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RECENT NORTH CAROLINA SUPREME COURT CASES ON CAPITAL PUNISHMENT

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On September 4, 1979, the North Carolina Supreme Court decided three cases involving the capital punishment sentencing statute, G.S. 15A-2000. They were State v. Cherry (No. 47-Mecklenburg), State. v. Goodman (No. 46-Cumberland), and State v. Johnson (No. 63-Cleveland). A majority of the justices (Branch, Copeland, Exum, Britt) joined in the opinion of the court in each case. Justice Carlton wrote a concurring opinion that explained what he believed to be the holdings in each case and specifically reserved his views on what he perceived to be dicta. Justice Huskins wrote a concurring opinion stating that he supported the majority opinion in each case and joined Justice Carlton's concurring opinion, which he believed correctly analyzed the results in the cases. Justice Brock did not participate. This memorandum attempts to briefly summarize the main points in the opinions of the court in these cases. Each section gives the name of the case that supports the discussion.

AGGRAVATING CIRCUMSTANCES

1. The aggravating circumstance in G.S. 15A-2000(e)(3) (prior conviction of felony involving violence) must be a felony conviction that occurred before the events from which the murder arose. State v. Goodman. (The reader should remember, however, that the General Assembly in Ch. 565 of the 1979 Session Laws, effective May 14, 1979, added a new aggravating circumstance that includes crimes of violence--not just convictions--against other persons which were a part of a course of conduct during which the murder occurred.

2. The aggravating circumstance in -2000(e)(4) (murder committed for purpose of avoiding or preventing lawful arrest or effecting an escape from custody) requires evidence from which the jury can infer that at least one purpose motivating the killing was the defendant's desire to avoid subsequent detection and apprehension for his crime. The death alone is not enough to invoke this factor. The court held that the evidence in State v. Goodman was sufficient, since it showed that after the victim was shot and cut but was still alive, the

defendant expressed concern that if the police found the victim he would tell them what had happened. The defendant killed him sometime later.

The court also held that the trial judge erred in submitting both -2000(e)(4) and -2000(e)(7) (murder committed to disrupt or hinder lawful exercise of a governmental function or enforcement of laws) when they were based on the same evidence. This resulted in an unnecessary duplication of aggravating circumstances.

3. When a defendant is convicted of first-degree murder based solely on the felony-murder theory, the underlying felony may not be used as an aggravating circumstance under -2000(e)(5). State v. Cherry. However, the underlying felony may be used if the defendant is convicted by the use of both theories, premeditation-and-deliberation and felony-murder, or by premeditation and deliberation alone. State v. Goodman. Based on these rulings, a defendant should request the trial judge to require the jury to specify the theory or theories upon which they have found the defendant guilty. If the jury specifies only felony-murder, the underlying felony may not be used as an aggravating circumstance.

4. The court held that -2000(e)(9) (murder was especially heinous, atrocious, or cruel) is directed at "the conscienceless or pitiless crime which is unnecessarily tortuous to the victim" and is limited to acts done to the victim during the commission of the murder itself. It approved the trial judge's instruction in State v. Goodman:

> You are instructed that the words "especially heinous, atrocious or cruel" means extremely or especially or particularly heinous or atrocious or cruel. You're instructed that "heinous" means extremely wicked or shockingly evil. Atrocious means marked by or given to extreme wickedness, brutality or cruelty, marked by extreme violence or savagely fierce. It means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain, utterly indifferent to[,] or enjoyment of[,] the suffering of others.

Upon defendant's request, the trial judge must instruct the jury that "not every murder is necessarily especially heinous, atrocious, or cruel in the sense those words are used" in -2000(e)(9). State v. Johnson.

MITIGATING CIRCUMSTANCES

1. The defendant has the burden of proving mitigating circumstances by a preponderance of the evidence. (The statute was silent on this point.) If all the evidence, if believed, tends to show that a particular mitigating circumstance exists, the defendant is entitled, upon his request, to a peremptory instruction on the issue. State v. Johnson.

2. Slight intoxication is not sufficient as a mitigating circumstance under -2000(f)(6) (defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired), although it may be considered under -2000(f)(9). In order to raise an issue under -2000(f)(6), intoxication must affect the defendant's ability to understand and control his actions. The court approved the following jury instruction in State v. Goodman, where intoxication was the only impairing factor:

> Generally, voluntary intoxication is not a legal excuse for crime. However, if you believe that he had been drinking and was drunk or intoxicated and that this impaired his mental and physical capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of the law, then you should [judge describes how to answer questions posed]

3. The court held in State v. Johnson that the trial judge inadequately defined -2000(f)(6) in his jury instructions. The defendant pled guilty to first-degree murder and at the sentencing hearing had a psychiatrist testify that his mental capacities were impaired at the time of the murder.

This is the insufficient instruction:

> The third mitigating circumstance listed is: The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired. That means his capacity to recognize what he was doing was a criminal act or his capacity to follow the law was lessened by reason of an impairment of his capacity in those respects.

The court explained the problem with this instruction:

> On this state of the record, then, the trial court's cryptic reference to this mitigating circumstance in the definitional portion of his instructions was prejudicially insufficient. Defendant was entitled to a fuller treatment of the issue. The trial court should have explained the difference between defendant's capacity to know right from wrong which defendant conceded he possessed, and the impairment of his capacity to appreciate the criminality of his conduct from which his evidence indicated and he contends he suffered. While defendant might have known that his conduct was wrong, he might not have been able to appreciate, i.e., to fully comprehend, or be fully sensible, of its wrongfulness. Further while his capacity to so appreciate the wrongfulness of his conduct might not have been totally obliterated, it might have been impaired, i.e., lessened or diminished. The trial court should also have more carefully explained that even if there was no impairment of defendant's capacity to appreciate the criminality of his conduct, the jury should nevertheless find the existence of this mitigating factor if it believed that defendant's capacity to conform his conduct to the law, i.e., his capacity to refrain from illegal conduct, was impaired. Again, this does not mean that defendant must wholly lack all capacity to conform. It means only that such capacity as he might otherwise have had in the absence of his mental defect is lessened or diminished because of the defect.

4. The court held in State v. Cherry that -2000(f)(9) ("any other circumstance . . . [having] mitigating value") allows the defendant to introduce only relevant evidence concerning the defendant, his character or record, or the circumstances of the offense. The trial judge properly excluded the following evidence from the sentencing hearing: (1) an affidavit from a New Mexico ex-convict showing that he had been rehabilitated after release from prison (he had been under a death sentence at one time); (2) an affidavit of Dr. William Bowers stating that the death penalty is counterproductive as a deterrent to crime; (3) a newspaper reporter's affidavit stating that he believed that sometimes innocent people were executed; and (4) several ministers' affidavits expressing their religious opposition to the death penalty.

5. A defendant must request the trial judge to include in his jury instructions particular items (e.g., good character, model prisoner since arrest) of mitigating value under -2000(f)(9). Otherwise, the trial judge may simply instruct the jury that it may consider any circumstance which it finds to have mitigating value under the subdivision. The trial judge is not required to sift the evidence to find possible mitigating circumstances. State v. Goodman; State v. Johnson.

Upon defendant's request, the trial judge must submit to the jury in writing a list of all mitigating circumstances supported by the evidence--those circumstances enumerated by -2000(f)(1)-(8) as well as those the defendant has specified under -2000(f)(9). State v. Johnson.

OTHER JURY INSTRUCTIONS

1. The court suggested the following wording, "Do you find beyond a reasonable doubt that the aggravating circumstances found by you outweigh the mitigating circumstances found by you?" be used instead of, "Do you find beyond a reasonable doubt that the mitigating circumstances are insufficient to outweigh the aggravating circumstances?". State v. Goodman.

2. It would be error for a trial judge to instruct the sentencing jury that they might recommend a sentence of life imprisonment even though they found aggravating circumstances outweighed mitigating circumstances. State v. Goodman.

PLEA BARGAINING

If the State has evidence to prove an aggravating circumstance beyond a reasonable doubt, the prosecutor may not promise to sit quiet at the sentencing hearing in exchange for a guilty plea to first-degree murder. If the prosecutor has no such evidence, he may announce that fact to the court. Although a sentencing jury then must still be impanelled, the judge may sentence the defendant to life imprisonment without having the jury consider the case. State v. Johnson.