North Carolina Central Law Review

Volume 4 | Issue 2 Article 9

4-1-1973

Mandatory Death: State v. Waddell

Joseph Adams

District Court, however, did not show whether this remedy was available under the general maritime law or was taken from the available state law.

The *Dennis* case is the first case to go into the recovery that will be granted by the new *Moragne* federal maritime law for wrongful death. This is the first case to determine a measure of recovery completely under the new maritime law without having to rely on the question of whether a right will be granted by state law. But this case raises many more questions than it answers. Now the right to recover is granted by the general maritime law but the question of the measure of recovery is still, it seems, dependent on the various state laws in all their various interpretations. This is the question *Moragne* left unsolved. By which standard do you measure the amount of recovery—the various non-uniform state laws or the federal laws on recovery?

Recently Senator Warren Magnuson attempted to amend The Death on the High Seas Act by extending its coverage to not only include navigable waters more than a maritime league from shore, but also to include state territorial waters.[38] His bill was not enacted into law so this void on the correct measure of recovery is still there. The simplest solution would be to have Congress enact a new statute covering this area of questioning or at least (though not the best solution, in my opinion), extend The Death on the High Seas Act to cover state territorial waters. Until Congress acts on this new problem, the courts should continue to follow the lead of *Moragne* and grant recovery. After recovery is granted, caution should be observed so that the open-ended decision of *Moragne* does not once again lead to the confusion wrought by *The Tungus* and *Hess* on the question of a measure of recovery. If caution is not observed, further confusion and another intolerable lack of uniformity in the maritime law will be created and we will once again have a problem similar to pre-*Moragne* days.

RICHARD K. FOSTER

Mandatory Death: *State v. Waddell*

The North Carolina Supreme Court recently handed down a decision reversing a judgment insofar as it imposed the death sentence upon a defendant, James E. Waddell, convicted of rape.[1] However, this decision in

[38] S. 3143, 91st Cong., 1st Sess. (1969).

[1] State v. Waddell — N.C. —, — S.E.2d — (1973). This decision was filed January 18, 1973, and at the time this paper was written the decision had not been reported in advance sheet form.

no way abolished the death penalty in North Carolina. On the contrary, this decision imposed a mandatory death penalty where no mandatory death penalty existed before.

The Court based its decision on *Furman v. Georgia.*[2] In the *Furman* decision the United States Supreme Court held that the Georgia statute which gave the jury discretionary authority to impose the death penalty or life imprisonment on a defendant convicted of murder was a violation of the Eighth and Fourteenth Amendments in that it was cruel and unusual punishment. The United States Supreme Court seemed to be saying that the death penalty may not be unconstitutional per se, but that the death penalty is unconstitutional when imposed selectively by either a trial judge or jury. In that decision this view was stated by Mr. Justice Douglas in his opinion as follows:

> In a nation committed to equal protection of the law there is no permissible "caste" aspect of law enforcement. Yet we know the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, poor and lacking political clout, or if he is a member of a suspect or unpopular minority . . . Thus, these discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination. Whether a mandatory death penalty would otherwise be constitutional, in a gesture, I do not know.

The North Carolina statute under which Waddell was sentenced to death is similar to the Georgia statute which the *Furman* decision condemned. North Carolina General Statute § 14-21 reads as follows:

> Every person who is convicted of ravishing and carnally knowing any female . . . shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the state's prison, and the court shall so instruct the jury.

The statutes which cover the three remaining capital crimes (GS 14-17, murder; GS 14-52, burglary; GS 14-58, arson) include the same punishment provision as GS 14-21 above.

In applying *Furman* to the present Waddell case, the majority of the North Carolina Supreme Court, given in an opinion by Justice Huskins, interprets *Furman* as not invalidating the entire statute, but invalidating only that portion of GS 14-21 which gives the jury authority to recom-

[2] 408 U.S. 238, 33 L.Ed. 2d 346, 92 S.Ct. 2726 (1972).

mend life imprisonment. According to Justice Huskins this invalidation of this provision leaves intact that portion of the statute which precedes it and provides for punishment by death. This makes death the sole and exclusive punishment for rape.

Justice Huskins' rationale for this conclusion is that GS 14-21 is severable. Before 1949 the penalty for rape in North Carolina was mandatory death. A 1949 amendment added the proviso impowering the jury to recommend life imprisonment, which is the present GS 14-21. It is this proviso alone, contends Justice Huskins, not the entire statute that is condemned by the *Furman* decision. With this proviso severed from the statute, the punishment for rape is the same as it was before 1949—mandatory death.

The 1949 proviso was also included in the murder, burglary, and arson statutes; therefore, Justice Huskins contends that *Furman* makes death the sole punishment for those crimes also.

The question now arises—does the North Carolina Supreme Court have the authority to sever GS 14-21 or must the entire statute fall? Justice Huskins holds that the striking out of the invalid portion of the statute is within the power of the Court. As authority he cites 16 Am. Jur. § 186 which states that:

> If the objectionable parts of a statute are severable from the rest in such a way that the legislature would presume to have enacted the valid portion without the invalid, the failure of the latter will not necessarily render the entire statute invalid . . . .

As an additional authority he cites several North Carolina cases[3] and one United States Supreme Court case, *U. S. v. Jackson*,[4] all of which held substantially that the unconstitutionality or invalidity of part of a statute does not necessarily nullify the remainder unless it is evident that the legislature would not have enacted the statute without the invalid portion. The important and pertinent point of the above cited rule is that the Court must consider in so dismembering a statute the legislative intent or scheme behind the enactment of the statute. To satisfy this point Justice Huskins contends that the legislative intent can be inferred from past North Carolina legislative history.

North Carolina first enacted a statute authorizing the death penalty for rape in 1776, re-enacted it in 1860, amended it in 1949, and ratified

[3] Rank v. Lacy, 189 N.C. 75, 123 S.E.2d 475 (1924); Jackson v. Board of Adjustment, 275 N.C. 136, 166 S.E.2d 78 (1969); Clark v. Meyland, 261 N.C. 149, 134 S.E.2d 169 (1964).

[4] 399 U.S. 570, 20 L.Ed. 2d 132, 88 S.Ct. 1209 (1969).

it in the new state constitution in 1970. However, after the 1949 amendment the death penalty was no longer mandatory but was left to the discretion of the jury. Since 1949 seventeen bills or resolutions designed to abolish or limit the death penalty have failed to pass the North Carolina House. Accordingly, Justice Huskins concludes that such legislative history for almost two hundred years does not demonstrate any intent or desire of the legislature to impose any other punishment for rape than death.

The majority decision is based upon the supposition that when the legislature rewrote GS 14-21 in 1949, it would have left the statute unchanged had it known that a decision such as *Furman* would have invalidated the death penalty as authorized by the rewritten part.

The reason, as Justice Huskins explains it, that the defendant Waddell's life was spared in this case was the ex post facto doctrine. The North Carolina Constitution[5] provides that an upward change of penalty by legislative action cannot be constitutionally applied retroactively. Although this clause was addressed to the legislature, according to Justice Huskins, the ban against retroactive punishment applies to the court as well.

The rendering of a mandatory death penalty caused some dissension in the Court. A minority opinion of the Court, expressed in a strong dissent by Chief Justice Bobbitt, agrees with Justice Huskins and the majority that the *Furman* decision holds that the Eighth and Fourteenth Amendments will no longer tolerate infliction of the death penalty if either the judge or jury is permitted to impose that sentence as a matter of discretion. However, the Chief Justice does not agree that *Furman* authorizes this Court to dismember and invalidate any portion of GS 14-21, but says that *Furman* simply holds that:

> . . . no death sentence can be imposed and carried out so long as our statute, GS 14-21, contains provisions which leave the unbridled discretion of the jury which punishment shall be death or life imprisonment.

In the Chief Justice's interpretation the main thrust of *Furman* was only to restrict the circumstances under which the death penalty may constitutionally be imposed.

To support this conclusion the Chief Justice cites numerous cases from sister states which have statutes similar to North Carolina's GS 14-17, GS 14-21, GS 14-52, and GS 14-58. All of these cases were affected by

[5] N.C. Const. Art. I, § 16.

the *Furman* decision. Two of the most notable were *State v. Johnson*[6] and *Graham v. State*.[7]

In *State v. Johnson*, a 1972 Ohio case, the jury found the defendant guilty of murder in the first degree and he was sentenced to death when the jury did not recommend mercy. The pertinent portion of the Ohio statute[8] provided:

> whoever violates this section is guilty of murder in the first degree and shall be punished by death unless the jury trying the accused recommends mercy in which case the punishment shall be imprisonment for life.

Justice Brown, from the Ohio Supreme Court set forth a disposition of the case as follows:

> The United States Supreme Court has held that the carrying out of the death penalty imposed at the discretion of the trier of the fact constituted cruel and unusual punishment . . . Under that holding, which we are required to follow, the inflicting of the death penalty under the existing law of Ohio is now unconstitutional . . . and the sentence is reduced to life imprisonment.

In *Graham v. State*, a 1972 Arkansas case, the jury found the defendant guilty of murder in the first degree and did not recommend life imprisonment. The pertinent Arkansas statute[9] provided: "The jury shall have the right in all cases where punishment is death by law, to render a verdict of life imprisonment." On appeal the Arkansas Supreme Court upheld the conviction but remanded the case for a pronouncement of life imprisonment. In that decision the Court said:

> The United States Supreme Court has recently decided that where a jury is permitted to decide between the punishments of life and death, the death penalty constitutes cruel and unusual punishment . . . So long as this ruling in *Furman* is applicable to this State, we are obligated to reduce appellant's sentence from death to life imprisonment.

Other cases cited by Chief Justice Bobbitt having statutes similar to North Carolina's either state or clearly imply that under their existing statutes the death penalty may not be imposed and carried out, unless and until present statutory provisions are amended by the legislature. It is sug-

[6] 31 Ohio St. 2d 160, 235 N.E.2d 751 (1972).
[7] 432 S.W.2d 673 (1972).
[8] Ohio R.C. § 2201.01 (1954).
[9] Ark. Stat. Ann. § 49-2193 (1964).

gested by the Chief Justice that, likewise, North Carolina cannot impose a mandatory death sentence with its present statute without legislative action.

In the view of Chief Justice Bobbitt the Court has assumed a legislative rather than a judicial function. "Speculation as to what the legislature would do is a legally unsound move for the Court." He is in total agreement with previous holdings of this Court that the legislature not the Court decides public policy, responds to public opinion and, by legislative enactments, reflects society's standards. The matter of retention, modification, or abolition of the death penalty is a question for law-making authorities rather than the Courts. The Constitution of North Carolina[10] has authorized only the General Assembly to provide that crimes of murder, rape, burglary, and arson, and those only, may be punishable by death.

According to the Chief Justice, provided the Court had such authority to uphold a mandatory death penalty, there is no evidence that the legislature would have enacted a mandatory death penalty had they been confronted with such an issue. In a report submitted by the Judicial Council to the 1969 General Assembly attention was called to the possibility that the United States Supreme Court might render a decision like *Furman*. It was advised that if the General Assembly wished to continue the death penalty for rape it should amend GS 14-21 striking the following: "Provided, if the jury shall so recommend . . . the punishment shall be life imprisonment." As a result of this report, bills were introduced to fix death as sole punishment for rape, murder, burglary, and arson.[11] However, the General Assembly refused to prescribe death as the punishment without providing for the alternative of life imprisonment if the jury so recommends. The Chief Justice contends that the reasonable inference from the actions of the General Assembly is that it wanted GS 14-17, GS 14-21, GS 14-52, and GS 14-58 to remain exactly as they had been since 1949.

Justice Sharp joined with the Chief Justice's dissent saying that such action by this Court "violates fundamental constitutional principles"—the doctrine of separation of powers. The North Carolina Constitution[12] provides that "the legislature, executive, and supreme judicial powers of the state government shall be forever separate and distinct from each other." According to Justice Sharp the history of this Court has been one of judicial restraint and strict adherence to the doctrine of separation of

[10] N.C. Const. Art. XI, §§ 1 and 2.
[11] House Bill No. 133; House Bill No. 137 (1969).
[12] N.C. Const. Art. I, § 7.

powers, and "this Court has consistently deplored the encroachment of other courts upon the legislative prerogative during the past decade." While giving credence to the doctrine of separation of powers, the Court does what the General Assembly declined to do.

The decision of Waddell may have taken from the North Carolina jury the discretionary power to render life imprisonment or death in capital cases of guilty verdicts, but this is no guarantee that the death penalty will not be selectively imposed. There is still room for discrimination. A jury, having the awareness that a defendant in a capital case faces mandatory death if convicted, may be more reluctant to bring in a guilty verdict. This reluctance may stem from the fact that a defendant is black, white, rich, poor, or has red hair. Any punishment, death or otherwise, will remain cruel and unusual until such punishment is applied equally.

Several bills that would affect the death penalty have been proposed for introduction into the 1973 General Assembly, which is presently in session. The extent of these bills is not known at the present, but according to news reports at least two proposals seek a mandatory death penalty and at least one proposal opposes capital punishment. By the time this paper is printed, the outcome of these bills will probably be known. Whatever the legislature decides, the North Carolina Supreme Court will inevitably be confronted with its new law. It will be interesting to see how the Court will dissect the new law to conform to judicial specifications.

JOSEPH ADAMS

The Presumption of Legitimacy: A Rebuttable Presumption

A child born in wedlock is presumed to be legitimate. According to Professor Stansbury, "this presumption is one of the strongest known to the law and it has been said that 'irresistible evidence' of the rebutting circumstances is necessary to overcome it."[1] It is the purpose of this comment to examine the various methods by which this presumption may be rebutted, placing primary emphasis on blood grouping tests and North Carolina law.

The original common law seems to have made the presumption conclusive. That is, no proof no matter how convincing could refute the presumption that a child born in wedlock was the husband's legitimate child.

[1] D. Stansbury, *The North Carolina Law of Evidence*, Sec. 246 (2d ed. 1963).