

AGGRAVATING AND MITIGATING CIRCUMSTANCES

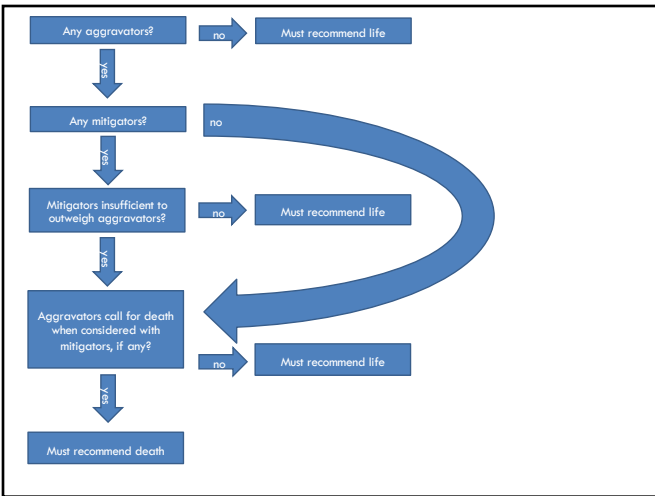
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Overview of Penalty Phase

- Same jury as guilt phase
- Opening statements discretionary
- Rules of evidence don't apply but provide "guidance"
 - ▣ Confrontation Clause/Crawford does apply
- Intellectual disability and Enmund issues must be decided first
- If none, or if resolved in the state's favor, the jury uses a four-step process to determine sentence

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Aggravating Circumstances

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Overview of Aggravating Circumstances

- There are 11
- Listed in G.S. 15A-2000(e)
- Burden is on state to prove beyond a reasonable doubt
- Whether to submit
 - ▣ View evidence in the light most favorable to the state
 - ▣ But resolve doubt in favor of the defendant
- Jury must find unanimously

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Double Counting

- Can't submitting multiple aggravating circumstances based on the same evidence
 - ▣ Example: Fact that a defendant killed a victim during a rape cannot support both (e)(5) (during a specified felony) and (e)(9) (especially heinous, atrocious, or cruel)
- "While a complete overlap is impermissible, some overlap in the evidence supporting each aggravating circumstance is permissible."
 - ▣ State v. Miller, 357 N.C. 583 (2003)
 - ▣ Example: Evidence that a defendant severely beat the victim during the rape can support (e)(9) while the rape itself can support (e)(5)

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More Double Counting

- Exception: The same evidence may support aggravators directed at different aspects of the offense
 - **Example:** The fact that a defendant killed a police officer while resisting arrest may support both (e)(4) (murder to prevent arrest or effect escape) and (e)(8) (murder of LEO). While (e)(4) is directed at the defendant's motive, (e)(8) is directed at the status of the victim

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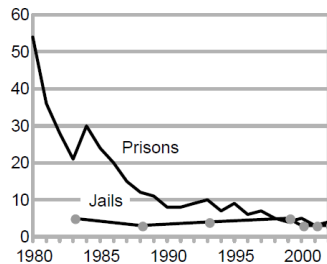
Still More Double Counting

- If a defendant is convicted only of felony murder, the underlying felony can't be used to support (e)(5) (during specified felony)
- The same evidence can be used to prove an element of first-degree murder and to support an aggravating circumstance

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(e)(1) Incarcerated Defendant

Homicides per 100,000 inmates



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(e)(2) Previous Capital Felony

- Crime must have been punishable by death at the time it was committed
- Prosecution need not have sought or obtained a death sentence
- Previous capital felony must have been committed before current capital felony, but previous conviction need not antedate current crime

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(e)(3) Previous Violent Felony

- “[F]elony involving the use or threat of violence to the person” means
 - Felony with violence or threat as an element
 - E.g., rape, common law robbery; involuntary manslaughter, attempted rape
 - Felony that was in fact committed by violence or threat
- Timing: The offense date of the previous violent felony must predate the commission of the capital felony
- Multiple previous violent felonies may be submitted as separate aggravators or in support of a single aggravator
- State may offer details about the circumstances of prior convictions, even if defendant stipulates to them

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(e)(4) Prevent Arrest/Effect Escape

- Cases focus on preventing arrest, not effecting escape
- “Witness elimination” is the most common theory
 - ▣ Easy when based on defendant’s statements
 - ▣ May sometimes be inferred from circumstances
- Proper to submit (e)(4) on the same evidence as (e)(8) (murder of law enforcement officer)

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(e)(5) During Specified Felony

- Applies if defendant was committing, attempting, or fleeing after “any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping,” aircraft piracy, or bombing
- Can’t submit based on felony used to support felony murder if defendant was convicted only under felony murder
- Continuous transaction doctrine/afterthoughts
- May submit multiple (e)(5) circumstances based on multiple felonies

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(e)(6) Pecuniary Gain

- Need only be a motive, not the motive
- Can’t be an afterthought
- Can’t submit (e)(5) (during specified felony) and (e)(6) where motive for the specified felony is pecuniary gain
 - ▣ Must choose one
 - ▣ Recall that (e)(5) is precluded if the specified felony was the basis for felony murder and the defendant was convicted only under that theory

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(e)(7) Hinder Governmental Function or Law Enforcement

- Applies when the murder “was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws”
- May overlap with (e)(4) (prevent arrest/effect escape)
 - ▣ Can't submit both
- May overlap with (e)(8) (against law enforcement officer or specified others)
 - ▣ Can't submit both

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(e)(8) Against Law Enforcement Officer or Specified Others

- Applies when victim is an officer, correction officer, fireman, judge, prosecutor, juror or witness killed “while engaged in the performance of his official duties or because of the exercise of his official duty.”
- Witnesses aren't perpetually “engaged in” duties
- “Off duty” officers may be “engaged in” duties
- Can submit on same evidence as (e)(4) (prevent arrest/effect escape)

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(e)(9) HAC

- Applies when the murder is “especially heinous, atrocious, or cruel”
 - ▣ Includes unusually agonizing, dehumanizing, pitiless, torturous, or depraved murders, or those committed using grossly excessive force
- Frequent partial overlap with (e)(5) (during specified felony)

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(e)(10) Risk of Death to Multiple People by Hazardous Weapon

- “The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person”
- Use of any gun when more than one person (other than the shooter) is present likely supports this circumstance
 - ▣ But may not so instruct the jury as a matter of law
- Other examples: vehicles, bombs and incendiary devices

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(e)(11) Course of Violent Conduct

- Murder was “part of a course of conduct . . . which included the commission . . . of other crimes of violence against another person or persons”
- Are two crimes part of one course of conduct?
 - ▣ Close in time?
 - ▣ Same modus operandi?
 - ▣ Similar motive?
- In multiple murders, each may aggravate the other

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Mitigating Circumstances

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Overview of Mitigating Circumstances

- Statutory mitigating circumstances
 - ▣ Eight specific circumstances, plus a catchall
 - ▣ Must submit the catchall and any specific circumstances that are supported by the evidence
- Non-statutory mitigating circumstances
 - ▣ Must submit if supported by the evidence
- General rules
 - ▣ Burden of proof is on the defendant by the preponderance of the evidence
 - ▣ Jury need not be unanimous

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(f)(1) No Significant Prior Criminal Activity

- “The defendant has no significant history of prior criminal activity”
- “Significant” = likely to affect sentencing recommendation
- Number, recency, and severity of prior crimes are all relevant
- If no evidence from either side, do not submit
- If defendant objects to submission, special procedures are required

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(f)(2) Mental/Emotional Disturbance

- Murder “was committed while the defendant was under the influence of mental or emotional disturbance”
- Must be some nexus between the disturbance and the crime
- Voluntary intoxication alone doesn’t count

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(f)(3) Victim Voluntary Participant

- “The victim was a voluntary participant in the defendant’s homicidal conduct or consented to the homicidal act”
- Not frequently submitted
- What if the victim voluntarily fought with the defendant?

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(f)(4) Minor Participant

- “The defendant was an accomplice in or an accessory to the capital felony committed by another person and his participation was relatively minor”
- Not frequently submitted
- Relationship to Enmund

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(f)(5) Duress or Domination by Another

- “The defendant acted under duress or under the domination of another person”
- Must be some nexus between the domination and the crime
- Not frequently submitted

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(f)(6) Impaired Capacity

- “The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired”
- Two distinct prongs
- “Insanity light”?
- Mental conditions, voluntary intoxication may establish if evidence shows they impaired capacity
- Expert testimony not required

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(f)(7) Age

- “The age of the defendant at the time of the crime”
- Not just chronological: immaturity, lack of emotional or intellectual development must also be considered
- Rough rule of thumb: actually or constructively a teenager?



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(f)(8) Assistance to Law Enforcement

- “The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution” in a felony case
- A defendant may aid in apprehension unintentionally (?)
- Truthful testimony may be in connection with any felony, not just capital felonies

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(f)(9) Catchall

- “Any other circumstance arising from the evidence which the jury deems to have mitigating value”
- Must submit (f)(9) itself
- Must submit any specific circumstance that the evidence supports and that a juror might reasonably view as mitigating
 - ▣ Generally, any aspect of the defendant’s character or history, or any aspect of the crime itself, that might provide a basis for a sentence less than death

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(f)(9) Catchall (cont’d)

- Examples
 - ▣ Defendant has been gainfully employed
 - ▣ Defendant was abused by his parents
 - ▣ Defendant has shown remorse
- Not nonstatutory mitigating circumstances
 - ▣ Accomplice/codefendant received lesser sentence
 - ▣ Absence of an aggravating circumstance (or circumstances)
 - ▣ Residual doubt about guilt

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Peremptory instructions

- Must be given upon timely written request if evidence of a mitigating circumstance is uncontroverted
 - ▣ Statutory: find factor if you find what all the evidence tends to show
 - ▣ Nonstatutory: find factor if you find what all the evidence tends to show and you determine that the circumstance has mitigating value

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Scenario

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