THE DEATH PENALTY IN NORTH CAROLINA

HISTORY AND OVERVIEW

Jamie Markham (for Jeff Welty)

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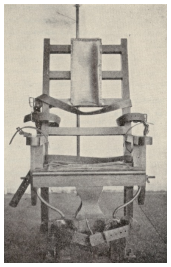
Early Years

- First execution in 1726
- Death penalty administered locally
- Many crimes punishable by death

2

"Delocalization"

- State assumed responsibility for executions in 1910
- Method changed to electrocution
- Narrowing of capital crimes
- Continued racial bias



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Furman and Its Aftermath

- *Furman v. Georgia*, 408 U.S. 238 (1972)
  - Unbridled discretion regarding imposition of the death penalty renders it arbitrary and violates the Eighth Amendment
- *Waddell* and *Woodson*
  - Mandatory death penalty? No, it may only be imposed on an individualized basis
- *Gregg v. Georgia*, 428 U.S. 153 (1976)
  - A new way forward: guided discretion

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A New Statute

- 1977: General Assembly enacts a new death penalty statute
  - Modeled on *Gregg*
  - Remains the law, with some amendments
  - Key provisions
    - Bifurcated proceeding
    - Enumerated aggravating and mitigating circumstances
    - Proportionality review

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Narrowing the Death Penalty

- New limitations over time
  - *Enmund v. Florida*, 458 U.S. 782 (1982) (no death penalty for felony murder accomplices with minor roles)
  - G.S. 15A-2005 and *Atkins v. Virginia*, 536 U.S. 304 (2002) (no death penalty for intellectually disabled [then called "mentally retarded"] defendants)
  - *Roper v. Simmons*, 543 U.S. 551 (2005) (no death penalty for juveniles)

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Other Important Developments

- Structured Sentencing
  - Made LWOP the sole alternative to the death penalty
- Giving prosecutors discretion regarding whether to seek the death penalty
  - G.S. 15A-2004
- The Racial Justice Act
  - G.S. 15A-2010 *et seq.*
  - Enacted 2009, repealed 2013

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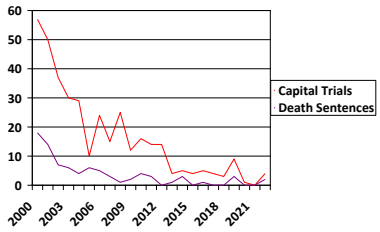
Fewer Capital Trials and Death Verdicts



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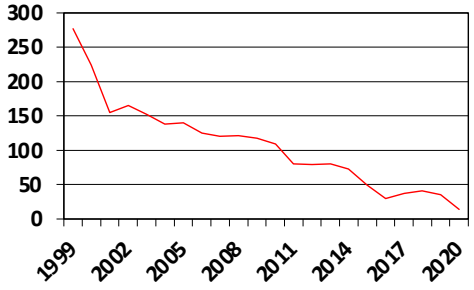
National Decline in Death Sentences



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No Executions Since 2006

Executions by State

State	Total Executions	2024	2023	2022	2021	2020
Texas	587	1	8	5	3	3
Oklahoma	124	1	4	5	2	0
Virginia	113	0	0	0	0	0
Florida	105	0	6	0	0	0
Missouri	98	1	4	2	1	1
Georgia	77	1	0	0	0	1
Alabama	73	1	2	2	1	1
Ohio	56	0	0	0	0	0
North Carolina	43	0	0	0	0	0
South Carolina	43	0	0	0	0	0
Arizona	40	0	0	3	0	0
Arkansas	31	0	0	0	0	0
Louisiana	28	0	0	0	0	0
Mississippi	23	0	0	1	1	0
Indiana	20	0	0	0	0	0
Delaware	16	0	0	0	0	0
U.S. Federal Gov't	16	0	0	0	3	10

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Death Row Today

- Men at Central Prison
- Women at Women's Prison
- 136 inmates = 5th largest death row nationally
- Longest serving there since 1985

	White	Black	Native Am.	Other
Male	50	74	6	4
Female	1	1	0	0

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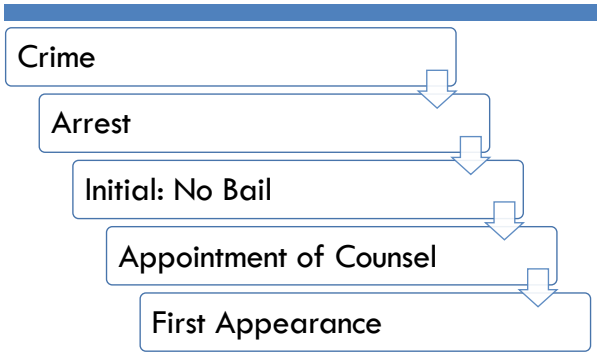
Capital Case Flow Chart



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Capital Case Flow Chart

- Indictment
- Rule 24 Hearing
- Pretrial Motions
- Trial
- Direct Appeal

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Capital Case Flow Chart

- MAR
- Federal habeas
- Clemency
- Execution

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The Death Penalty in North Carolina: History and Overview

Jeff Welty

April 2012, revised April 2017, further revised May 2024

This paper provides a brief history of the death penalty in North Carolina, a snapshot of the death penalty today, and an overview of the steps in a capital case.

The History of the Death Penalty in North Carolina

The death penalty has been a part of North Carolina law since the state was a British colony. The first known execution by colonial authorities was the hanging of a Native American man in 1726. In colonial times, the death penalty was available as a punishment for an array of different crimes.[1] Until the second half of the twentieth century, the death penalty was a permissible, and sometimes mandatory, punishment for crimes including murder, rape, burglary, and arson.

From colonial times through statehood and the civil war, the death penalty was carried out by local officials, usually by hanging. Racial prejudice permeated society at that time, and the criminal justice system, including the death penalty, was no exception. Historical evidence indicates that the death penalty was imposed disproportionately on blacks, especially for rape and burglary.

A significant change took place in 1910, when the state assumed responsibility for executions in an effort to make them more consistent and humane. "On March 18, 1910, Walter Morrison, a laborer from Robeson County, became the first man to die in the state's electric chair at Central Prison."[2] This made North Carolina a national leader in "delocalization."[3]

The next major development took place when the Supreme Court decided *Furman v. Georgia*, 408 U.S. 238 (1972). The Court ruled that the imposition of the death penalty was arbitrary and therefore violated the Eighth Amendment when the decision whether to impose the death penalty was left to the unbridled discretion of the judge or jury. *Furman* effectively invalidated all existing death penalty laws nationwide. In North Carolina, it led to the decision in *State v. Waddell*, 282 N.C. 431 (1973), which reasoned that if a discretionary death penalty was unconstitutional, the statutes authorizing the death penalty for murder, rape, arson, and burglary would be interpreted as mandatory. After *Waddell*, the number of inmates on death row ballooned to 120, making North Carolina's death row the largest in the nation at the time.[4]

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[1] North Carolina History Project, *Capital Punishment*, http://www.northcarolinahistory.org/encyclopedia/488/entry ("As late as 1817, twenty-eight crimes including burglary and counterfeiting could warrant the death penalty in the Tar Heel State.")

[2] North Carolina Department of Public Safety, *History of Capital Punishment in North Carolina*, http://www.doc.state.nc.us/dop/deathpenalty/DPhistory.htm.

[3] Seth Kotch & Robert P. Mosteller, *The Racial Justice Act*, 88 N.C. L. Rev. 2031 (2010).

[4] North Carolina Department of Public Safety, *History of Capital Punishment in North Carolina*, http://www.doc.state.nc.us/dop/deathpenalty/DPhistory.htm.

Waddell's mandatory death penalty regime was challenged and struck down in *Woodson v. North Carolina*, 428 U.S. 280 (1976), which held that the death penalty could be imposed only after particularized consideration of each defendant, his crimes, and his character. However, the Supreme Court charted a new way forward in *Gregg v. Georgia*, 428 U.S. 153 (1976). In that case, the Court upheld the constitutionality of Georgia's death penalty statute, which provided for bifurcated guilt and penalty phases, required the jury to find statutory aggravating and mitigating circumstances to guide its decision regarding the imposition of the death penalty, and guaranteed subsequent proportionality review by the state supreme court.

Subsequently, in 1977, North Carolina enacted a new death penalty statute. With some modifications, it remains the law today. *See generally* G.S. 15A-2000 *et seq.* Like the Georgia statute at issue in *Gregg*, it provides for a separate penalty phase and uses enumerated aggravating and mitigating circumstances to guide the jury's discretion.

At that point, North Carolina continued to authorize the death penalty as a punishment for some non-homicide offenses. However, the Supreme Court held in *Coker v. Georgia*, 433 U.S. 584 (1977), that the Eighth Amendment prohibited the imposition of the death penalty as a punishment for the rape of an adult woman. (It later held, in *Kennedy v. Louisiana*, 554 U.S. 407 (2008), that the death penalty may not be imposed for the rape of a child.) In 1979, the General Assembly rewrote the state's sexual assault laws, removing the possibility of the death penalty. *In re R.L.C.*, 179 N.C. App. 311 (2006) ("The death penalty was not completely removed from the [rape] statute until 1979 when all sex offenses were clarified, modernized, and consolidated"); S.L. 1979-682.

Major decisions in the 1980s and 1990s included the Court's rulings in *Enmund v. Florida*, 458 U.S. 782 (1982) (prohibiting the application of the death penalty to certain defendants who are guilty only as accomplices to felony murder), and *McKoy v. North Carolina*, 494 U.S. 433 (1990) (invalidating North Carolina's rule that a mitigating circumstance must be found unanimously in order to be considered by the jury). In 1994, North Carolina enacted Structured Sentencing, which made life imprisonment without parole the sole alternative to the death penalty. 1998, North Carolina made lethal injection the exclusive method of execution.

In 2001, the General Assembly modified the death penalty statute in two significant ways. First, it enacted G.S. 15A-2004, which gives prosecutors the discretion to decline to seek the death penalty; prior law had required prosecutors to pursue the death penalty when there was evidence of at least one aggravating circumstance. Second, it prohibited the imposition of the death penalty on intellectually disabled (formerly called mentally retarded) defendants, a prohibition that was later constitutionalized in *Atkins v. Virginia*, 536 U.S. 304 (2002).

Recent years have continued to see important changes in the death penalty process. In 2005, the Supreme Court decided *Roper v. Simmons*, 543 U.S. 551 (2005), which made juveniles ineligible for the death penalty. In *Baze v. Rees*, 553 U.S. 35 (2008), the Court rejected an Eighth Amendment challenge to lethal injection as a method of execution, though litigation over lethal injection continues in various forms.

In 2009, the General Assembly enacted the Racial Justice Act, G.S. 15A-2010 *et seq.* It was designed to remove racial discrimination from the death penalty system, but critics contended that it was drafted too broadly and invited endless litigation based on statistical correlations not indicative of discrimination. It was narrowed by amendment in 2012, S.L. 2012-136, and was repealed in 2013, S.L. 2013-154. Therefore, defendants charged today have no recourse under the Act. The repeal was intended to be retroactive, that is, to extinguish pending claims under the Act. However, in *State v. Ramseur*, 374 N.C. 658 (2020), the Supreme Court of North Carolina ruled that the retroactivity provision violated the prohibitions against *ex post facto* laws contained in the United States Constitution and in the North Carolina Constitution. Therefore, death-sentenced inmates who filed claims under the Act remain entitled to have their claims heard.

In the Spring of 2024, Superior Court Judge Wayland J. Sermons, Jr., conducted a hearing on RJA claims filed by Hasson Bacote. The case is widely viewed as a test case for future RJA claims, particularly claims based on allegations of racial discrimination in jury selection. Bacote's claims are based in part on research published in Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post*-Batson *North Carolina Capital Trials,* Iowa L. Rev. 1531 (2012). The article is predicated on the review of transcripts of North Carolina capital trials over a twenty-year period. Its key finding is that "prosecutors struck eligible black venire members at about 2.5 times the rate they struck eligible venire members who were not black" and that the disparity "did not diminish when we controlled for information . . . that potentially bore on the decision to strike [jurors], such as views on the death penalty or prior experience with crime." Whether the research was methodologically sound was the subject of extensive testimony at the Bacote hearing. The study was also previously addressed in *State v. Tucker*, 385 N.C. 471 (2023), where the court stated that the "study . . . was unreliable and fatally flawed," at least as it was used in that matter, because it "inaptly imputed racial motives to peremptory strikes for cases in which *Batson* arguments had not been made or *Batson* violations had not been found" and included cases that were tried years after the defendant was sentenced to death. A ruling on the Bacote matter is expected later this year and is virtually certain to be appealed.

The Death Penalty Today

For nearly two decades, the number of capital trials, death sentences, and executions have been falling compared to historical levels. The chart below shows the number of capital trials and death sentences in North Carolina since 2000.[5]

Year	Capital Trials	Death Sentences
2000	57	18
2001	50	14
2002	37	7
2003	30	6
2004	29	4
2005	10	6
2006	24	5
2007	15	3
2008	25	1
2009	12	2
2010	16	4
2011	14	3
2012	14	0
2013	4	1
2014	5	3
2015	4	0
2016	5	1
2017	4	0
2018	3	0
2019	9	3
2020	1	0
2021	0	0
2022	4	2

The last person to be executed in North Carolina was Samuel Flippen, who was put to death on August 18, 2006.[6] Since that time, there has been a *de facto* moratorium on executions, as a result of several related challenges to the death penalty system, some but not all of which have been resolved.

[5] Data regarding death sentences are from the Death Penalty Information Center, https://deathpenaltyinfo.org/death-sentences-united-states-1977-present. Data regarding capital trials are drawn primarily from N.C. Office of Indigent Defense Services, *FY15 Capital Trial Case Study* 11, http://www.ncids.org/Reports%20&%20Data/Latest%20Releases/FY15CapitalCaseStudy.pdf, and N.C. Office of Indigent Defense Services, *FY07 Capital Trial Case Study* 2, http://www.ncids.org/Reports%20&%20Data/Latest%20Releases/FY07CapitalStudyFinal.pdf. Both reports use fiscal year reporting. Data regarding capital trials in years 2000, 2001, and 2006 are from the North Carolina Capital Defender. Data regarding capital trials since 2016 are from the Center for Death Penalty Litigation.

[6] North Carolina Department of Public Safety, *News Regarding Scheduled Executions*, http://www.doc.state.nc.us/dop/deathpenalty/execution_news.htm.

- First, the North Carolina Medical Board announced that doctors could not ethically participate in executions (beyond certifying the inmate's death). The possibility of professional discipline made it impossible for the state to procure a physician to oversee executions, yet the version of G.S. 15-190 in effect at that time mandated the presence of "the surgeon or physician of the penitentiary,"[7] and a federal district judge ruled that Eighth Amendment concerns might be raised if medical personnel did not monitor an inmate who was being executed. The Department of Correction (now the Department of Adult Correction) sued, arguing that the Board had overstepped its authority by undermining state law. In *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189 (2009), the state supreme court agreed.
- Second, North Carolina death row inmates, like similarly-situated people across the country, began to raise Eighth Amendment challenges to lethal injection as a method of execution. Death-sentenced defendants began to argue that states' execution protocols could potentially cause severe pain prior to death because they involved poorly-chosen chemicals, or required the chemicals to be administered in the wrong order, or failed to take into account the particular medical conditions of certain inmates, such as inmates whose veins may be difficult to access or fragile. The United States Supreme Court rejected an Eighth Amendment challenge to Kentucky's lethal injection protocol in *Baze v. Rees*, 553 U.S. 35 (2008). That protocol mandated the use of a three-drug "cocktail" that was broadly similar to the protocol in effect at that time in North Carolina. However, the General Assembly subsequently amended G.S. 15-188, the statute governing the method of execution, and in 2013 what is now the Department of Adult Correction adopted a new protocol that calls for the use of a single drug, pentobarbital.[8] Further litigation ensued in both state and federal courts, but that litigation has been stayed or held in abeyance pending the resolution of litigation under the Racial Justice Act, described below.[9]
- Third, separate from the *constitutional* challenges to North Carolina's execution protocol, death row inmates presented an *administrative* challenge, arguing that the protocol had been adopted or revised in violation of the requirement, in effect at the time, that changes to the protocol be approved by the Council of State.[10] The Council had approved the revision in a non-public meeting, and several death row inmates argued, *inter alia*, that the Council was required to, but did not, follow the process set forth in the Administrative Procedures Act when adopting the protocol. This argument was rejected by the state supreme court in *Conner v. North Carolina Council of State*, 365 N.C. 242 (2011). As noted above, a new protocol, adopted under a revised statute, was promulgated in 2013.
- Fourth, and finally, the General Assembly enacted the Racial Justice Act in 2009. Virtually every death-sentenced inmate in North Carolina filed a claim under the Act. As explained above, the Act was repealed in 2013, and the repeal bill indicated an intent for the repeal to operate

[7] The statute has since been amended to allow certain "medical professional[s] other than a physician" to be present. S.L. 2015-198. The legislature has also expressly excluded lethal injection from the practice of medicine. S.L. 2013-154.

[8] The current protocol is available online at https://www.dac.nc.gov/documents/files/execution-procedure-manual-single-drug-protocol-pentobarbital/download?attachment.

[9] *See Order, Robinson v. Hooks*, 07 CVS 1109 (Wake Co. Superior Ct., Mar. 11, 2019) (discussing status of federal litigation and staying state litigation pending the disposition of litigation concerning the RJA).

[10] That requirement, former present in G.S. 15-188, has since been removed. S.L. 2012-136.

retroactively to eliminate the claims that had been filed.[11] However, the Supreme Court of North Carolina ruled that the repeal cannot operate retroactively. Thus, litigation under the Act is ongoing.

According to the Department of Adult Correction, as of May 15, 2024, there were 136 inmates on North Carolina's death row.[12] North Carolina has the nation's fifth-largest death row.[13] Of the 136 inmates, 134 are men, housed at Central Prison in Raleigh. Two are women, housed at the North Carolina Correctional Institution for Women – commonly called "Women's Prison" – also in Raleigh. By race, 75 inmates are black, 51 are white, six are Native American, and four belong to other racial groups. Wayne Laws, from Davidson County, is the longest-serving inmate on death row, having been sentenced to death in 1985. No other current inmate was sentenced to death before 1990, but several have been on death row since the early 1990s.

Steps in a Capital Case

A capital case begins with a murder and an arrest. The first legally distinctive feature of the case arises when the defendant is taken before a magistrate for his initial appearance. In most non-capital cases, it is mandatory that the magistrate set conditions of release, but in capital cases, G.S. 15A-533(c) provides that "[a] judge may determine in his discretion whether a defendant charged with a capital offense may be released before trial." The use of the word "judge" appears to mean that a magistrate may not set release conditions for a defendant charged with first-degree murder, and the use of the word "may" indicates that release is discretionary, not mandatory.

Another unique aspect of capital cases concerns the appointment of counsel. The Office of Indigent Defense Services, rather than the court, appoints counsel for indigent defendants in capital cases – and virtually all capital defendants qualify as indigent, given the prohibitive costs of defending a capital prosecution. IDS appoints one attorney "as soon as feasible after the [defendant] is taken into custody or service is made upon him of the charge." G.S. 7A-451(b). *See also* IDS, *Rules for Providing Legal Representation in Capital Cases, Part 2*, §2A.2(a). Thus, a capital defendant normally is represented prior to the defendant's first appearance before a district court judge. Furthermore, capital defendants are entitled by statute to two lawyers. IDS normally will appoint a second attorney no later than immediately following the Rule 24 hearing, a proceeding discussed below.

Either in lieu of, or after, a probable cause hearing, the defendant will be indicted. (Under G.S. 15A-642, indictment may not be waived in capital cases.) The indictment normally will use the so-called statutory short form charging language, which is set forth in G.S. 15-144 (stating that when charging murder, "it is sufficient . . . to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder" the victim). The adequacy of the short form language has been challenged many times

[11] S.L. 2013-154.
[12] North Carolina Department of Adult Correction, *Death Row Roster*, https://www.dac.nc.gov/divisions-and-sections/institutions/death-penalty/death-row-roster.
[13] Death Penalty Information Center, *Death Row Inmates by State*, https://deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year.

on the ground that it does not specifically state all the elements of first-degree murder, but it has always been upheld. *See*, *e.g.*, *State v. Hunt*, 357 N.C. 257 (2003).

The pretrial stage of a capital case is generally similar to the pretrial stage of other felony cases, though a greater number of pretrial motions may be filed. One distinctive feature of capital cases is the requirement of a pretrial hearing under Rule 24 of the General Rules of Practice for the Superior and District Courts. That rule requires a pretrial conference in every potentially capital case. At the conference, the court normally will consider a forecast of the state's evidence. The court may then determine whether there is sufficient evidence of at least one statutory aggravating circumstance for the case to proceed capitally.

There are several unique aspects to capital trials.

- Intellectual disability. Both constitutional and statutory law prohibit the imposition of the death penalty on intellectually disabled (formerly called mentally retarded) defendants. G.S. 15A-2005(c) provides that when the defendant moves to strike the death penalty on the grounds of intellectual disability, and when the motion is supported by appropriate affidavits, the court *may* order a pretrial hearing to determine whether the defendant is intellectually disabled. If the state consents, the court *must* hold a pretrial hearing. If the court holds a hearing and determines that the defendant is intellectually disabled, it must declare the case to be non-capital. If the court determines that the defendant has not established intellectual disability, the defendant has the right to present the issue of intellectual disability to the jury at the capital sentencing hearing.
- Jury selection. Jury selection in capital cases is distinctive in several ways. First, the state and each defendant are entitled to 14 peremptory challenges, rather than 6 as is the norm in non-capital cases. G.S. 15A-1217(a). Second, G.S. 15A-1214(j) expressly recognizes the trial judge's discretion to require jurors to be selected individually in capital cases, and individual jury selection is relatively common in such cases. Third, jurors must be both "death qualified" and "life qualified." That is, any juror who is not able to consider both the death penalty and life without parole as possible sentences in a first-degree murder case must be excused for cause.
- Penalty phase. If the defendant is convicted of first-degree murder, the case continues to a penalty phase. When intellectual disability is at issue, the jury must determine whether the defendant is intellectually disabled. When intellectual disability is not at issue, or if the jury determines that the defendant is not intellectually disabled, the jury is asked to determine (1) whether the state has proven the existence of any aggravating circumstances; (2) whether the defendant has proven any mitigating circumstances; (3) whether the aggravators outweigh the mitigators, and (4) whether the aggravators, weighed against the mitigators, are sufficiently substantial to call for the death penalty.

Although proceedings after the trial are beyond the scope of this course, it is worth briefly describing the process. A defendant who is convicted of first-degree murder and sentenced to death may appeal of right directly to the North Carolina Supreme Court. N.C. R. App. P. 4(d). If that appeal is unsuccessful, the

defendant may file a petition for a writ of certiorari with the United States Supreme Court, asking that court to review any claims grounded in federal law.

If the United States Supreme Court denies review, the case enters what are generally called post-conviction proceedings. That term encompasses both state and federal collateral review. State collateral attack proceedings normally come first, and involve the filing of a motion for appropriate relief. If a defendant is denied relief in state court, he then typically files a federal habeas petition seeking review of any collateral review claims that are based in federal law. If the defendant is also unsuccessful in federal court, an execution date may be set.

Once an execution date has been set, the defendant may seek clemency from the governor. If clemency is denied – and if any last-minute motions by the defendant, such as successor motions for appropriate relief, are unsuccessful – the defendant will be executed by lethal injection.