608 in the Jamestown colony of Virginia.[7] The common law rule for all convicted murderers provided for a mandatory death sentence.[8] During the mid-1700's, there was an abolitionist movement which arose; however, very little was done toward ending the death penalty.[9] When the Bill of Rights was adopted in 1791, the only limitation imposed on punishment was the prohibition against "cruel and unusual punishments."

The United States Constitution, as it currently stands, neither allows nor prohibits the imposition of the death penalty. The constitutional limitation on the imposition of the death penalty, the Eighth Amendment, serves only to prohibit the imposition of "cruel and unusual punishments."[10] The United States Supreme Court has held that, while the death penalty does not violate the concept of "cruelty," it "is not a license to the Government to devise any punishment short of death within the limit of its imagination."[11] The Supreme Court has also noted the static nature of the Eighth Amendment and the fact that its meaning changes with our "evolving standards of decency."[12]

In *McGautha v. California*[13], the defendants argued that the lack of guidance provided to jurors in making a punishment determination was constitutionally infirm.[14] Specifically, they asserted that the lawless imposition of the death penalty deprived a defendant of his life without Fourteenth Amendment due process.[15]

The Supreme Court justified this unguided discretion by noting that

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6. http://www.deathpenaltyinfo.org/article.php?scid=15&did=410#EarlyDeathPenaltyLaws.

7. *Id.*

8. McGautha v. Cal., 402 U.S. 183, 198 (1971) (including the companion case Crampton v. Ohio, 248 N.E.2d 614 (Ohio 1969)).

9. Michael A. Cokley, Comment, *Whatever Happened to That Old Saying "Thou Shall Not Kill?": A Plea for the Abolition of the Death Penalty*, 2 LOY. J. PUB. INT. L. 67, 82 (2001).

10. U.S. CONST. amend. VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

11. Trop v. Dulles, 356 U.S. 86, 99 (1958).

12. *Id.* at 100-01.

13. 402 U.S. 183 (1971).

14. *Id.* at 185.

15. *Id.* at 196.

> [t]o identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.[16]

The Court referred to the Model Penal Code's use of aggravating and mitigating circumstances and concluded that the use of these circumstances provides only "the most minimal control over the sentencing authority's exercise of discretion."[17] The Court further noted that any list of circumstances could in no way be exhaustive and certainly could not prevent a jury from imposing the death sentence in an arbitrary or capricious manner.[18] Further, the attempt to list appropriate considerations might impermissibly inhibit consideration by the jury rather than provide meaningful guidance.[19]

In spite of the many problems involved with the application of a system of aggravating and mitigating circumstances, the Supreme Court was precluded from holding that such a system was constitutionally required.[20] When addressing whether the implementation of jury sentencing discretion is a superior way of handling capital cases, the Court noted that the Federal Constitution provides the basis for the Court's authority in these cases, and the Constitution "does not guarantee trial procedures that are the best of all worlds, or that accord with the most enlightened ideas[.]"[21]

In the landmark case *Furman v. Georgia*,[22] the issue before the Supreme Court was whether the imposition of the death penalty constituted "cruel and unusual punishment" in violation of the Eighth Amendment, as applied to the states through the Fourteenth Amendment. This was the first case where the United States Supreme Court addressed the issue of whether the imposition of the death penalty in any instance is "cruel and unusual." Prior to *Furman*, the constitutionality of the death penalty was presumed by the Court.[23]

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16. *Id.* at 204.

17. *Id.* at 207.

18. *Id.*

19. *Id.* at 208.

20. *Id.* at 207 (holding that it was "quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution.").

21. *Id.* at 221.

22. 408 U.S. 238 (1972).

23. *See* Gregg v. Georgia, 428 U.S. 153, 168 (1976).

In *Furman* and its two companion cases[24], the three defendants had each received the death penalty, for a murder conviction in one case and rape convictions in the other two cases. In each of the three cases, the determination of whether the punishment should be death or a lesser punishment was left solely within the discretion of the judge or the jury. The Court concluded that the standardless sentencing violated the Eighth Amendment. The *per curiam* decision of the Court succinctly stated, "the Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[25]

The decision in *Furman* was greatly divided: five of the justices filed separate concurring opinions while the other four justices each filed their own dissenting opinions. The meaning of *Furman* must be drawn from their various rationales.

Of the concurring opinions, only those by Justices Brennan and Marshall went so far as to conclude that the death penalty was unconstitutional in all instances. In coming to his conclusion, Justice Brennan expounded on the basic principles underlying the Cruel and Unusual Punishment Clause of the Eighth Amendment: the punishment must not be so severe as to degrade the dignity of humanity; the imposition of the punishment must not allow for the arbitrary infliction of a severe punishment; the punishment cannot be unacceptable to modern societal standards; and the punishment must not be excessive in nature.

In Justice Marshall's concurring opinion, he reiterated the common theme in the Court's other decisions regarding the meaning of "cruel and unusual" punishments, suggesting the concept gets its meaning from the "evolving standards of decency that mark the progress of a maturing society."[26] Marshall concluded that even if capital punishment was not excessive, it nonetheless remains in violation of the Eighth Amendment as morally unacceptable to the people of the United States.[27]

The other three members of the *Furman* majority, Justices Douglas, Stewart and White each concluded that the unguided system resulted in qualities which violated the Eighth Amendment. Each of

24. Jackson v. Georgia, 171 S.E.2d 501 (Ga. 1969) and Branch v. Texas, 447 S.W.2d 932 (Tex. Crim. App. 1969). The United States Supreme Court's review of *Furman*, *Jackson*, and *Branch* are collectively referred to as *Furman v. Georgia*.

25. *Furman*, 408 U.S. at 239-40 (emphasis added).

26. *Id.* at 329 (Marshall, J., concurring) (citing Trop v. Dulles, 356 U.S. 86, 101 (1958)); *see also* Weems v. United States, 217 U.S. 349, 373 (1910).

27. *Furman*, 408 U.S. at 369 (Marshall, J., concurring).

the three justices articulated their own rationale. For example, Justice Douglas noted that the lack of standards governing the selection of a penalty allows for a system where "[p]eople live or die, dependent on the whim of one man or of 12."[28] Further, he felt that the Eighth Amendment was written to provide for equal justice for all; however, the application of the statutes shows discriminatory patterns. Specifically, the death penalty was being imposed more frequently upon minorities, the poor, ignorant, and the young.

The common theme among the opinions of the three concurring justices was that legislatively unguided discretionary sentencing violates the Eighth Amendment because it is "pregnant with discrimination,"[29] allows for the imposition of the death penalty "wantonly" and "freakishly,"[30] and results in the imposition of the death penalty with "great infrequency" providing "no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."[31]

In *Gregg v. Georgia*,[32] the defendant was convicted of two counts of murder.[33] The issue before the United States Supreme Court was whether the imposition of the death penalty for murder was "cruel and unusual" thereby violating the Constitution.

The Court concluded that the death penalty was not a *per se* violation of the Eighth Amendment. The Court held that in order for a state's death penalty scheme to comply with the mandates of *Furman*, the discretion afforded to the sentencing body must be directed so as to prevent the arbitrary and capricious imposition of a death sentence.[34] Specifically, a bifurcated proceeding allows for review of evidence unrelated to guilt and provides jurors with standards for dealing with the information received during a Sentencing Proceeding.[35] The Court also noted that requiring the sentencer to specify the factors relied upon in reaching its ultimate conclusion allows for a more effective appellate review to ensure that the death penalty is not applied "capriciously or in a freakish manner."[36]

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28. *Id.* at 253 (Douglas, J., concurring).

29. *Id.* at 257 (Douglas, J., concurring).

30. *Id.* at 310 (Stewart, J., concurring).

31. *Id.* at 313 (White, J., concurring).

32. Gregg v. Georgia, 428 U.S. 153 (1976) (its companion cases are Proffitt v. Florida, 428 U.S. 242 (1976) and Jurek v. Texas, 428 U.S. 262 (1976)).

33. *Id.* at 160.

34. *See id.* at 189.

35. *Id.* at 195.

36. *Id.*

In response to *Furman*'s rejection of unbridled jury discretion in the imposition of capital cases, several states passed statutes providing for a mandatory death sentence. These statutes were passed in an effort to retain the death penalty in a form that was compatible with the Constitution.[37]

In *Woodson v. North Carolina*,[38] the Supreme Court addressed North Carolina's first-degree murder statute which proscribed a mandatory death sentence, thereby eliminating all jury discretion.[39] The Court held that the statute violated the Eighth and Fourteenth Amendments' requirement that the State's power to punish must be exercised in a manner which comports with the limits of "civilized standards."[40] Furthermore, the vesting of standardless sentencing power in the hands of the jury was a constitutional infirmity addressed in *Furman*.[41] Also, a mandatory death penalty statute does not allow for the "particularized consideration of relevant aspects of the character and record" of each defendant.[42]

In *Lockett v. Ohio*,[43] the Court addressed the constitutionality of an Ohio statute that narrowly limited the sentencer's discretion to consider the mitigating factors of the defendant's character, age, lack of intent to cause death, or his minor role in the crime. The Ohio statute had a very limited range of mitigating circumstances that the sentencer could consider.

The Court held that the Eighth and Fourteenth Amendments mandate "individualized sentencing" in capital cases.[44] The Court further concluded:

> [T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.[45]

37. *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280 (1976).
38. 428 U.S. 280 (1976).
39. *Id.* at 284.
40. *Id.* at 301.
41. *Id.* at 302.
42. *Id.* at 303.
43. 438 U.S. 586 (1978).
44. *Id.* at 604.
45. *Id.* (emphasis in original).

III. THE DEATH PENALTY IN NORTH CAROLINA

Once a capital defendant has been found guilty of first-degree murder in North Carolina, the trial court must conduct a Sentencing Proceeding to determine if the defendant will be sentenced to life imprisonment or death.[46] All of the evidence presented in the Guilt Phase, along with any additional evidence presented during the Sentencing Proceeding, can be used by the jury in making its punishment determination.[47]

During its deliberations, the jury must initially determine if any aggravating circumstances exist which are sufficiently substantial to justify the death penalty.[48] If the jury determines that such aggravating circumstances do exist, the jury must then decide whether the mitigating circumstances outweigh the aggravating circumstances.[49]

Even when the jury finds that no mitigating circumstances exist, the jury must still decide whether the death penalty is the proper penalty in the particular case.[50] Based upon these considerations, the jury is then asked to determine the proper punishment.[51]

IV. NORTH CAROLINA LAW ON MITIGATING CIRCUMSTANCES

The North Carolina Supreme Court has defined a mitigating circumstance as "a fact or group of facts which do not constitute any justification or excuse for killing or reduce it to a lesser degree of the crime of first-degree murder, which may be considered as extenuating, or reducing the moral culpability of killing or making it less deserving of the extreme punishment than other first-degree murders."[52]

"The primary purpose of mitigating circumstances is . . . to treat the capital defendant with 'that degree of respect due the uniqueness of the individual.'"[53] Evidence of mitigation extends to "any aspect of a defendant's character or record and any of the circumstances of the

46. N.C. GEN. STAT. § 15A-2000(a)(1) (2003).

47. § 15A-2000(a)(3).

48. § 15A-2000(b)(1) & (c)(2).

49. § 15A-2000(b)(2).

50. State v. Wiley, 355 N.C. 592, 614, 565 S.E.2d 22, 36 (2002) (citing Lockett v. Ohio, 438 U.S. 586, 605 (1978), *cert. denied*, 537 U.S. 1117 (2003)).

51. § 15A-2000(b).

52. State v. Boyd, 311 N.C. 408, 319 S.E.2d 189 (1984) (quoting State v. Brown, 306 N.C. 151, 178, 293 S.E.2d 569, 586 (1982), *cert. denied*, 471 U.S. 1030 (1985)).

53. State v. Taylor, 354 N.C. 28, 43, 550 S.E.2d 141, 151 (2001) (quoting *Lockett*, 438 U.S. at 605), *cert. denied*, 535 U.S. 934 (2002)).

offense that the defendant proffers as a basis for a sentence less than death."[54]

The sentencing jury is instructed that they must consider all of the mitigating circumstances supported by the evidence.[55] North Carolina's statutorily-defined mitigating circumstances include:

(1) The defendant has no significant history of prior criminal activity.
(2) The capital felony was committed while the defendant was under the influence of mental or emotional disturbance.
(3) The victim was a voluntary participant in the defendant's homicidal conduct or consented to the homicidal act.
(4) The defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor.
(5) The defendant acted under duress or under the domination of another person.
(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.
(7) The age of the defendant at the time of the crime.
(8) The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.
(9) Any other circumstance arising from the evidence which the jury deems to have mitigating value.[56]

A. *North Carolina's (f)(1) Mitigating Circumstance*

North Carolina's (f)(1) mitigating circumstance provides that "[t]he defendant has no significant history of prior criminal activity."[57] The test governing its submission is "whether a rational jury could conclude that defendant had no *significant* history of prior criminal

54. State v. Nicholson, 355 N.C. 1, 40, 558 S.E.2d 109, 136 (quoting *Lockett*, 438 U.S. at 604), *cert. denied*, 537 U.S. 845 (2002).

55. N.C. GEN. STAT. § 15A-2000(b) (2003).

56. § 15A-2000(f). The author recognizes the existence of nonstatutory mitigating circumstances, but omits a discussion of them as not relevant to this article. For information on the application of nonstatutory mitigating circumstances in North Carolina, *see* State v. Anthony, 354 N.C. 372, 555 S.E.2d 557 (2001), *cert. denied*, 536 U.S. 930 (2002); State v. Meyer, 353 N.C. 92, 540 S.E.2d 1 (2000), *cert. denied*, 534 U.S. 839 (2001); State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990); State v. Greene, 324 N.C. 1, 376 S.E.2d 430 (1989), *sentence vacated on other grounds*, 494 U.S. 1022 (1990).

57. § 15A-2000(f)(1).

activity."[58] In determining whether a defendant's prior criminal history is "significant", the focus is on whether "the criminal activity is such as to influence the jury's sentencing recommendation."[59] The nature and age of the prior criminal activities are also significant considerations.[60] The mere number of criminal activities in a defendant's history is not dispositive.[61]

When the trial court concludes that the evidence supports submission of the (f)(1) mitigating circumstance, it must be submitted without regard to the wishes of either the defendant or the State.[62] Submission of the (f)(1) mitigating circumstance is proper even when the defendant objects to its submission.[63] The jury is permitted to consider *any* prior criminal activity and is not limited to actual convictions.[64] The (f)(1) mitigating circumstance, however, applies only to a defendant's criminal activity which occurred *before* the murder for which the defendant is currently being tried.[65]

B. *Caselaw on the (f)(1) Mitigating Circumstance*

North Carolina has been especially liberal in its interpretation of what evidence constitutes an insignificant history of prior criminal activity.[66] The (f)(1) mitigating circumstance has been submitted in numerous cases where the defendant has a seemingly significant criminal history.

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58. State v. Bone, 354 N.C. 1, 16, 550 S.E.2d 482, 491 (2001) (quoting State v. Wilson, 322 N.C. 117, 143, 367 S.E.2d 589, 604 (1998)), *cert. denied*, 535 U.S. 940 (2002) (emphasis in original).

59. State v. Blakeney, 352 N.C. 287, 319, 531 S.E.2d 799, 821 (2000) (quoting State v. Greene, 351 N.C. 562, 569, 528 S.E.2d 575, 580 (2000), *cert. denied*, 531 U.S. 1041 (2000)), *cert. denied*, 531 U.S. 1117 (2001).

60. *Greene*, 351 N.C. at 570, 528 S.E.2d at 580.

61. *Id.*

62. *Blakeney*, 352 N.C. at 318, 531 S.E.2d at 821; State v. Parker, 350 N.C. 411, 436, 516 S.E.2d 106, 123 (1999), *cert. denied*, 528 U.S. 1084 (2000); *see also* State v. Walker, 343 N.C. 216, 222, 469 S.E.2d 919, 922, *cert. denied*, 519 U.S. 901 (1996) (The defendant had been convicted of second degree murder and had a history of drug dealing. Contrary to the defendant's specific request that the (f)(1) mitigating circumstance not be submitted, the trial court submitted it *ex mero motu*.).

63. State v. Ingle, 336 N.C. 617, 642, 445 S.E.2d 880, 893 (1994), *cert. denied*, 514 U.S. 1020 (1995).

64. State v. Nicholson, 355 N.C. 1, 55, 558 S.E.2d 109, 145, *cert. denied*, 537 U.S. 845 (2002).

65. *Id.* at 50, 558 S.E.2d at 142.

66. N.C. GEN. STAT. § 15A-2000(f)(1) (2003).

In *State v. Rowsey*,[67] the defendant's prior criminal history included two counts of larceny, fifteen counts of injury to property, and an alcoholic beverage violation.[68] It was also established that the defendant illegally possessed marijuana on the day of the shooting at issue in the case, and the defendant had illegally concealed the murder weapon on his body numerous times prior to the shooting.[69] Furthermore, the defendant had participated in the breaking and entering of a church.[70] Evidence presented before the trial court, but not presented to the jury, additionally showed that at the time of trial the defendant had also been charged with five counts of felony breaking and entering and felony larceny offenses.[71]

Upon review by the North Carolina Supreme Court, the defendant argued that the trial court erred in its submission of the (f)(1) mitigating circumstance over his objection.[72] The Court concluded that the trial court's submission was not error, because a rational juror could have concluded that the defendant did not have a significant history of prior criminal activity at the time of the murder.[73] Specifically, the Court noted that most of the defendant's convictions were property crimes and did not consist of any felony convictions.[74] Further, the defendant's criminal history did not include any "violent" criminal activity.[75] The Court upheld the defendant's death sentence.[76]

In *State v. Billings*,[77] the evidence established that the defendant had been convicted of second degree murder and had a history of drug-dealing.[78] The defendant's criminal record consisted of convictions for two felonies and five misdemeanors, as well as the unlawful consumption of drugs and alcohol both as a child and as an adult.[79] At trial, the defendant specifically requested that the (f)(1) mitigating

67. 343 N.C. 603, 472 S.E.2d 903 (1996), *cert. denied*, 519 U.S. 1151 (1997).
68. *Id.* at 619, 472 S.E.2d at 911.
69. *Id.* at 619-20, 472 S.E.2d at 911.
70. *Id.* at 620, 472 S.E.2d at 911.
71. *Id.*
72. *Id.* at 619, 472 S.E.2d at 911.
73. State v. Rowsey, 343 N.C. 603, 620, 472 S.E.2d 903, 912 (1996).
74. *Id.*
75. *Id.*
76. *Id.* at 610, 472 S.E.2d at 906.
77. 348 N.C. 169, 500 S.E.2d 423, *cert. denied*, 525 U.S. 1005 (1998).
78. *Id.* at 189, 500 S.E.2d 435.
79. *Id.*

circumstance *not* be submitted.[80] However, the trial court concluded that the evidence was sufficient to support its submission.[81]

Before the North Carolina Supreme Court, the defendant argued that based on his prior criminal history, submission of the (f)(1) mitigating circumstance was error.[82] The Court disagreed, noting that at least one juror had found the (f)(1) mitigating circumstance to exist, and the Court suggested that this finding "weighed [ ]in defendant's favor."[83] The Court upheld the defendant's death sentence.[84]

In a very similar case, *State v. Walker*,[85] the North Carolina Supreme Court also upheld the submission of the (f)(1) mitigating circumstance where the defendant had been convicted of second degree murder and had a history of drug dealing.[86] In *Walker*, however, the (f)(1) mitigating circumstance was submitted *ex mero motu* where the defendant had also specifically requested that the mitigator not be submitted.[87] The Court upheld the defendant's death sentence.[88]

In *State v. Barden*[89], the case addressed in the Introduction to this article, the defendant argued that the trial court erred in submitting the (f)(1) mitigating circumstance to the jury. His prior criminal history included a rape conviction along with an addiction to drugs and alcohol.[90] At trial, the rape victim testified that she had been brutally raped by the defendant.[91] The North Carolina Supreme Court upheld the trial court's submission of the (f)(1) mitigating circumstance, noting that the defendant cross examined the rape victim at trial in a way to discredit her testimony regarding the rape.[92] The Court upheld the defendant's death sentence.[93]

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80. *Id.*

81. *Id.*

82. *Id.* at 188-89, 500 S.E.2d at 435.

83. State v. Billings, 348 N.C. 169, 189, 500 S.E.2d 423, 435, *cert. denied*, 525 U.S. 1005 (1998).

84. *Id.* at 192, 500 S.E.2d at 437.

85. 343 N.C. 216, 469 S.E.2d 919, *cert. denied*, 519 U.S. 901 (1996).

86. *Id.* at 222, 469 S.E.2d at 922.

87. *Id.*

88. *Id.* at 228, 469 S.E.2d at 926.

89. 356 N.C. 316, 572 S.E.2d 108 (2002), *cert. denied*, 123 S. Ct. 2087 (2003).

90. *Id.* at 373, 572 S.E.2d at 144.

91. *Id.*

92. *Id.*

93. *Id.* at 389, 572 S.E.2d at 153.

V. ANALOGOUS SITUATIONS IN NORTH CAROLINA LAW

The North Carolina General Assembly has made the policy determination that the number and significance of prior crimes should impact a defendant's punishment. Various criminal laws in the State reflect this determination. Under the Structured Sentencing Act, a defendant's prior criminal history is factored into his punishment, and a defendant receives a greater sentence based upon the number and severity of the prior convictions in his criminal history. With the Habitual Offender Act, the General Assembly has established that after three felony convictions, a defendant is designated as an habitual offender. As an habitual offender, the defendant receives an exaggerated sentence.

Also, the (e)(3) aggravating circumstance is submitted to a capital sentencing jury when a defendant has been convicted of a prior violent felony. The (e)(3) is an aggravating circumstance, and as such, weighs in favor of the defendant being given the death penalty. When the (f)(1) mitigating circumstance is submitted, the defendant is *supposedly* being given credit for his insignificant criminal record, mitigating the circumstances weighing in favor of giving the defendant a life sentence.

North Carolina's Structured Sentencing Act, Habitual Felon Act, and the submission of the (e)(3) aggravating circumstance in cases where the (f)(1) mitigating circumstance is also submitted provide analogous situations where the public policy of punishing a prior criminal history are exercised. These examples further establish the conflict present with the current way the (f)(1) mitigating circumstance is being used in North Carolina capital Sentencing Proceedings.

A. The Structured Sentencing Act

Under the Structured Sentencing Act, a defendant's prior criminal history impacts the punishment he receives by elevating the potential incarceration period based upon the defendant's prior criminal history. Two defendants, both committing the same crime, under the same circumstances, can be sentenced differently based upon their prior convictions; the defendant with more criminal convictions of a more severe nature will be sentenced to a longer incarceration period.

The Structured Sentencing Act, sections 15A-1340.10 *et seq.* of the North Carolina General Statutes, applies to the sentencing of most crimes committed in North Carolina, but it does not apply to capital

murder.[94] Defendants convicted of capital murder are sentenced pursuant to section 15A-2000, which provides for the submission of mitigating and aggravating factors to guide the discretion of jurors. The presence of aggravators and mitigators guides the discretion of the jury by requiring that they consider them when coming up with a sentence recommendation.[95]

Under the Structured Sentencing Act, the trial court initially must determine the prior record level[96] of the defendant.[97] Points are assigned to felony convictions which range from 2 points for a Class H or I conviction up to 10 points for a Class A conviction.[98] The prior record level of a defendant is based upon the sum of points assigned to each of the defendant's prior convictions.[99] Based upon the prior record level and the statutorily defined class of the offense, the trial court can look to the statutorily defined punishment grid located at Section 15A-1340.17 of the North Carolina General Statutes to determine a minimum and maximum sentence.[100]

Movement from one prior record level to another can have a significant impact on the punishment imposed on a defendant during sentencing. For instance, in *State v. Wilson*[101] the State and the defendant stipulated that the defendant had a prior conviction for second degree kidnapping.[102] The North Carolina Supreme Court held that the trial court erred in failing to submit the (f)(1) mitigating circumstance in this case.[103] Under the Structured Sentencing Act, second degree kidnapping is a Class E felony which places the defendant in Record level

94. N.C. GEN. STAT. § 15A-1340.10 (2003) (does not apply to impaired driving under § 20-138.1, failure to comply with control measures under § 130A-25, or violent habitual felons under Article 2B of Chapter 14 of the General Statutes).

95. § 15A-2000(b).

96. § 15A-1340.14(c).

(1) Level I - 0 points.

(2) Level II - At least 1, but not more than 4 points.

(3) Level III - At least 5, but not more than 8 points.

(4) Level IV - At least 9, but not more than 14 points.

(5) Level V - At least 15, but not more than 18 points.

(6) Level VI - At least 19 points.

97. § 15A-1340.13(b) (the prior record level is established pursuant to § 15A-1340.14).

98. § 15A-1340.14(b).

99. § 15A-1340.14(a).

100. § 1340.13(c) (2003).

101. 322 N.C. 117, 367 S.E.2d 589 (1988).

102. *Id.* at 142, 367 S.E.2d at 603.

103. *Id.* at 144, 367 S.E.2d at 604.

II.[104] A defendant in Record Level II, would be sentenced to 230 to 288 months' imprisonment in the presumptive range.[105] In sentencing a defendant with a record level of I, which designates the presence of no prior criminal history, the sentence for a Class B1 felony is 192 to 240 months' imprisonment.[106] In sum, the difference between record level I and II is 38 to 44 months', a significant difference in imprisonment based on the prior conviction for second degree kidnapping, which was found to support "no significant criminal history."

B. *The Habitual Offender Act*

North Carolina's Habitual Offender Act[107] punishes the habitual felon by setting the limit at three felonies.[108] Under Structured Sentencing, after a defendant has been convicted of three felonies the defendant is sentenced under an exaggerated sentence for any subsequent felonies.[109]

Under the Habitual Offender Act, "Any person who has been convicted of or pled guilty to three felony offenses in any federal court or state court. . . is declared to be an habitual felon."[110] Being an habitual felon is a status which provides that a person thereafter convicted of a crime to be given an increased punishment for that crime.[111] An habitual felon is elevated within structured sentencing so that the defendant is eligible for a longer minimum and maximum sentence. Specifically, after conviction of the third felony, punishment for that third felony as an habitual felon is under Class C, with Class I crimes being the least significant and Class A crimes being the most severe.[112]

In numerous instances the North Carolina Supreme Court has held that a defendant's prior criminal history warranted submission of the (f)(1) mitigating circumstance; however, the defendants' prior felonies, including the ones for which defendant is currently being sentenced, would have qualified the defendants as "habitual felons."[113]

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104. N.C. GEN. STAT. § 14-39 (2003).
105. § 15A-340.17(c)(4).
106. *Id.*
107. N.C. GEN. STAT. §§ 14-7.1 - 14-7.6 (2003).
108. § 14-7.1.
109. § 14-7.6.
110. § 14-7.1.
111. State v. Allen, 292 N.C. 431, 435, 233 S.E.2d 585, 588 (1977).
112. § 14-7.6.
113. State v. Bone, 354 N.C. 1, 550 S.E.2d 482 (2001), *cert. denied*, 535 U.S. 940 (2002) (holding that the trial court did not err in submitting the (f)(1) mitigating circumstance where defendant was convicted of the felonies: common law robbery, three convictions for robbery with a dangerous weapon, second degree kidnapping,

C. *The (e)(3) Aggravating Circumstance and the (f)(1) Mitigating Circumstance*

The (e)(3) aggravating circumstance exists when the defendant has a prior conviction for a violent felony.[114] When a jury is deciding whether to recommend a sentence of life or death in a capital sentencing hearing, the jury is instructed to weigh the aggravating circumstances against the mitigating circumstances.[115] The jury is told to determine how much weight to give each circumstance they determine exists; however, it only takes the presence of one aggravating circumstance to support a death sentence. Further, the number of circumstances is not determinative in that one aggravating circumstance can be found to outweigh numerous mitigating circumstances.

Under the aggravating circumstance (e)(3)[116], the General Assembly has shown its desire to punish recidivists. The (e)(3) aggravating

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and assault on an officer); State v. Fletcher, 348 N.C. 292, 500 S.E.2d 668 (1998), *cert. denied*, 525 U.S. 1180 (1999) (holding that the trial court erred and should have submitted the (f)(1) mitigating circumstance where defendant was convicted of two counts of felonious breaking and entering, three counts of felonious larceny, and felonious possession of stolen property); State v. Billings, 348 N.C. 169, 500 S.E.2d 423, *cert. denied*, 525 U.S. 1005 (1998) (holding that the trial court did not err in submitting the (f)(1) mitigating circumstance where defendant was convicted of two felonies); State v. Jones, 346 N.C. 704, 487 S.E.2d 417 (1997) (holding that the trial court did not err in submitting the (f)(1) mitigating circumstance where defendant was convicted of "2 or 3 felony counts" for stealing jewelry left in a hotel room where defendant worked); State v. Geddie, 345 N.C. 73, 478 S.E.2d 146 (1996) (holding that the trial court did not err in submitting the (f)(1) mitigating circumstance where defendant was convicted of three violent felonies); State v. Ball, 344 N.C. 290, 474 S.E.2d 345 (1996), *cert. denied*, 520 U.S. 1180 (1997) (holding that the trial court did not err in submitting the (f)(1) mitigating circumstance where defendant was convicted of the felonies: robbery and felonious assault); State v. Buckner, 342 N.C. 198, 464 S.E.2d 414 (1995), *cert. denied*, 519 U.S. 828 (1996) (holding that the trial court did not err in submitting the (f)(1) mitigating circumstance where defendant was convicted of the felonies: common law robbery, drug trafficking, and seven breaking or entering convictions); State v. Lloyd, 321 N.C. 301, 364 S.E.2d 316, *sentence vacated on other grounds*, 488 U.S. 807 (1988) (holding that the trial court did not err in submitting the (f)(1) mitigating circumstance where defendant was convicted of the felonies: "assault with intent to rob not being armed" and "breaking and entering a business place with intent to commit larceny"); State v. Brown, 315 N.C. 40, 339 S.E.2d 808 (1985), *cert. denied*, 476 U.S. 1165 (1986), *overruled on other grounds by* State v. Vandiver, 321 N.C. 570, 364 S.E.2d 373 (1988) (holding that the trial court did not err in submitting the (f)(1) mitigating circumstance where defendant was convicted of the felonies: five counts armed robbery, six counts felony breaking or entering, and one count of felonious assault).

114. N.C. GEN. STAT. § 15A-2000(e)(3) (2003).

115. § 15A-2000(b)(2).

116. § 15A-2000(e)(3).

circumstance applies in those cases where "the defendant had been previously convicted of a felony involving the use or threat of violence to the person."[117]

The North Carolina Supreme Court has recognized the grave nature of the jury's finding of the (e)(3) aggravating circumstance by holding that the existence of the (e)(3) aggravating circumstance is significant to the Court's finding that the death penalty is proportionate in a given case.[118] There has not been a case where the (e)(3) aggravating circumstance was found by the jury at trial and on review by the Court found to be a case where the death sentence was disproportionately imposed.[119] Further, the Court has held that a finding of the (e)(3) aggravating circumstance, without the presence of any other aggravating factors, is "sufficient to support a sentence of death."[120] Most significantly, the Court has conceded that there is little distinction between a finding of the (e)(3) aggravating circumstance and the (e)(2) aggravating circumstance (another capital felony conviction).[121]

There is inherent conflict in the submission of the (f)(1) mitigating circumstance and the (e)(3) aggravating circumstance in the same case. Under the (f)(1) mitigating circumstance the defendant is given credit for "no significant criminal history", but the (e)(3) aggravating circumstance weighs against the defendant by noting his prior conviction for a violent felony. A defendant cannot have an insignificant criminal history and have been convicted of a violent felony. The two concepts are simply inconsistent.

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

117. *Id.*

118. State v. Barden, 356 N.C. 316, 388, 572 S.E.2d 108, 153 (2002), *cert. denied*, 123 S. Ct. 2087 (2003); State v. Mitchell, 353 N.C. 309, 331, 543 S.E.2d 830, 843 (2001), *cert. denied*, 534 U.S. 1000 (2001).

119. *Mitchell*, 353 N.C. at 331, 543 S.E.2d at 843; State v. Peterson, 350 N.C. 518, 538, 516 S.E.2d 131, 143 (1999), *cert. denied*, 528 U.S. 1164 (2000).

120. State v. Williams, 355 N.C. 501, 591, 565 S.E.2d 609, 661 (2002), *cert. denied*, 537 U.S. 1125 (2003); State v. Bacon, 337 N.C. 66, 110 n.8, 446 S.E.2d 542, 566 n.8 (1994), *cert. denied*, 513 U.S. 1159 (1995).

121. State v. Cummings, 352 N.C. 600, 635, 536 S.E.2d 36, 60 (2000), *cert. denied*, 532 U.S. 997 (2001); State v. Warren, 348 N.C. 80, 118, 499 S.E.2d 431, 452, *cert. denied*, 525 U.S. 915 (1998).

The North Carolina Supreme Court, however, has repeatedly upheld the submission of the (e)(3) aggravating circumstance and the (f)(1) mitigating circumstance in the same case.[122]

VII. CONCLUSION

The North Carolina General Assembly complied with the dictates of the United States Supreme Court case law requiring individualized sentencing of capital defendants through its creation of mitigating circumstances used in North Carolina's death penalty scheme. Nevertheless, the current use of the (f)(1) mitigating circumstance in North Carolina's courtrooms is offensive to the Eighth Amendment. A mitigating circumstance submitted in support of a sentence less than death *should* benefit the defendant; however, the (f)(1) mitigating circumstance is being used by prosecutors as a vehicle to abuse the system, allowing the submission of harmful evidence under the guise that it mitigates the defendant's capital murder.

The fact that prosecutors are repeatedly the ones requesting submission of the (f)(1) mitigating circumstance during the Sentencing Proceeding and the fact that defendants are the ones contesting its submission certainly raises the question as to why the prosecutor would be submitting the circumstance if it were truly serving to mitigate. Further, if it does mitigate, would not the defendant support its submission? On the other hand, would it not be malpractice on the part of defense counsel to fail to submit the (f)(1) mitigating circumstance and then argue against its submission? In sum, the (f)(1) mitigating circumstance does *not* serve as a mitigating factor when it is submitted in a case where the defendant has a laundry list of convictions or a serious conviction such as second degree murder or rape.

As written, the (f)(1) mitigating circumstance complies with the dictates of the Eighth Amendment by guiding the jury's discretion. Specifically, it allows the jury to give credit to those defendants that

122. State v. Barden, 356 N.C. 316, 373-74, 572 S.E.2d 108, 144 (2002), *cert. denied*, 123 S. Ct. 2087 (2003) ((e)(3) submitted where defendant had a rape conviction); State v. Blakeney, 352 N.C. 287, 318-19, 531 S.E.2d 799, 821 (2000), *cert. denied*, 531 U.S. 1117 (2001) ((e)(3) submitted where defendant had been convicted of robbery with a dangerous weapon); State v. Ball, 344 N.C. 290, 310-11, 474 S.E.2d 345, 357 (1996), *cert. denied*, 520 U.S. 1180 (1997) ((e)(3) submitted where defendant had a record including felonious assault or robbery); State v. Walker, 343 N.C. 216, 223-24, 469 S.E.2d 919, 922-23, *cert. denied*, 519 U.S. 901 (1996) ((e)(3) submitted where defendant had been convicted of attempted second degree murder); State v. Brown, 315 N.C. 40, 61, 337 S.E.2d 808, 824 (1985), *cert. denied*, 476 U.S. 1165 (1986) ((e)(3) submitted where defendant shot at a law enforcement officer inflicting serious debilitating injury).

have had a limited criminal history. However, as applied, the (f)(1) mitigating circumstance is completely an anomaly of the law of North Carolina in that what was intended to help the defendant is hurting the defendant.