
THE TWENTY-FIFTH ANNIVERSARY OF POST-FURMAN
EXECUTIONS IN NORTH CAROLINA:
A HISTORY OF ONE SOUTHERN STATE’S
EVOLVING STANDARDS OF DECENCY

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INTRODUCTION

Dear Governor, I know you have a lot on your plate as a new Governor in a State in economic crisis. Unfortunately, there is another crisis coming your way, one brewing in the criminal justice system. You will likely soon face an unprecedented situation requiring you to decide whether to grant clemency to dozens of death row inmates with pending execution dates. The good news is that our State has struggled with the current death penalty system for over 25 years, and its citizens are more informed about issues of justice and fairness than most in the Southern Death Belt. North Carolinians know how broken the

death penalty system has been, and their beliefs regarding the appropriateness of the death penalty have evolved significantly. Thus, Governor, rest assured; you will be given great latitude to do what is just. . . .

Twenty-five years ago, on March 16, 1984, at 2:00 a.m., the State of North Carolina executed James Hutchins by electrocution. Hutchins shot and killed three law enforcement agents. At the time he was severely mentally ill. Like many of the executions which followed, the greatest battle for Hutchins' life did not occur at trial but during his final days. The outcome of this ultimate battle did not depend on a jury of his peers, but on the mind, heart and soul of one individual—the Governor of North Carolina. Much happens and is learned between a death sentence and a final execution date. Only the Governor in clemency proceedings is privy to the full picture of the crime committed and of the person convicted of committing that crime.

Over the past twenty-five years, the execution-related events that have taken place in North Carolina's courthouses, attorney offices, Legislature, Governor's Office and Central Prison¹ are worthy of a book. This brief history provides a broad sweep of the more significant events that have shaped the face of the death penalty in North Carolina. It follows four waves: three that have ebbed and one that is yet to hit. The first wave was the crime wave of the 1980's and early 90's. This wave generated much energy, creating a second wave, one of strong public support for the death penalty; this wave, in turn, contributed to a third wave of increased death sentences. These waves have now subsided.

Today, there is a de facto moratorium on executions in North Carolina. The moratorium may end when the North Carolina Supreme Court rules, probably in spring 2009, in *Dep't of Corr. v. Medical Board*, on the question of a doctor's role in executions by lethal injection.² If

¹ North Carolina's death row for men and its execution chamber are located at Central Prison in Raleigh, North Carolina.

² See North Carolina Medical Board Position Statement, <http://www.ncmedboard.org/Clients/NCBOM/Public/PublicMedia/capitalpunishment.htm> (last visited May 6, 2009). As this article was going to press, the North Carolina Supreme Court ruled in *Dep't of Corr. v. Medical Bd.*, No. 51PA08 (N.C. Feb. 6, 2009), <http://www.aoc.state.nc.us/www/public/sc/opinions/2009/051-08-1.htm/>, holding that the North Carolina Medical Board does not have the authority to discipline doctors who participate in executions. Whether and when executions resume is dependent upon several factors including the outcome of related pending litigation, the impact of the newly passed Racial Justice Act and the willingness of doctors to voluntarily participate in executions. See, e.g., Charles Van Der Horst, Op-Ed., *Doctors Won't Kill for the State*, NEWS & OBSERVER

the decision leads to a lifting of the lethal injection moratorium, North Carolina's newly elected Governor, Beverly Perdue, will likely find herself facing the "fourth wave"—a wave of execution dates not seen by any previous governor of this state or, perhaps, of any state.

As Thomas Maher describes in his article, *Worst of Times, and Best of Times: The Eighth Amendment Implication of Increased Procedural Reliability on Existing Death Sentences*, *infra*, a significant number of inmates in North Carolina will face execution in the near future.³ During the three years of the current moratorium, capital cases have proceeded through North Carolina's death penalty machinery. Dozens of the 162 death row inmates currently on death row have exhausted, or will soon exhaust, their state and federal appeals. In these cases, once the moratorium is lifted, execution dates *must* be set.⁴

The coming wave of execution dates will raise questions never before addressed by a Governor—the sole decision-maker in North Carolina on whether to commute a death sentence to life—and these questions will present themselves in a judicial, legislative and political landscape not experienced by prior governors. As Maher discusses in his essay, *infra*, there has been a “sea change” in both the public support for the death penalty in our state and in the reliability of the death penalty system.⁵ In the last few years, support has gone down, and with recent reforms, reliability has gone up. Most, if not all, of the cases that will be part of the post-moratorium fourth wave were tried prior to the reforms discussed by Maher. As the former counsel for Governor Easley, Hampton Dellinger, has observed, these reforms have essentially created “‘two death rows’ with different rules for each.”⁶

Prior to the *Furman* moratorium (1972 - 1974),⁷ North Carolina Governors granted clemency to death row prisoners almost as much as they allowed executions to go forward. After reinstatement of the death penalty in 1977, times had changed—sociologically, politically

(Raleigh, N.C.), May 5, 2009, <http://www.newsobserver.com/opinion/columns/story/1513424.html>. In addition, the legislature may impose its own moratorium.

³ See Thomas K. Maher, *Worst of Times, and Best of Times: The Eighth Amendment Implication of Increased Procedural Reliability on Existing Death Sentences*, 1 ELON L. REV. 95 (2009).

⁴ See N.C. GEN. STAT. § 15-194 (2008).

⁵ See Maher, *supra* note 3, at 96, 102.

⁶ Bob Geary, *Resume executions or keep the ban?*, INDEPENDENT WEEKLY, Nov. 26, 2008 (quoting Gerda Stein, Public Information Coordinator, Center for Death Penalty Litigation), <http://www.indyweek.com/gyrobase/Content?oid=oid%3A271523>.

⁷ See *Furman v. Georgia*, 408 U.S. 238, 239-40 (1971).

and constitutionally. The public was demanding that the Government be tough on crime, and support of the death penalty was an easy way to be tough. Yet, when the *Furman* moratorium ended there were no inmates on death row, so the Governor did not have to decide a petition for clemency from a condemned prisoner until 1984—seven years later. When the current moratorium ends, Governor Perdue will not be so fortunate.

This article reviews twenty-five years of North Carolina's struggle with the appropriate application of the punishment of death. With six to eight hundred homicides a year, deciding which killers should live and die has proven harder than expected, and only a tiny percentage have actually faced execution. Some of the stories of those executed, and those almost executed, are included in this article, though there is far too little space to include all of the compelling stories of injustice—stories of ineffective lawyers, prosecutorial misconduct, misled juries and victims re-victimized. Hopefully, the few stories told will provide a glimpse into those left untold.

This article, ultimately, is about the Governor's role at the time of a pending execution. Based on the history of executions in this state and on the changed milieu, this article argues that clemency must be done differently post-moratorium and offers the Governor some ideas for doing justice in the face of the coming wave of executions in today's new landscape.

I. PRE-FURMAN ROLE OF CLEMENCY IN AN OVER-INCLUSIVE DEATH PENALTY SYSTEM

In 1868, the framers of the North Carolina Constitution limited the application of the death penalty by reducing the number of crimes punishable by death from twenty-two to four: murder, rape, burglary and arson.⁸ Shortly thereafter, the North Carolina Legislature made death mandatory for those convicted of any of the four offenses.⁹ Lo-

⁸ Compare N.C. CONST. art. XI, § 2 (1868) (specifying four crimes punishable by death) with N.C. REV. CODE §§ 34-1, 2-12 (1855) (specifying 22 crimes punishable by death).

⁹ For example,

In 1869, the General Assembly of North Carolina reenacted the punishment for rape in the following language: "Every person who is convicted, in due course of law, of ravishing and carnally knowing any female of the age of ten years or more by force and against her will; or who is convicted, in like manner, of unlawfully and carnally knowing and abusing any female child under the age of ten years, shall suffer death."

cal governments had complete control over the process and carried out death sentences by public hanging.

In 1909, the power to execute prisoners was taken from local governments and assumed by the state government.¹⁰ North Carolina was one of the first states to introduce electrocution as a method of executing prisoners.¹¹ On March 18, 1910, the State of North Carolina conducted its first execution of a prisoner—Walter Morrison, a black laborer from Robeson County convicted of rape.¹²

The mandatory death penalty for burglary convictions was eliminated in 1941, and for murder, rape, and arson convictions in 1949.¹³ The Legislature amended the death penalty statutes¹⁴ by simply adding a proviso giving the jury unguided discretion to sentence a convicted defendant to death or to life.¹⁵

Under both the mandatory and the discretionary systems, North Carolina governors played a critical role in ensuring the appropriateness of a death sentence. Executions and clemency grants were *both* commonplace.¹⁶ In the thirty-nine years of a mandatory death penalty

State v. Waddell, 282 N.C. 431, 441, 194 S.E.2d 19, 26 (N.C. 1973) (quoting 1868-69 N.C. Sess. Laws 406-07).

¹⁰ The North Carolina Department of Correction website states that the shift occurred in 1910, but publications closer in time indicated that the year was 1909. See, e.g., FREDERICK E. HAYNES, CRIMINOLOGY (2d ed. 1935); ROMA S. CHEEK, THE PARDONING POWER OF THE GOVERNOR OF NORTH CAROLINA 121 (1934).

¹¹ See *The History of the Electric Chair*, Canadian Coalition Against the Death Penalty, <http://www.ccadp.org/electricchair.htm> (last visited Feb. 27, 2009); see also *History of Capital Punishment in North Carolina*, N.C. Dep't of Corr., <http://www.doc.state.nc.us/dop/deathpenalty/DPhistory.htm> (last visited Feb. 27, 2009).

¹² *Persons Executed in North Carolina: 1910-1920*, N.C. Dep't of Corr., <http://www.doc.state.nc.us/dop/deathpenalty/1020.htm> (last visited Feb. 27, 2009).

¹³ This change was typical in the States. As the U.S. Supreme Court noted in *Woodson v. North Carolina*, 428 U.S. 280, 280 (1976), “[t]hough at the time the Eighth Amendment was adopted, all the States provided mandatory death sentences for specified offenses, the reaction of jurors and legislators to the harshness of those provisions has led to the replacement of automatic death penalty statutes with discretionary jury sentencing.”

¹⁴ See 1949 N.C. SESS. LAWS 263 (rape); 1949 N.C. SESS. LAWS 262 (murder); 1941 N.C. SESS. LAWS 304-05 (burglary); 1949 N.C. SESS. LAWS 263 (arson).

¹⁵ E.g., Chapter 14, section 17 of the North Carolina Code was amended to read, “A murder . . . in the first degree . . . shall be punished with death: Provided, if . . . the jury shall so recommend, the punishment shall be imprisonment for life” *Crawford v. Bailey*, 234 F. Supp. 700, 701 n.1, (E.D.N.C. 1964).

¹⁶ Likely reasons for these high numbers of both executions and clemencies include the mandatory nature of the death sentence for those convicted of capital crimes and the prevalent prejudice against blacks.

system, 334 prisoners were executed¹⁷ and 221 were granted clemency.¹⁸ In the twenty years of an unguided discretionary system, thirty prisoners were executed and eight were granted clemency.¹⁹ The last execution pre-Furman was in 1961. The last commutation was in 1970.²⁰

II. THE STRUGGLE FOR A CONSTITUTIONAL DEATH PENALTY: 1972-1990

In 1971, the United States Supreme Court upheld the death penalty as constitutional, even given the “untrammelled discretion” of the jury to “pronounce life or death.”²¹ Just one year later, however, the Court reversed itself in *Furman v. Georgia* and held that unbridled jury discretion in death penalty sentencing schemes was unconstitutional.²²

The North Carolina Supreme Court was called upon to interpret *Furman* in *State v. Waddell*, a capital rape case. Divining from the nine separate opinions of the Justices how to apply *Furman* was challenging, but the Court discerned the essence to be that “the Eighth and Fourteenth Amendments will no longer tolerate the infliction of the death sentence if either judge or jury is permitted to impose that sentence as a matter of discretion.”²³ Noting that “[i]t is the proviso, and the proviso alone, which creates the discretionary difficulty condemned by the *Furman* decision,” the Court struck down the discretionary part of the state’s rape statute, leaving the original statute in effect.²⁴ The Court suggested that the legislature “may wish to delete the unconstitutional proviso” from all four of the death penalty statutes.²⁵ Following the

¹⁷ In 1938, North Carolina stopped using the electric chair and moved to using the gas chamber. See N.C. Dep’t of Corr., *supra* note 12.

¹⁸ These numbers are the sum of the numbers from CHEEK, *supra* note 10, at 124, and Board of Paroles, *Death Sentences Commuted to Life or Other Imprisonment 1933-1949*, N.C. State Archives, Dec. 20, 1949 (on file with author). The number of executions includes sixteen executions in 1931 and 1932. *Persons Executed in North Carolina: 1931-1940*, N.C. Dep’t of Corr., <http://www.doc.state.nc.us/dop/deathpenalty/3140.htm> (last visited Feb. 28, 2009). The numbers of commutations for these two years was not found.

¹⁹ See Board of Paroles, *N.C. Commutation and Execution Statistics 1949-1962*, N.C. State Archives (on file with author).

²⁰ See *Persons Executed in North Carolina: 1951-1961*, N.C. Dep’t of Corr., <http://www.doc.state.nc.us/dop/deathpenalty/5161.htm> (last visited Feb. 28, 2009).

²¹ *McGautha v. California*, 402 U.S. 183, 207 (1971).

²² See *Furman*, 408 U.S. 238 (1972).

²³ *Waddell*, 282 N.C. at 448, 194 S.E.2d at 25.

²⁴ *Id.* at 475, 194 S.E.2d at 44.

²⁵ *Id.* at 445, 194 S.E.2d at 28 (referring to N.C. GEN. STAT. § 14-21 (1969) (rape); N.C. GEN. STAT. § 14-17 (1969) (murder); N.C. GEN. STAT. § 14-52 (1969) (burglary); N.C. GEN. STAT. § 14-58 (1969) (arson)).

Court's lead, in 1974, the North Carolina General Assembly made death, once again, the only available sentence for first degree rape and first degree murder.²⁶

As a result of *Furman* and *Waddell*, North Carolina's death row was emptied and all death sentences were commuted to life. But the row was not empty for long. With the return of mandatory death sentences and with aggressive prosecution,²⁷ North Carolina's death row grew to 120 prisoners in just two years, becoming the largest in the nation.²⁸ None of these inmates, however, would be executed.

In 1976, the United States Supreme Court considered the constitutionality of North Carolina's mandatory death penalty statute, and in *Woodson v. North Carolina* struck it down as unconstitutional.²⁹ As a result, the death sentences of all 120 prisoners on North Carolina's death row were vacated, and death row was once again emptied.³⁰

The North Carolina legislature went back to the drawing board and turned to the statutes upheld by the United States Supreme Court in *Gregg v. Georgia*³¹ for guidance. It enacted the current capital sentencing structure, effective June 1977, which provides a bifurcated sentencing proceeding in which jurors weigh aggravating and mitigating circumstances.³² In October 1977, the first defendants to be sentenced to death under the new statute arrived on death row. The first, Mr. Daniel Webster, committed suicide two weeks after arrival on death

²⁶ See 1973 N.C. SESS. LAW 323. For the story of the passing of this legislation, see Symposium, North Carolinians Against the Death Penalty, *Unjust in the Much: The Death Penalty in North Carolina* 45 (Calvin Kytte & Daniel H. Pollitt ed., Chestnut Tree Press 1999).

²⁷ Joe Freeman Britt, Robeson County District Attorney from 1974 until 1989, was the most aggressive of the prosecutors. In 1976, the *Guinness Book of World Records* named Britt the "deadliest prosecutor" for obtaining twenty-three death verdicts in twenty-eight months from 1974 to 1976. As reported in the *National Law Journal*, "[a]t the height of what he refers to as his 'blitz' against murderers, the small-town lawyer was responsible for 4 percent of the death-row inmates in the nation." Dee Reid, 'Killer' DA: In First 28 Months On Job, He Won 23 Death Verdicts, *NAT'L L. J.*, Sept. 17, 1984, at col. 3. He won forty-four death penalty convictions during his fifteen years as a prosecutor. *Harmful Error*, The Center for Public Integrity, <http://projects.publicintegrity.org/pm/states.aspx?st=NC> (last visited Feb. 28, 2009). He left when he was elected to a Superior Court judgeship.

²⁸ See *Persons Executed in North Carolina: 1910-1920*, N.C. Dep't of Corr., *supra* note 12.

²⁹ *Woodson v. North Carolina*, 428 U.S. 280 (1976).

³⁰ See *Persons Executed in North Carolina: 1910-1920*, N.C. Dep't of Corr., *supra* note 12.

³¹ *Gregg v. Georgia*, 428 U.S. 153 (1976).

³² Compare N.C. GEN. STAT. § 15A-2000 (1977), with N.C. GEN. STAT. § 15A-2000 (2008). See also 1977 N.C. SESS. LAWS 407-11.

row. The other, Mr. James Calvin Jones, won on appeal, received a life sentence and was paroled in December 1992. In fact, all of the early death sentences under the new statute were overturned on appeal.³³

Given the uncertainty involved, it is not surprising that the application of a new sentencing law would be followed by a high number of reversals. However, it also takes good appellate lawyering. In this instance, credit can be given to the decision of Governor James Hunt to establish an Office of the Appellate Defender and to appoint Adam Stein,³⁴ an experienced capital litigator, as North Carolina's first Appellate Defender.³⁵ Stein served as North Carolina Appellate Defender from 1981 to 1985. From 1980 to 1985, twenty-one death row inmates won their appeals and were resentenced to something less than death.³⁶ Only three inmates were denied relief in both state and federal courts and given execution dates in the 1980's.³⁷

A. *The execution of James Hutchins*

The modern history of North Carolina executions³⁸ begins with James Hutchins. It is not surprising that the first death row inmate to make it through North Carolina's capital system was denied clemency. First, there had been numerous death sentences since the enactment of the 1977 death penalty statute but no execution. Fifteen inmates had been removed from death row after having their convictions or sentences overturned in the courts. Death penalty proponents were eager to see the state follow through with a death sentence.

Then, there was the matter of his crimes. Hutchins had killed three law enforcement officers: two of whom were responding to a call from Hutchins' daughter reporting that her father was beating her;

³³ *Persons Removed from Death Row*, N.C. Dep't of Corr., <http://www.doc.state.nc.us/dop/deathpenalty/removed.htm> (last visited Mar. 1, 2009).

³⁴ Adam Stein had represented death row inmates on appeal since 1967, when he represented sixteen year-old Marie Hill.

³⁵ See Ferguson Stein Chambers Gresham & Sumter, P.A., *Adam Stein*, <http://fergusonstein.com/attorneys.php?attorneyId=14> (last visited Mar. 1, 2009).

³⁶ See *Persons Removed From Death Row*, N.C. Dep't of Corr., *supra* note 33.

³⁷ See *id.*

³⁸ A year before any execution could occur, the legislature changed the North Carolina statute regarding the method of execution: condemned inmates would now have a choice between gas and lethal injection. 1983 N.C. SESS. LAWS 652. "The law provided condemned prisoners the option of death by injection; however, if no specific choice was made, the inmate would be executed by the default method, lethal gas." CHEEK, *supra* note 10, at 167.

the third had pulled Hutchins' car over after he fled.³⁹ Many would posit that a multiple cop killer is exactly the kind of killer for whom the death penalty is intended.

Hutchins' case received significant national and local news coverage, but the coverage had little to do with the facts of the crime or the person scheduled to be executed. The attention was focused on the facts that: 1) there had not been an execution in North Carolina since 1961 – not since the civil rights movement, the women's movement, or the first walk on the moon; 2) (related to 1), the return of the death penalty to North Carolina was being made real to its citizens for the first time;⁴⁰ and 3) Hutchins would be one of the first prisoners in the country to be executed by lethal injection.⁴¹

The day before Hutchins' original execution date, January 13, 1984, Governor James B. Hunt met with Hutchins' wife, who begged for her husband's life. He also met with representatives from groups that included the North Carolina Council of Churches, the Baptist State Convention, Amnesty International, the Academy of Trial Lawyers and the North Carolina Civil Liberties Union—all of whom argued against the execution. These representatives also “held press conferences while over 100 people gathered in near-freezing weather for a silent vigil outside the state Capitol [and] [a]nother vigil was planned outside Central Prison shortly before the execution.”⁴² By 4 p.m. on January 12th, Hunt's office had received 404 telephone calls, of which only eighteen supported the execution; 157 letters, of which two supported the execution; and 10 telegrams, all against the execution.⁴³

³⁹ See *State v. Hutchins*, 303 N.C. 321, 327-29, 279 S.E.2d 788, 793-94 (1981).

⁴⁰ For example, the *Raleigh News & Observer* ran many stories inspired by the pending execution, including a three-page story detailing the lives of three of the thirty-four death row prisoners—Michael McDougall, Kermit Smith, and Willie Gladden—and probing how they were coping with the pending execution. They admitted that it had not been real to them until the preparations for Hutchins' execution. See Katrina N. Seitz, *The Transition of Methods of Execution in North Carolina* 168 (Apr. 18, 2001) (unpublished Ph.D. dissertation, Virginia Polytechnic and State University) (citing *Reality of Death Looms over the Condemned*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 11, 1984, at A1).

⁴¹ With an initial execution date of January 13, 1984, it looked like Hutchins would be the second American prisoner to be executed by lethal injection. See Seitz, *supra* note 40, at 167. But there was a last minute stay of execution, which led to the March execution date. See *id.* In the end, Hutchins was the third person to die of lethal injection and the 15th overall to be executed in the United States since reinstatement. See *id.*

⁴² Katherine White, Raleigh Bureau, Associated Press, *Death Penalty Protest Draws 100 to Capitol*, Jan. 12, 1984.

⁴³ *Id.*

While the question of the appropriateness of the death penalty was being debated in the public arena, the attorneys for James Hutchins were waging a legal battle in the courts. They were racing against the clock: Hutchins could be executed on the 13th no later than 6 p.m. They got their stay of execution at 12:05 p.m. from Judge James Dickson Phillips of the United States Court of Appeals for the Fourth Circuit.⁴⁴ But this was not the end of the story. Justice William Brennan described the high drama that had taken place, in his dissent from the United States Supreme Court's lifting of the stay:

Late yesterday, Hutchins filed a petition for a writ of habeas corpus and an application for a stay of execution in the court of District Judge Woodrow W. Jones. Chief Judge Jones, however, acted only to deny the application, leaving in limbo Hutchins' petition for habeas corpus. After taking this action, Chief Judge Jones apparently went home. As a result, when Hutchins approached Judge Phillips for relief, Judge Phillips was faced with an application to stay the execution scheduled to take place within a matter of hours, appended to which was a copy of Hutchins' petition for habeas corpus that had been left undecided by the District Court.

Judge Phillips, knowing that a petition for a writ of habeas corpus was then pending in the District Court, and would not be decided before Hutchins' execution, correctly issued the stay to preserve the issue noted above. . . .

Despite its holding that Judge Phillips had jurisdiction to issue the stay, the Court has inexplicably concluded that Judge Phillips improperly exercised that jurisdiction Far from being an abuse of discretion, the action of Judge Phillips was eminently reasonable and correct. Not only is there at least one other federal judge in Judge Phillips' own Circuit who has ruled favorably on the merits of this question [citation omitted] and at least one District Court in Arkansas that has reached a similar conclusion [citation omitted], but also this Court itself has recognized the potential validity of the claim. [Citations omitted].

Finally, the State argues that Hutchins should pursue state-court remedies [T]his in any event is a literal impossibility given the 6 p. m. deadline for execution. Indeed, in light of the constraints imposed on our deliberations by that deadline, the most disturbing aspect of the Court's decision is its indefensible—and unexplained—rush to judgment. When a life is at stake, the process that produces this result is surely insensitive, if not ghoulish.⁴⁵

⁴⁴ See *Woodard v. Hutchins*, 464 U.S. 377 (1984) (five to four decision lifting the stay imposed by Judge Phillips). Judge Phillips believed a stay was necessary to preserve an issue on which some inmates were winning—whether the exclusion for cause of potential jurors unequivocally opposed to the death penalty resulted in a biased jury during the guilt phase of the trial proceedings. See generally *Hutchins v. Woodard*, 730 F.2d 953, 961-64 (1984) (Judge Phillips specially concurring with the majority).

⁴⁵ *Woodard*, 464 U.S. at 381-83.

Though the stay was lifted, a new date had to be set—March 16th, 2 a.m. Once again, “[m]ore than 100 ministers, lawyers, civil rights activists and workers protested against the execution [] at the State Capitol.”⁴⁶ In addition, Governor Hunt’s Office received twenty-two telephone calls between 10:00 p.m., March 15 and 5:00 a.m., March 16, only four of which supported the execution. The Office received 120 letters, six of which supported the execution.⁴⁷

Despite the loud opposition to Hutchins’ execution, there was public support for the death penalty as a general matter, though not as significant as it would become. In the spring of 1984, for example, a poll conducted by the University of North Carolina School of Journalism found that “[a]pproximately 65% of those polled indicated they supported the death penalty . . . 24% opposed it . . . [and] [t]welve percent indicated they didn’t know how they felt, or voiced no opinion.”⁴⁸

But the public knew little about the man to be executed. Most significantly, they did not know that Hutchins “suffer[ed] from a severe paranoid disorder characterized by paranoid delusions, disturbed judgment, and hallucinations.”⁴⁹ At the time of his crimes, he believed he was being persecuted by law enforcement. He would not cooperate with his trial counsel or the psychiatric experts. His two requests for new counsel were both denied. His counsel presented no evidence of insanity or mental illness.⁵⁰ Furthermore, they did not know that two North Carolina Supreme Court Justices dissented in Hutchins’ case, concluding that he deserved a new trial, and a judge on the Fourth Circuit Court of Appeals and four U.S. Supreme Court Justices believed that his case needed further review.⁵¹

Governor Hunt denied clemency to James Hutchins. In denying clemency, Governor Hunt said, *inter alia*, that “[t]here is certainly no question of his guilt. James Hutchins received a fair trial. . . . The state and federal courts have given this matter full and fair consideration. I

⁴⁶ Mary A. Rhyne, *Killer of 3 Lawmen executed; First in N.C. in 22 years*, BOSTON GLOBE, Mar. 16, 1984.

⁴⁷ Untitled, NEWS & OBSERVER (Raleigh, N.C.), Mar. 17, 1984, at 6A.

⁴⁸ Seitz, *supra* note 40, at 176.

⁴⁹ Charlotte School of Law, *Mental Illness and the Death Penalty in North Carolina* 18 (May, 2007), <http://www.deathpenaltyinfo.org/CharlotteMI.pdf>.

⁵⁰ *Id.*

⁵¹ *See Hutchins*, 730 F.2d at 957.

find no basis on which to overturn their decision and grant this request for clemency.”⁵²

When Hunt denied clemency to Hutchins, he knew that he would probably have to decide the fate of another on death row in a few months and that this inmate would likely be the one woman on death row, Velma Barfield.⁵³

B. *The execution of Velma Barfield*

Velma Barfield was convicted and sentenced to death in 1978 for the poisoning death of her boyfriend. She had confessed to giving lethal doses of arsenic to her boyfriend, as well as to her mother and an elderly couple for whom she was caring. At trial, Barfield raised an insanity defense, based on her long time addiction to prescription drugs. She testified that she stole from her victims and poisoned them, but that she did not intend for them to die. She just wanted to make them sick long enough for her to make things right.⁵⁴

In post-conviction litigation, Barfield’s new attorneys were appalled by the level of representation she had received at trial. Trial counsel had never tried a capital case and, among other things, failed to provide a wealth of information that would have supported both Barfield’s defense at guilt, as well as her mitigation case at sentencing.⁵⁵ Sealing her fate, the prosecutor opposing this inexperienced attorney was none other than Joe Freeman Britt.⁵⁶

After exhausting her state and federal appeals, in August 1984, a superior court judge inexplicably scheduled her execution date early, for November 2—four days before Election Day.⁵⁷ The timing could not have been worse for Barfield or for Governor Hunt. Hunt was seeking the seat of Sen. Jesse Helms in a political race of historic proportions. As *Time* magazine put it, “The Helms-Hunt battle is this year’s most ferociously contested Senate race. . . . A victory might even

⁵² Associated Press Report, Untitled, Mar. 16, 1984 (on file with author).

⁵³ After Hutchins’ execution, thirty-two men and one woman were left on North Carolina’s death row.

⁵⁴ See *State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510 (1979).

⁵⁵ Jim Nesbitt, *Woman on Death Row Creates Political Stir in North Carolina*, BOSTON GLOBE, Sept. 7, 1984, 1984 WLNR 125394. See also John Woestendiek, *The Grandmother on Death Row Reborn Samaritan or Vicious Murderer?*, PHILADELPHIA INQUIRER, Sept. 23, 1984, at A1.

⁵⁶ See discussion of Joe Freeman Britt, *supra* note 27.

⁵⁷ *Barfield v. Woodard*, 748 F.2d 844 (4th Cir. 1984).

make Helms a presidential prospect in 1988. For Hunt, a victory could result in his being anointed as leader of the progressive South.”⁵⁸

The popular opinion of the day was that politics would certainly play a part in the Governor’s clemency decision—despite his public statements to the contrary. Hunt could lose critical votes either way he decided Barfield’s petition for clemency. The question then was with which result would he lose the fewest? If he denied clemency and an execution occurred two days before the election, liberal supporters might not turn out to vote. If he granted clemency, there was the danger of looking liberal on crime⁵⁹ and he might lose a substantial number of conservative votes. In addition, Hunt had campaigned for Governor as an advocate of the death penalty and Helms had already accused him of “flip-flopping” on other issues.⁶⁰

The national and international attention on the Barfield case was even greater than that on Hutchins. Observers wondered: Would North Carolina become the first State to execute a woman in modern times?⁶¹ Or would North Carolina’s Governor show mercy to a repentant grandmother and spare her the gas chamber? As Joe Freeman Britt recalled,

There were all these Velma Barfield support groups that grew up all around the nation, all over North Carolina, European countries – England, France, Finland Everybody involved in the case got tons of letters every day about it from all over the world. That then generated a certain political pressure in the case.⁶²

The “Margie Velma Barfield Support Committee” played a central role in the organized pro-clemency campaign. The group was “a coalition of friends, family, clergy, inmates and, on a less visible level, death-

⁵⁸ Joseph N. Boyce & Jacob V. Lamar Jr., *The Old South vs. the New*, Sep. 24, 1984, <http://www.time.com/time/magazine/article/0,9171,923642,00.html>.

⁵⁹ Opinion polls showed that as much as 78% of North Carolinians surveyed supported the death penalty. Nesbitt, *supra* note 55. See also William Schmidt, *Decision on Execution Order a Key Issue in Carolina Race*, N.Y. TIMES, Sept. 27, 1984, at A1.

⁶⁰ Adam Clymer, *Diverging Politics of Sexes Seen in Poll*, N.Y. TIMES, Sept. 30, 1984, at 1.

⁶¹ A woman had not been executed in the United States since California executed Elizabeth Duncan in 1962. *Women Executed in the U.S. Since 1900*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/women-executed-us-1900> (last visited Feb. 8, 2009).

⁶² Office of the Clark County Prosecuting Attorney, <http://www.clarkprosecutor.org/html/death/US/tucker437.htm> (citing Kathy Walt, *Execution May Haunt Texas; Tucker Case Likely to Bring Unprecedented Scrutiny*, HOUSTON CHRONICLE, Dec. 14, 1997 (quoting Barfield’s Prosecutor, Joe Freeman Britt)) (last visited Feb. 8, 2009).

penalty opponents and prison employees.”⁶³ As part of an aggressive public relations campaign, Barfield’s children appeared on national talk shows, speaking of their forgiveness of their mother who killed their grandmother and of Barfield’s transformation from the woman who committed the murders.⁶⁴ In addition, there were stories about Barfield’s repentance and prison service in newspapers and magazines across the country.⁶⁵

The clemency opponents were also aggressive. The “Victims of Barfield” launched a letter-writing campaign⁶⁶ and “stalked Hunt . . . during campaign stops in [the victims’ home towns].” The group confirmed that “politics will play a crucial role in the clemency decision.” As Britt commented, “[t]his will make or break Hunt. . . . He’s counting the votes it will cost him right now.”⁶⁷

Hunt held clemency meetings September 18-19 with both “supporters and opponents of clemency, including Mrs. Barfield’s attorneys, clergymen, civil rights activists and relatives and friends of her victims.”⁶⁸ Supporters included Ruth and Billy Graham, who “urged Mr. Hunt to commute the sentence on the condition that Mrs. Barfield live the rest of her life as she had the past six years—as an inmate of the state prison system, where she has been described as a model prisoner and a valued counselor of other inmates.”⁶⁹ In addition, five prominent faculty members of the University of North Carolina at Chapel Hill petitioned Hunt to delay the execution and the clemency decision until after the election.⁷⁰

In stark contrast to the close-in-time announcement in Hutchins, Governor Hunt denied clemency six weeks before Barfield’s execution date. He held a press conference in his office:

⁶³ Woestendiek, *supra* note 55.

⁶⁴ United Press Int’l, *Convicted Killer’s Children Seek to Avert Execution*, PHILADELPHIA INQUIRER, Sept. 19, 1984, at A7.

⁶⁵ Schmidt, *supra* note 59. See also, Fred Grimm, *Judge Won’t Halt Woman’s Execution*, MIAMI HERALD, Nov. 1, 1984, at A1.

⁶⁶ Woestendiek, *supra* note 55.

⁶⁷ Nesbitt, *supra* note 55.

⁶⁸ Associated Press, *Governor Refuses to Stop Execution of Grandmother*, LEXINGTON HERALD-LEADER, Sept. 28, 1984, at A8.

⁶⁹ Schmidt, *supra* note 59.

⁷⁰ The professors were Doris Betts, a novelist and professor of English; Daniel H. Pollitt, a law professor; E. M. Adams, a philosophy professor; George Taylor, a history professor, and Daniel Okum, a professor of environmental sciences. *Relatives of Murder Victim Urge No Clemency for Carolina Killer*, N.Y. TIMES, Sept. 20, 1984, at B15.

I have listened to supporters of Mrs. Barfield. . . . I have also listened to the views of those who oppose clemency, including relatives and friends of Mrs. Barfield's victims. Mrs. Barfield should pay the maximum penalty for her crimes. . . . [There was] no question of her guilt. After carefully looking at the issues, I don't believe that the ends of justice or of deterrence would be served by my intervention in this case. . . . I cannot in good conscience justify making an exception to the law as enacted by our state Legislature, or overruling those 12 jurors who, after hearing the evidence, concluded that Mrs. Barfield should pay the maximum penalty for her brutal actions. . . .⁷¹

Barfield's attorneys made one more effort in the courts. They presented new medical research supporting their claim that Barfield had been incompetent at the time of trial because of her state of withdrawal from long-time use of drugs.⁷² The petition was denied in all the courts in which they filed. Barfield instructed her attorneys not to petition the U.S. Supreme Court, which had denied previous appeals, stating that she wanted to focus on dying with dignity.⁷³

In the last months of Barfield's life, the Governor's Office received letters from the public regarding her execution at a rate of 175 letters a day. By November 1, the Governor had received a total of 6,888 letters, of which 4,003 favored clemency.⁷⁴ At the time of her execution, some 300 protesters—100 of whom had marched from the Capitol—stood outside the prison's gate with candles; some eighty people stood across the road in support of the execution, cheering at her designated time of death; and thirty-nine death row inmates watched them all through their small plexiglas windows on which they banged "rhythmically."⁷⁵

⁷¹ Associated Press, *supra* note 68. The New York Times quoted Mr. Hunt as also saying, "Death by arsenic poisoning is slow and agonizing Victims are literally tortured to death. It has been a tragedy for an entire community as well as our state." *Carolina Slayer Fails in Her Bid for a Reprieve*, N.Y. TIMES, Sept. 28, 1984, at A1.

⁷² *Barfield v. Harris*, 540 F.Supp. 451 (D.C.N.C. 1982). See also William E. Schmidt, *Woman Executed in North Carolina*, N.Y. TIMES, Nov. 2, 1984, at A1; Grimm, *supra* note 65.

⁷³ Ashley Halsey, *Poisoner Changes Mind, Fights Her Execution*, PHILADELPHIA INQUIRER, Oct. 30, 1984, at A6.

⁷⁴ Associated Press, *Judge Says He'll Take Barfield Case Under Study*, LEXINGTON HERALD-LEADER, Nov. 1, 1984, at A2.

⁷⁵ William E. Schmidt, *First Woman is Executed in U.S. since 1962*, N.Y. TIMES, Nov. 3, 1984, at 1. *Velma Barfield Executed for Murdering Boyfriend*, DALLAS MORNING NEWS, Nov. 2, 1984, at A1.

C. *The execution of John Rook*

The last prisoner to be executed in the 1980's was John William Rook, executed on September 19, 1986.⁷⁶ Once again, there was no doubt that the condemned prisoner had killed his victim. The evidence was that he raped, beat, and ran over Ann Marie Roche with his car. His primary defense was that her death was caused by injuries sustained when he ran over her and that he had not intended to do so. Rook had been severely abused and neglected as a child, had an I.Q. of seventy-one, and was only twenty-one at the time of his crimes. His father had forced him to start drinking at age ten. Rook was an alcoholic with an emotional disturbance.

In post-conviction, Rook's case made the news when the attorneys claimed that Rook was neglected and ill-treated by the juvenile justice system in the 1970's. Rook had been in the system from ages thirteen to sixteen and had never received psychological help.⁷⁷ One Justice on the North Carolina Supreme Court and a Judge on the Fourth Circuit Court of Appeals would have granted a new sentencing hearing to Rook, on the ground that the jury had not made an individualized finding on the mitigating circumstances submitted.⁷⁸

James G. Martin succeeded Hunt as Governor. He was presented with Rook's clemency petition and denied it. Rook filed an eleventh hour appeal for a stay of execution, almost succeeding. In a five to four decision, the United States Supreme Court denied his request for a stay. The primary issue on appeal was a new study finding racial bias in the application of the death penalty in North Carolina,⁷⁹ evidence relevant to claim pending before the U.S. Supreme Court in *McCleskey v. Kemp*.⁸⁰

Rook refused to see any family members in the hours leading up to his execution. That night about 100 protestors stood outside the

⁷⁶ State v. Rook, 304 N.C. 201, 283 S.E.2d 732 (1981).

⁷⁷ Donna Alvarado, *Convicted Killer's Attorney's Blame Juvenile Justice System*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 31, 1983, at 5C.

⁷⁸ Rook v. Rice, 783 F.2d 401 (4th Cir. 1986).

⁷⁹ The study looked at the homicide cases in the year after reinstatement of the death penalty. It found that the result in outcomes (611 defendants arrested for homicide yielding nine death sentences) could only be explained by judicial district and the defendant's race. At the verdict stage, the victim's race was a determinative factor. BARRY NAKELL & KENNETH A. HARDY, *ARBITRARINESS OF THE DEATH PENALTY* (Temple University Press 1987).

⁸⁰ Rook v. Rice, 478 U.S. 1040 (1986). McCleskey lost his appeal on April 22, 1987.

prison, carrying candles and singing hymns.⁸¹ Rook's last words were "Freedom, freedom at last! It's been a good one!"⁸²

D. *After three executions, the death penalty machinery
ground to a halt—again*

Though the death penalty sentencing statute enacted in 1977 had withstood constitutional scrutiny, there were many trial issues—such as the appropriate jury instructions—still to be settled. In what would become a significant decision, in 1983, the North Carolina Supreme Court held that juries "must unanimously find that an aggravating circumstance exists before that circumstance may be considered by the jury in determining its sentence recommendation" and similarly, a "jury must unanimously find a mitigating circumstance to exist."⁸³

*On February 21, 1989, the United States Supreme Court granted certiorari to review this sentencing instruction in the case of North Carolina inmate Dock McCoy. A little over a year later, the Court issued its opinion, once again striking down a part of North Carolina's death penalty sentencing process. The Court found that the requirement that capital jurors had to be unanimous on the existence of a mitigating circumstance before that circumstance could be considered for the purpose of sentencing, unconstitutionally restricted a juror's ability to consider mitigating evidence.*⁸⁴

III. THE PUSH FOR MORE EXECUTIONS AND LESS DEFENSE LAWYERING: 1990-1996

When *McKoy* was decided, there were 86 prisoners on death row.⁸⁵ It was clear that some prisoners' cases would not be affected, but no one knew how many.⁸⁶ It was estimated that as many as 65 prisoners

⁸¹ Associated Press, *North Carolina Killer Executed After Appeal Fails*, N.Y. TIMES, Sept. 20, 1986, at 1.

⁸² *Last Words on Death Row*, Compilation by Court TV, <http://www.cnn.com/2007/US/law/12/10/court.last.words/index.html> (last visited Feb. 4, 2009).

⁸³ *State v. Kirkley*, 308 N.C. 196, 218-19, 302 S.E.2d 144, 157 (1983).

⁸⁴ *McKoy v. North Carolina*, 494 U.S. 433 (1990).

⁸⁵ *Death Sentences in the United States From 1977 to 2007*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2007> (last visited Mar. 14, 2009).

⁸⁶ The *McKoy* decision would not affect those who did not receive the *Kirkley* instruction because they were tried earlier or because their judge had foreseen the *McKoy* decision, having been foreshadowed by *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860 (1988).

would be granted resentencing hearings.⁸⁷ It was feared that the costs could be as high as \$2 million.⁸⁸ There was no chance, however, that the resentencing hearings would not take place. There was mounting public pressure to get condemned prisoners through the system and onto the gurney.⁸⁹

Support for the death penalty, at least in the abstract, had become well-entrenched. From 1982 until the mid-1990's, support for the death penalty nationally was "strong and unwavering . . . consistently over 70% . . ."⁹⁰ This level of support was a departure from the pre-Furman days when the death penalty had ground to a halt with little public concern. The shift followed closely the dramatic increase in violent crime.

Nationally, from 1950 through the mid-1960s, homicide rates held relatively constant at about four to five per 100,000 persons. The rate then began rising steadily, peaking in 1980 at 10.2 per 100,000. From 1980 to 1991, the rate fluctuated between eight to ten per 100,000.⁹¹ The same trend held true in North Carolina, where the Reported Index Crime Rate increased 39.6 percent between 1984 and 1994. The state's violent crime rate experienced the greatest spike between 1988 and 1992, with a 35.3% increase.⁹²

As violent crime increased so did the public outcry for crime control. Politicians "found it increasingly difficult to resist enacting or endorsing policies that resulted in longer prison terms, larger prison

⁸⁷ Justin Catanoso, *Court's Decision Reopens Family's Painful Wounds*, NEWS & RECORD (Greensboro, N.C.), Mar. 7, 1990, at A8. In the end, 44 death row inmates received new sentencing hearings, and 17 of those were sentenced to life the second time around. Dock McCoy, age sixty-five at the time of his crimes, was declared incompetent and never resentenced. He died in general population in 2004. Janine Kremling, Dwayne M. Smith, John K. Cochran, Beth Bjerregaard & Sondra Fogel, *The Role of Mitigating Factors in Capital Sentencing Before and After McKoy v. North Carolina*, JUSTICE QUARTERLY, Sept. 2007, at 357-81.

⁸⁸ Libby Lewis, *Death-Row Cases Dredged Up*, NEWS & RECORD (Greensboro, N.C.), Aug. 18, 1991, at D1.

⁸⁹ See, e.g., *Ruling Shows Death Sentencing Rarely Final: Supreme Court Addresses N.C. System*, NEWS & RECORD (Greensboro, N.C.), Mar. 12, 1990, at B2.

⁹⁰ Samuel R. Gross & Phoebe C. Ellsworth, *Second Thoughts: Americans' Views on the Death Penalty at the Turn of the Century* (2001) (unpublished Research Paper, University of Michigan), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=264018.

⁹¹ Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, <http://pricetheory.uchicago.edu/levitt/Papers/LevittUnderstandingWhyCrime2004.pdf> (last visited Feb. 6, 2009).

⁹² CRIME AND JUSTICE IN NORTH CAROLINA: AN EXAMINATION OF 1984-1994 DATA AND TRENDS, <http://www.gcc.state.nc.us/trends.htm> (last visited Feb. 6, 2009).

populations, and more death sentences and executions.”⁹³ As illustrated by the 1984 Senatorial race between Jesse Helms and James Hunt, described *supra*, support for the death penalty became synonymous with “unyielding in the war on crime, unwilling to coddle criminals, firm and courageous.”⁹⁴

In the 1990’s, prisoners were going to North Carolina’s death row in record numbers. Between January 1990 and October 1991, 27 condemned prisoners arrived, a fifty-seven percent increase of death row.⁹⁵ Despite the *McKoy* remands, by January 22, 1995, there were 112 inmates on death row.⁹⁶ By the end of the year, the highest annual number of prisoners had joined—thirty-four.⁹⁷

Not only were more defendants being sent to death row but more were staying there. From 1979 to 1984, the North Carolina Supreme Court reversed death sentences or convictions sixty-one percent of the time.⁹⁸ In each of the years from 1990 to 1992, over 80 percent of capital convictions were overturned on direct appeal by the Court. This reversal rate decreased dramatically in 1993 to just over forty percent, marking the beginning of a sharp decline in reversals: in 1994, the reversal rate was thirty-two percent; in 1995, just four percent.⁹⁹ From 1995 to 2000, the court upheld all but twelve percent of capital cases. The interpretation by some was that death penalty law had be-

⁹³ Elizabeth Rapaport, *Straight is the Gate: Capital Clemency in the United States from Gregg to Adkins*, 33 N.M. L. Rev. 349, 364 (2003).

⁹⁴ Gross & Ellsworth, *supra* note 90, at 17.

⁹⁵ Greg Trevor & Nancy Webb, *Executions Will Be More Frequent, N.C. Officials Predict*, CHARLOTTE OBSERVER, Oct. 19, 1991, at C5.

⁹⁶ The flood of death sentences was due not only to political forces but also because of a law that prevented prosecutors from offering a plea deal to first degree life in any case with an aggravating factor. See Mary Stolberg, *The Jury’s Still Out; Death-Penalty Reform, if Any, Must Get Past a Seemingly Impenetrable Maze of Conflicting Opinions and Emotions*, WINSTON-SALEM J., June 20, 2000, at A1 (discussing impetus to pursue death sentences, in what even prosecutors believe are marginal cases, under a North Carolina law forbidding prosecutors in potentially capital cases to accept a plea to first-degree murder in exchange for a sentence of life without parole and requiring them either to pursue a death sentence or accept a plea to second-degree murder, which carries only a thirteen-year minimum sentence).

⁹⁷ *Death Sentences in the U.S.*, *supra* note 85.

⁹⁸ Forty-four of these cases were *McKoy* related, but even not counting these, the court reversed 43% of the time.

⁹⁹ Matthew Easley, *Death-penalty reversals plummet*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 16, 2001, at A1.

come settled. It was presumed, then, that executions would start coming quicker.¹⁰⁰

The mounting pressure was bad news for those who were near the end of their appeals, namely those who had not received *McKoy* resentencing hearings. One such prisoner was Michael McDougall. McDougall's crime was brutal—he stabbed two neighbors who were roommates with a butcher knife after talking his way into their apartment. One survived. The other died after being raped and stabbed twenty-two times. At trial, McDougall put on evidence that at the time of the crimes he was in a cocaine induced psychosis, and he suffered from underlying depression and organic brain damage. He had also suffered severe and traumatic experiences as a child.¹⁰¹

McDougall's lead trial attorney, Jerry Paul, became a poster boy for dysfunctional attorneys. In post-conviction proceedings, evidence was presented, *inter alia*, that just prior to and during McDougall's trial, Paul:

- Had his bar license suspended.
- Went to the emergency room nine times.
- Was on narcotic drugs.¹⁰²
- Solicited false testimony.
- Was unable to conduct cross examination of experts because of impairment.
- Furnished McDougall drugs in jail.¹⁰³

One of McDougall's petitions for a stay was accompanied with "affidavits from 143 other N.C. lawyers who said that McDougall should receive a new sentencing hearing because Paul was incompetent."¹⁰⁴ One judge found that Paul "acted unethically or even criminally" during the trial, but no judge granted relief because McDougall had two other attorneys in the courtroom.¹⁰⁵

¹⁰⁰ There was certainly no expectation that capital defendants would find relief beyond the state courts. The Fourth Circuit was well-known for its hostility towards habeas petitions. It granted no relief to a North Carolina capital defendant between 1992 and 2000.

¹⁰¹ *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308 (1983).

¹⁰² *McDougall v. Rice*, 685 F. Supp. 532, 539 (W.D.N.C. 1988).

¹⁰³ Liz Chandler, *Lawyers Inadequate Defense Cited in a Third of Death Case Reversals*, CHARLOTTE OBSERVER, Sept. 11, 2000, at A1.

¹⁰⁴ Associated Press, *Victim's Family Awaits Execution: Convicted Killer Scheduled to get Lethal Injection on Friday*, CHARLOTTE OBSERVER, Oct. 15, 1991, at C3.

¹⁰⁵ "Attorney Scofield was an experienced criminal trial lawyer, and Paul's inability to conduct the examination of two witnesses had no adverse effect on the legal representa-

The North Carolina Council of Churches joined McDougall's family and lawyers in seeking clemency from Governor Martin, and were given a lengthy hearing. Governor Martin denied clemency in a letter which stated in part:

After prayerful consideration, I have decided not to interfere with carrying out the judgment of the court in the case of Michael Van McDougall Mr. McDougall, his family and others whose lives were forever altered by the events of August 21, 1979, will be much in my thoughts in the days to come. I pray that God's comfort be with all of us.¹⁰⁶

McDougall was executed on Oct. 18, 1991.

The next clemency petition to come before Governor Martin was that of Anson Maynard, a Native American and the first minority scheduled for execution. Maynard was the first inmate to present a claim of innocence to a North Carolina Governor. Maynard had maintained his innocence since his arrest, even turning down a plea deal. His conviction was based on the testimony of a co-defendant, who was given immunity in exchange for his testimony. The victim, Steven Henry, had been shot, stabbed and beaten, before being thrown into the Cape Fear River tied to cinder blocks. Henry had been scheduled to testify against Maynard in a theft ring case.¹⁰⁷

Maynard's execution was set for January 13, 1992. Nine days prior, the Center for Community Action of Lumberton issued a ten-page report asking that the Governor grant clemency to Maynard because of his innocence. The North Carolina Council of Churches joined in the plea.¹⁰⁸

Governor Martin spent hours over several days listening to arguments and evidence from both sides. A week before the execution date, he commuted Maynard's sentence to a life sentence, the first clemency grant in North Carolina since reinstatement.

"After extensive review of all of the claims and counterclaims, I am not convinced that Anson Maynard pulled the trigger to kill Stephen Henry," Martin said.

tion the appellant received" *McDougall v. Dixon*, 921 F.2d 518, 533-39 (4th Cir. 1990).

¹⁰⁶ Steve Lyttle, *Martin Won't Grant Clemency to Convicted Killer Despite Pleas*, CHARLOTTE OBSERVER, Sept. 29, 1991, at C2.

¹⁰⁷ Associated Press, *Death Row Inmate Insists He's Innocent: Final Appeal Readied in Staying Case*, CHARLOTTE OBSERVER, Jan. 6, 1992, at 10C.

¹⁰⁸ Associated Press, *Activists Say Innocent Man about to be Executed in N.C.*, THE STATE (Columbia, S.C.), Jan. 9, 1992, at B3.

“Nor am I convinced that Anson Maynard is totally innocent,” Martin said. “Since it is not clear to me that he was the murderer, I conclude that the most appropriate use of the power of clemency vested in my office is to decide that the state of North Carolina will not carry out the execution of Anson Maynard.”

....

Martin said he made his decision after going through evidence presented during the trial and evidence not available to jurors.¹⁰⁹

In defense of the Governor’s decision, his spokeswoman made a statement that, “This is not a sweeping generality that applies to all cases,” she said.¹¹⁰ “In the case of John Rook and Michael McDougall, there was no doubt the individual was guilty. In this case, the governor did not feel there was sufficient evidence to justify the execution.”¹¹¹

Another inmate was soon scheduled for execution—John Gardner. Gardner’s crimes were well-known. He had shot and killed two employees at a Steak & Ale restaurant in Winston-Salem in 1982. One victim’s father, Richard Adams, had become a vocal victim’s advocate and death penalty proponent.¹¹²

Gardner’s case was the first time attorneys ran a public campaign at clemency highlighting what the jury did not know when they voted for the death sentence over life. In his case, the jury never heard evidence of the significant physical and mental abuse and neglect that Gardner suffered as a child. They had not heard about this and other mitigating evidence because Gardner’s trial attorney did *no* mitigation investigation. In addition, the attorney tried the case under the influence of alcohol and cocaine. The attorney’s license to practice law was later suspended because of his failure to show up to court due to cocaine addiction.¹¹³

Governor Martin denied clemency, and Gardner was executed October 23, 1992.

¹⁰⁹ Governor James Martin, Press Release, *Governor Commutes Anson Maynard’s Death Sentence to Life Without Parole* (Jan. 11, 1992) (on file with author).

¹¹⁰ Kelly Simmons, *One Clemency Does Not a Death-Row Trend Make*, NEWS & RECORD (Greensboro, N.C.), Jan. 12, 1992, at D1. Maynard died in prison in 2006.

¹¹¹ *Id.*

¹¹² *Pause on N.C. Executions Approved*, FOX NEWS NETWORKS, May 31, 2005, <http://www.foxnews.com/story/0,2933,158169,00.html>.

¹¹³ Stan Swofford, *Killer Was An Abused Child: Evidence May Have Been Altered*, NEWS & RECORD (Greensboro, N.C.), Sept. 9, 1992, at B1.

The McDougall and Gardner cases offer a glimpse into a fundamental failing of the capital punishment system of the 1980's and 90's. The quality of counsel appointed to represent individuals charged with capital murder was rarely good, often poor and sometimes bordered on criminal.¹¹⁴ Though there was an Office of the Appellate Defender, which handled capital appeals, North Carolina had no state-wide defender system to represent capital defendants at trial. The system was fractured by county, and often, when capital experts from the "outside" offered assistance, judges and attorneys resisted.

In the late 1980's, the "outside" attorneys that began to appear in the courts on behalf of capital defendants were a small group of attorneys who staffed the North Carolina Resource Center. This organization was created in 1985 with funding from the N.C. State Bar's IOLTA program and from the North Carolina Academy of Trial Lawyers. The purpose of the agency was "to identify, recruit, and assist attorneys representing prisoners under sentence of death in NC after direct appeal to the NC Supreme Court; and to act as a clearinghouse for the identification of legal issues that arise in those cases, to help insure that the prisoner receives adequate representation."¹¹⁵ The Center was "housed" within the Office of the Appellate Defender.

In 1988, the Resource Center received an infusion of state and federal money. The federal money was from a program created at the behest of the federal judiciary, who were concerned about the level of representation of death row inmates in federal court.¹¹⁶ The program

¹¹⁴ In 2002, the Common Sense Foundation published a report on the quality of trial counsel of prisoners on North Carolina's death row. It found that more than one in six of the men and women on death row, at least thirty-seven individuals, were represented at trial by lawyers who have been disciplined by the State Bar. Of the first twenty-one inmates executed, four, or nearly 20%, were represented by disciplined attorneys. The State Bar estimated that less than 1% of the state's attorneys had been disciplined. Frances Ferris Crocker, *Common Sense Says the People on Death Row Often had the State's Worst Lawyers at Trial*, The Common Sense Foundation (2002), http://www.common-sense.org/?fnoc=/common_sense_says/DPSpecialReport2002.

¹¹⁵ Memorandum, *The Evolution of the Center for Death Penalty Litigation*, Feb. 24, 2002, (on file with author).

¹¹⁶ Dennis Cassano, *Minneapolis lawyers succeed in South; Team wins a new trial for mentally retarded man on Florida's death row*, MINNEAPOLIS STAR TRIBUNE, Jan. 13, 1996, at 13A. The judiciary's concerns were validated in 1990 when the American Bar Association issued a report concluding that "the inadequacy and inadequate compensation of counsel at trial" was one of the "principal failings of the capital punishment systems in the states today." The report contained numerous examples of flagrant misconduct by defense attorneys in capital cases. Ira Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases: A Report Containing the American Bar Association's Recom-*

funded a network of federal resource centers in death penalty states. The state money was primarily designated for training and consulting services to attorneys appointed in capital cases at the trial level.

The attorneys at the North Carolina Resource Center¹¹⁷ provided expertise in post-conviction litigation, which necessarily involved examining the conduct of all those involved at the trial level. Such examination did not sit well with local attorneys and “tough on crime” politicians, who included judges. The Resource Center attorneys were seen as obstructionists responsible for long and endless appeals of condemned prisoners. This position was shared by politicians in other death penalty states that had a federally funded Resource Center. The result was a national campaign to defund the Resource Centers.¹¹⁸ A similar campaign took place at the state level.

Despite the pleas of the federal judiciary, the campaign in Congress was successful, and the North Carolina Resource Center was forced to close its doors in September of 1995. Similarly, under state legislation, funding for such a center within the Office of the Appellate Defender was struck from the budget. Some state funding, however, was left for capital defense consultation services. With this funding and the court-appointment funds available at both the state and federal levels for representation of capital defendants, the Resource Center emerged from the ashes as the Center for Death Penalty Litigation.¹¹⁹

The movement to close the Resource Centers was part of a larger effort to speed up death row appeals. This effort received an adrenaline boost on April 19, 1995, when Timothy McVeigh bombed the Oklahoma City federal building. One year later, on April 24, 1996, President Bill Clinton signed into law the Anti-terrorism and Effective Death Penalty Act.¹²⁰ This legislation restricted the review by federal courts of state death sentences and imposed strict statutes of limita-

mentations Concerning Death Penalty Habeas Corpus and Related Materials from the American Bar Association Criminal Justice Section's Project on Death Penalty Habeas Corpus, 40 AM. U. L. REV. 1 (1990) (internal quotation marks and citation omitted).

¹¹⁷ The author was hired as one of these attorneys in 1993.

¹¹⁸ See, e.g., Marcia Coyle, *Republicans Take Aim at Death Row Lawyers*, NAT'L L. J., Sept. 18, 1995, at A1; Estes Thompson, *Resource Center is Execution Target GOP Plan: Eliminate Agency Devoted to Death Row Appeals*, CHARLOTTE OBSERVER, Feb. 13, 1995, at 4C.

¹¹⁹ The author did not become a staff attorney at the Center for Death Penalty Litigation but was a contract attorney for some of the Center's clients for many years.

¹²⁰ Anti-terrorism & Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in amendments to 28 U.S.C. §§ 2244-2267 (1996)).

tions for habeas review. Practically, it eliminated the federal courts' ability to hear successor appeals.

On June 21, 1996, the North Carolina Legislature made similar changes to its post-conviction law, N.C. GEN. STAT. § 15A-1415, limiting successor appeals and imposing short statute of limitations for post-conviction filings. The state legislature knew it had to be concerned with meaningful process, however, given the state court's role as original court for hearing post-conviction cases. Therefore, the new legislation also included rights for the capital defendant post-conviction, such as the right to two attorneys and the right to open discovery of both the prosecution's and the defense's case files at trial.¹²¹

During the political battles of 1994 and 1995 over the funding of capital defender specialists, three prisoners were executed—David Lawson, Kermit Smith and Phillip Ingle. Ingle was mentally ill, diagnosed as a “paranoid schizophrenic prone to psychotic breaks.”¹²² He became the state's first “volunteer” by giving up his rights to appeal his conviction, beyond the direct appeal, and asking to be executed. The Governor obliged.

No other inmate would be executed for three years, mostly due, ironically, to litigation around the state and federal legislation intended to speed up executions. Unknowable at the time, 1995 marked a crossroads for North Carolina. From that point in time, the number of prisoners executed annually would increase (on average) while the number of death sentences imposed annually would decline (precipitately).

IV. THE DECLINE OF SUPPORT FOR THE DEATH PENALTY IN NORTH CAROLINA: 1997—2008

In 1997, public support in the United States for the death penalty was strong at around seventy-five percent.¹²³ It then began a decline. By 2000, a Harris Poll found support for the death penalty at sixty-four

¹²¹ 1995 N.C. Sess. Laws 389-97 (modifying N.C. GEN. STAT. §§ 15A-1415 and 7A-451(c)).

¹²² Charlotte School of Law, *supra* note 49, at 10.

¹²³ Harris Interactive survey reported that 75% were in favor of capital punishment in 1997. Harris Interactive, *Support For Death Penalty Still Very Strong Despite Widespread Belief That Some Innocent People Are Convicted of Murder* PR Newswire, Aug. 17, 2001. See also National Polls and Studies, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/national-polls-and-studies> (last visited Mar. 1, 2009).

percent.¹²⁴ It has since remained relatively constant. In August 2007, a Pew survey found that sixty-two percent of Americans favored the death penalty, while thirty-two percent opposed it and six percent were unsure.¹²⁵ More recently in North Carolina, in April 2007, researchers at Elon University found that only fifty-eight percent of North Carolinians supported the death penalty.¹²⁶ Two years prior, their poll found sixty-one percent in support of the death penalty.¹²⁷

The decline in public support of the death penalty can be attributed to the convergence of trends and events over the past two decades. Because of the significance of each trend and event and because of the state's particular social and political context, the convergence created a tipping point regarding the death penalty. These events and trends include the following seven.

1) The high homicide rate of the 1980's fell considerably during the 1990's. From 1991 to 2000, the national homicide rate fell from 9.8 to 5.5 per 100,000 persons—a drop of forty-four percent.¹²⁸ In North Carolina, the murder rate dropped from 10.7 per 100,000 in 1990 to 8.5 in 1996, and to 6.5 in 2007.¹²⁹ This decline in crime correlated to a similar decline in public concern about crime. In 1994, polls indicated that the percentage of people who thought crime “was the most important problem facing the country ranged from 28% to 52%, far ahead of any other problem. In 2000, crime was only mentioned by 12% of the population, and was roughly tied with education (11%) and health care (10%), but it was still the most commonly mentioned problem.”¹³⁰

The “crime wave” of the 1980's is largely attributed to the influx of drugs (especially crack cocaine), gang activity, and increased availability of assault weapons. Its end is attributed to increased incarceration,

¹²⁴ *Id.*

¹²⁵ Robert Ruby & Allison Pond, *An Enduring Majority: Americans Continue to Support the Death Penalty*, Pew Forum on Religion and Public Life, Dec. 19, 2007, available at <http://pewforum.org/docs/?DocID=272>.

¹²⁶ Mike Baker, *Poll: Death penalty support waning, Experts say N.C. opinions changing due to cases*, STAR-NEWS (Wilmington N.C.), Apr. 25, 2007, <http://www.starnewsonline.com/apps/pbcs.dll/article?AID=/20070425/NEWS/704250470/-1/State>.

¹²⁷ *Support strong for lottery, death penalty in N.C., Elon University Poll finds*, Nov. 17, 2005, <http://www.elon.edu/e-web/elonpoll/200511.xhtml>.

¹²⁸ Levitt, *supra* note 91, at 165.

¹²⁹ *Nationwide Murder Rates, 1996-2007: Alphabetical by State Murder Rates per 100,000 People*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/murder-rates-1996-2007> (analyzing annual violent crime data from the FBI's *Crime in the United States* report) (last visited Jan. 31, 2009).

¹³⁰ Gross & Ellsworth, *supra* note 90, at 29.

more police, the decline of the crack epidemic and legalized abortion.¹³¹

2) The public learned that the death penalty is more expensive than life in prison. In 1993, the Public Policy Institute at Duke University conducted a detailed study on the costs of the death penalty in North Carolina. It focused on the “extra costs to the North Carolina public of adjudicating a case capitally through to execution, as compared with a noncapital adjudication that results in conviction for first degree murder.”¹³² It found that “the extra cost *per death penalty imposed* is over a quarter million dollars, and *per execution* exceeds \$2 million.”¹³³

The Duke study found the greatest expense to be at the trial stage, not the appellate stage as commonly assumed. This reality was recently explained in a study by the North Carolina Office of Indigent Defense Services. IDS did an analysis of the costs of capital cases at the trial level. It found that the most significant factor driving the cost of capital cases at the trial level is “the DA’s decision whether to proceed capitally.”¹³⁴ Prosecutors overreach in their charging decisions for a variety of reasons, including to gain bargaining leverage and to appear tough on crime. The result of charging capitally is that the costs increase significantly: “Regardless of whether the case ended in a trial, plea, or dismissal, a proceeded capital case costs 3 to 5 times more than a proceeded non-capital case.”¹³⁵ For this taxpayer expense, the D.A.’s get only the rare death sentence:

Over 83% of all potentially capital cases at the trial level have ended in a conviction of second degree murder or less and over 12% have ended in a voluntary dismissal, no true bill, or no probable cause finding. Moreover, more than 45% of potentially capital cases ended in a conviction of *less* than second degree murder. For proceeded capital cases, almost 60% ended in a conviction of second degree murder or less and 22% ended in a conviction of *less* than second degree murder.¹³⁶

¹³¹ Levitt, *supra* note 91, at 176-183. The death penalty is notably missing from the list.

¹³² Phillip J. Cook & Donna B. Slawson, *The Costs of Processing Murder Cases in North Carolina*, N.C. Admin. Office of the Courts, May 1993, at 3, available at <http://www.deathpenaltyinfo.org/northcarolina.pdf>.

¹³³ *Id.*

¹³⁴ N.C. OFFICE OF INDIGENT DEFENSE, FY07 CAPITAL TRIAL CASE STUDY: PAC AND EXPERT SPENDING IN POTENTIALLY CAPITAL CASES AT THE TRIAL LEVEL 7 (2008), available at <http://www.ncids.org/Reports%20&%20Data/Latest%20Releases/FY07CapitalStudyFinal.pdf>.

¹³⁵ *Id.*

¹³⁶ *Id.* at 10.

3) In 1994, the North Carolina capital punishment statute was changed to allow juries to sentence those convicted of capital murder to life without the possibility of parole (LWOP).¹³⁷ Studies have consistently shown that public support of the death penalty declines when LWOP is an alternative. Nationally, in public opinion polls, LWOP is consistently chosen “by 30-40% of the population—reducing support for the death penalty to the 45-60% range”¹³⁸ Polls of North Carolinians have produced similar results.¹³⁹

In addition, with the availability of LWOP, juries return fewer death sentences. When LWOP was not available, juror interviews revealed that some voted for death not because they thought the sentence was appropriate but because they believed that a life sentence would mean the person could be out on the streets in seven years.¹⁴⁰ By law, neither defense lawyers nor judges were allowed to provide jurors with any information about the possibility of parole—even when jurors asked.

4) A death penalty moratorium movement began in 1997. The ABA adopted a resolution calling upon all states with the death penalty to impose a moratorium until they implemented policies and procedures that “(1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed.”¹⁴¹

A report supporting the resolution described critical flaws in the application of the death penalty, including widespread incompetent representation of capital defendants and death row inmates, improper representation of the state by prosecutors, and racial discrimination in capital sentencing. The report emphasized that courts are often unable to address these problems because of statutory restrictions, such as

¹³⁷ N.C. GEN. STAT. § 14-17 (2008).

¹³⁸ Gross & Ellsworth, *supra* note 90, at 47.

¹³⁹ See, e.g., Editorial, *New parole directive overlooks death row*, NEWS & RECORD (Greensboro, N.C.), Nov. 7, 2005, at A12.

¹⁴⁰ The author, along with her colleagues, discovered this phenomenon through personal interviews of jurors who sentenced her clients to death. The seven years is consistent with the parole eligibility of an inmate sentenced to a second degree life sentence under prior law. In contrast, a sentence of first degree life meant the possibility of parole in twenty years.

¹⁴¹ AM. BAR ASS'N SECTION OF INDIVIDUAL RIGHTS & RESPONSIBILITIES ET AL., ABA RECOMMENDATION NO. 107 (Feb. 3, 1997), available at <http://www.abanet.org/irr/rec107.html>.

those found in the AEDPA, a situation aggravated by defunding of federal death penalty resource centers.¹⁴²

5) Perhaps the single most significant trend contributing to the decline of support of the death penalty has been the release of innocent persons from death row. Between 1990 and 1997, at least seventy defendants were released from death row in the United States because of innocence. In 1998, thirty of the exonerated gathered at a highly-publicized conference at Northwestern University Law School in Chicago, Ill. The conference was followed in 2000 with the Governor of Illinois imposing a moratorium on executions and subsequently commuting all death sentences because so many innocents had been released from his state's death row.¹⁴³

If North Carolinians at that time believed that their State was different from Illinois, and had no innocent prisoners on death row, that belief was soon dispelled. In 1999, three North Carolina death row inmates who claimed innocence were granted relief.

- Charles Munsey received a new trial after being on death row for 3 years. The snitch who had put him away testified that he had lied. Evidence supported that the prosecutor turned a blind eye. Munsey died of lung cancer before he could be retried.¹⁴⁴
- Alfred Rivera won a new trial after being on death row for 2 years.¹⁴⁵ The original jury had not heard evidence of Rivera being framed. On retrial, he was acquitted.
- Wendell Flowers was convicted of the stabbing death of a fellow prison inmate. Four inmates were involved, and he was the only one to receive the death penalty. There was no credible evidence that Flowers did the stabbing and withheld evidence supported the DA's original theory that Flowers was the lookout.¹⁴⁶ Wendell Flowers gave up his

¹⁴² LESLIE A. HARRIS, AM. BAR ASS'N, ABA REPORT ACCOMPANYING RECOMMENDATION No. 107, at 2 (Feb. 3, 1997), available at <http://www.abanet.org/ftp/pub/irt/rpt107.wpd>

¹⁴³ Gross & Ellsworth, *supra* note 90, at 19.

¹⁴⁴ See, e.g., Liz Chandler et al., *Uncertain Justice-The Death Penalty On Trial: Errors, Inequities Often Cloud Capital Cases In the Carolinas*, CHARLOTTE OBSERVER, Sept. 10, 2000 at 1A; Joseph Neff, *DA turned blind eye to evidence snitch lied*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 12, 2006, <http://www.newsobserver.com/politics/misconduct/v-print/story/387751.html>. See also North Carolina Coalition for a Moratorium, *Case Summaries*, <http://www.ncmoratorium.org/CaseSummaries.aspx> (last visited Mar. 6, 2009).

¹⁴⁵ *Innocence Cases 1993-2004*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/innocence-cases-1994-2003> (last visited Mar. 6, 2009).

¹⁴⁶ In granting clemency, Governor Hunt stated, "I am convinced from all that I have learned about this case that several inmates were involved in this murder. . . . From the testimony of the eyewitness it is not clear exactly what role Flowers actually carried out. But it is clear as a bell that Flowers did not kill Rufus Watson alone. . . ." Amanda

federal appeals and did not request clemency. Disregarding Flowers' desire to be executed, Governor Hunt commuted his sentence to LWOP.

In November 2000, Governor Hunt was presented with another clemency petition of an inmate with a claim of innocence, Marcus Carter. Charged with the murder and rape of a woman in a back alley, Carter's first trial resulted in a hung jury.¹⁴⁷ Carter represented himself in his second trial, after a falling out with his court appointed attorneys who had not visited him between trials. Carter (who is black) dozed during jury selection and ended up with an all-white jury. He called only one witness in the guilt phase, "a DNA expert who couldn't draw any conclusions because she didn't have enough forensic material to test."¹⁴⁸ He was convicted. Carter then turned over his sentencing hearing to his lawyers. They called two witnesses: Marcus' mother and a psychologist, who had been given just fifteen minutes to prepare. Hunt commuted Carter's death sentence to LWOP just hours before he was to be executed. Governor Hunt said this about his decision,

I am confident that Marcus Carter is guilty of the crime for which he was sentenced, and I also believe that he was mentally competent when he committed the crime and when he stood trial. But in cases where capital punishment could be imposed, we must go the extra mile to assure there is a fair trial. In the case of Marcus Carter, I am convinced that the overall circumstances of this case put that in question. Therefore, I cannot allow this execution to go forward.¹⁴⁹

In 2001, Michael Easley, who had served as the Attorney General under Governor Hunt for eight years, became Governor of North Carolina. In January 2002,¹⁵⁰ he was presented with a clemency petition of

Lamb, *Hunt Commutes First Death Sentence*, WRAL-TV/CAPITAL BROADCASTING CO. (Raleigh N.C), <http://www.wral.com/news/local/story/144577/> (last visited Mar. 1, 2009).

¹⁴⁷ Governor James Hunt, Press Release, *Gov. Hunt Commutes Death Sentence for Carter*, <http://www.unc.edu/student/orgs/cedp/page26.html> (last visited Mar. 6, 2009)

¹⁴⁸ Ames Alexander & Liz Chandler, *3 Carolinas Executions Due Next Month Schedule Prompts Moratorium Talk; Hunt Commits Only to Clemency Review*, CHARLOTTE OBSERVER, Oct. 19, 2000, at 1B.

¹⁴⁹ Governor James Hunt, Press Release, *supra* note 147. Carrying Hunt's statements to their logical conclusion would suggest that he suspected if Carter been given a fair trial (given the prior hung jury and the circumstantial nature of the evidence of guilt), a second jury might very well have acquitted Carter or, because of residual doubt, at least not have imposed a death sentence.

¹⁵⁰ Easley was presented with his first capital clemency petition, that of Willie Ervin Fisher, just a couple of months after taking office. Easley denied clemency to Fisher and then denied clemency to four other inmates facing execution in 2001. *Willie*

an inmate claiming innocence, Charlie Alston.¹⁵¹ Alston was convicted for the murder of a woman who was killed in her bedroom, beaten with a hammer and suffocated with a pillow. Alston had always maintained his innocence. The DNA evidence that could establish his innocence had been lost. His federal appeals were cut short when Alston's post-conviction lawyer missed a filing deadline due to drug and mental problems. Just a few hours prior to his execution, Easley commuted Alston's death sentence. In his official statement Easley said, "After long and careful consideration of all the facts and circumstances of this case in its entirety, I conclude that the appropriate sentence for the defendant is life in prison without parole."¹⁵²

In 2001, Alan Gell received a new trial after attorneys proved in a post-conviction hearing that the prosecution had withheld evidence of his innocence at his 1998 trial. The case was retried in 2004: Gell was acquitted.¹⁵³

In 2003, Jerry Hamilton was granted a new trial after being on death row since 1997. The State withheld evidence of his innocence, and the DNA did not match that found at the scene.¹⁵⁴ Hamilton is awaiting retrial.

Fisher—Chronology of Events, N.C. Dep't of Corr., http://www.doc.state.nc.us/DOP/death_penalty/fisher_chronology.htm (last visited Feb. 27, 2009). One case stood out in the press, that of Ronald Frye. His alcoholic attorney drank heavily during Frye's trial and did no mitigation investigation, missing significant evidence of abuse and neglect. Liz Chandler, *With Lives On Line, Attorney Turned To Drink 3 Capital Appeals Allege Shoddy Work*, CHARLOTTE OBSERVER, Sept. 11, 2000, at 6A.

¹⁵¹ Beau Breslin and John J.P. Howley, *Defending the Politics of Clemency*, 81 OR. L. REV. 231, 237-38, (2002).

¹⁵² National Coalition to Abolish the Death Penalty, *NCADP Praises North Carolina Governor Mike Easley for Commutation of Death Sentence*, <http://www.civilrights.org/press/2002/ncadp-praises-north-carolina-governor-mike-easley-for-commutation-of-death-sentence.html> (last visited Feb. 6, 2009). Easley did not grant clemency to another man, Henry Hunt, who had claimed innocence for almost twenty years. Office of the Clark County Prosecuting Attorney, <http://www.clarkprosecutor.org/html/death/US/hunt875.htm> (citing Greg Barnes, *Hunt Executed for 1984 Slayings*, FAYETTEVILLE ONLINE, Sept. 12, 2003) (last visited Feb. 8, 2009). Evidence included a confession by another man, withheld evidence of innocence, lack of physical evidence linking Hunt to the crime scene and Hunt's passing of a lie detector test. Editorial, *And justice for all?*, NEWS & RECORD (Greensboro, N.C.), Jan. 24, 2003, at A14.

¹⁵³ Editorial, *Trials And Errors A Fair Trial Rescues Alan Gell From Death Row*, CHARLOTTE OBSERVER, Feb. 22, 2004, at 2D.

¹⁵⁴ Gary D. Robertson, *Death Row Prisoner May Get New Trial Judge Rules Prosecutors Withheld Key Evidence In 1997 Murder Trial*, CHARLOTTE OBSERVER, Apr. 25, 2003, at 4B.

Also in 2003, Darryl Hunt walked out of prison after spending 18 years in prison for a murder he did not commit. Tried capitally but sentenced to life because of a lone juror holdout, Hunt received a full exoneration in 2004.¹⁵⁵

Amazingly, since the start of the current moratorium in 2006, and within six months of each other, three North Carolina death row prisoners have been released with charges dismissed.

- Jonathan Hoffman was granted a new trial in 2004, after the prosecution withheld evidence that they had offered rewards to their key witness for his testimony. His capital charges were dismissed in 2007.¹⁵⁶
- Levon Jones received a new trial, in 2006 after a judge found trial counsel ineffective for missing key evidence of innocence. Jones was released from prison in 2008, after 14 years on death row.¹⁵⁷
- Edward Chapman was granted a new trial in 2007, after a judge found that his conviction and sentence rested upon withheld evidence, lost evidence, false testimony, circumstantial evidence and ineffective lawyering. Chapman was released from prison in 2008 after 15 years on death row.¹⁵⁸

6) The same flaws in the system that put the innocent men listed above on death row have been publicly highlighted in the cases of the forty-three prisoners who have been executed since 1984. Every executed inmate had attorney advocates at the end of their lives who pleaded their cases to the Governor and to the public.¹⁵⁹ They shared stories of drunk lawyers, disbarred lawyers, innocence, hidden evidence, lying witnesses, clients who are mentally ill, plea deals turned down, compelling mitigation cases never known by the jurors, racism,¹⁶⁰ murder victims' family members pleading for clemency, jurors

¹⁵⁵ Editorial, *Free At Last: Hunt's Pardon Well-Deserved. It's Rare That Gov. Mike Easley Grants A Pardon, But In The Case Of Darryl Hunt, Wrongly Convicted Of Murder, It Was Clearly The Right Thing To Do*, NEWS & RECORD, (Greensboro, N.C.), Apr. 19, 2004, at A8.

¹⁵⁶ Emily S. Achenbaum, *A Murder Case Dissolves*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 12, 2007, at A1.

¹⁵⁷ Mandy Locke, *Death Row Inmate To Go Free*, NEWS & OBSERVER (Raleigh, N.C.), Apr. 2, 2008, at A1.

¹⁵⁸ Marcie Young and David Ingram, *Savoring The Start Of Life After Death Row - Charges Dropped In 1992 Catawba County Killings; Court-Appointed Defense Faulted*, CHARLOTTE OBSERVER, Apr. 3, 2008, at A1.

¹⁵⁹ The author has represented five inmates in clemency proceedings: Zane Hill, Willie Fisher, Ernest Basden, Timothy Keel and Steven McHone.

¹⁶⁰ Multiple studies conducted in North Carolina have shown that persons convicted of killing white victims are much more likely to receive a death sentence than persons killing black victims. Another racism-concern is persons of color being excluded from capital juries. See, e.g., Eric Frazier and Ames Alexander, *Disparities in death sentences raise*

admitting they never intended the man they sentenced to death to actually be executed, and rehabilitation. These stories have changed the public perception of the people North Carolina executes.¹⁶¹

7) The removal from death row of at least ten women and men with mental retardation.¹⁶² The Legislature, convinced of the reduced culpability of persons with mental retardation, passed legislation in 2001 prohibiting such persons from being sentenced capitally.¹⁶³ In 2002, the United States Supreme Court held that the execution of persons with mental retardation is cruel and unusual punishment.¹⁶⁴

As the opinions of North Carolinians have gone, so have the verdicts of its juries. There has been a steep decline in death sentences returned by North Carolina juries.¹⁶⁵ From the peak of thirty-four in 1995, the annual number remained in the twenties until 2000, when it dropped to eighteen; then in 2001 to fourteen; in 2002 to seven. There have been no more than six death sentences in a single year

concerns about racism, CHARLOTTE OBSERVER, Sept. 30, 2000, at 1A. The NC Racial Justice Act is intended to address these problems. It was passed by the House in 2007 but stalled in the Senate. Whitney Woodward, *Advocates Make Case for Racial Justice Act*, NEWS & OBSERVER (Raleigh, N.C.), May 28, 2008, <http://www.newsobserver.com/news/story/1087430.html>. The Act was reintroduced in the 2009 session of the N.C. General Assembly in both the House, H.R. 472, 2009 Gen. Assem., Reg. Sess. (N.C. 2009), available at <http://www.ncga.state.nc.us/Sessions/2009/Bills/House/PDF/H472v1.pdf>, and the Senate, S.461, 2009 Gen. Assem., Reg. Sess. (N.C. 2009), available at <http://www.ncga.state.nc.us/Sessions/2009/Bills/Senate/PDF/S461v0.pdf>.

¹⁶¹ The *Charlotte Observer* published an in-depth five-part series, Sept. 10-14, 2000, on the application of the death penalty in North and South Carolina. *Uncertain Justice: The Death Penalty on Trial*, the series covered such topics as inadequate defense counsel, prosecutorial misconduct, and racism. Based on its findings, the editorial board of the *Charlotte Observer* called for a moratorium noting that “capital punishment is tainted with mistakes, inequities and incompetence to an appalling degree.” Editorial, *Uncertain Justice: Carolina’s death lottery justifies a moratorium*, CHARLOTTE OBSERVER, Sept. 10, 2000.

¹⁶² *Persons Removed from Death Row*, N.C. Dep’t of Corr., *supra* note 33.

¹⁶³ N.C. GEN. STAT. § 15A-2005 (2008).

¹⁶⁴ *Atkins v. Virginia*, 536 U.S. 304 (2002).

¹⁶⁵ Maher provides a fuller analysis of the systemic reforms passed in North Carolina that have made the difference in the rate of death sentences: 1) the 2004 LWOP law; 2) open-file discovery in post-conviction, effective 1996, N.C. GEN. STAT. § 15A-1415(e), (f); 3) D.A. discretion to not seek the death penalty in cases where an aggravating factor exists, effective 2001, N.C. GEN. STAT. § 15A-2004; 4) creation of the Indigent Defense Services Commission, effective 2001, § 7A-498; 5) post-conviction DNA testing, effective 2001, N.C. GEN. STAT. § 15A-269; and 6) pretrial open file discovery, effective 2004, N.C. GEN. STAT. § 15A-902 *et seq.* Maher, *supra* note 3, at 100-01.

since 2002.¹⁶⁶ In 2008, there was only one death sentence, out of thirteen capital trials.¹⁶⁷ As noted above, in the same year, there were two exonerations.

V. THE ROLE OF THE GOVERNOR IN A NEW CAPITAL PUNISHMENT LANDSCAPE

Assuming that neither the State Supreme Court, nor the North Carolina Legislature, acts to lengthen the current moratorium or enact an official moratorium, the Governor will soon face a wave of execution dates. Once the dates are set, she will be faced with the question identified by Maher, *infra*, “should we execute scores of inmates for crimes that would not warrant the death penalty if they were tried today?”¹⁶⁸ Governor Perdue should plan for that day. Here are possible options for action.

1) Support an official moratorium on executions of two years to study the problems already identified with North Carolina’s capital punishment system. In spring 2007, the North Carolina Senate passed a moratorium bill,¹⁶⁹ which then stalled in the House. There is widespread public support for a moratorium. In 2005, sixty-five percent of North Carolinians polled were in favor of a moratorium on executions.¹⁷⁰

2) Create a Governor’s Panel on Evolving Standards to screen all death sentences imposed prior to 2001.¹⁷¹ Similar to the NC Innocence Inquiry Commission, though more temporary, the Evolving Standards Panel would be comprised of former judges, prosecutors, criminal defense lawyers, and others chosen by the Governor. The

¹⁶⁶ Bureau of Justice Statistics, *Prisoners Executed Under Civil Authority in the United States, by Year, Federal, State by State, and Region, 1977-2008*, <http://www.ojp.usdoj.gov/bjs/cp.htm#publications>.

¹⁶⁷ Dan Kane, *In N.C., Death Penalty Gets Rarer*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 30, 2008, at A1.

¹⁶⁸ Maher, *supra* note 3, at 97.

¹⁶⁹ H.B. 1691, 2007-2008 Gen. Assem., Reg. Sess. (N.C. 2007).

¹⁷⁰ North Carolina Academy of Trial Lawyers, *New Poll Finds Majority of North Carolinians Favor a Moratorium on the Death Penalty*, Dec. 1, 2005, http://ncatl.org/file_depot/0-10000000/0-10000/9208/folder/51285/NCATL-mora-poll.pdf. See also List of organizations and local governments supporting a moratorium, People of Faith Against the Death Penalty, http://www.pfadp.org/index.php?option=com_content&task=view&id=30 (last visited Feb. 7, 2009).

¹⁷¹ “[M]any of those who work in the criminal justice system believe that the significant reforms were in place by the time cases were being tried or resolved after 2001.” Maher, *supra* note 3, at 102.

Panel would review the cases in light of the standards of today's capital punishment system. It would ask such questions as: Is this the type of case that would have been pled to life under the new law? Were the attorneys sufficiently experienced? Did the attorneys follow acceptable standards of practice? Did the prosecutors follow acceptable standards of practice? Is there important information that the convicted did not have, but would have had, under today's open discovery law? Did the convicted have a proper forensic mental health evaluation? Was there a mitigation investigator? Is the perpetrator and their crime comparable to those receiving death today?

The Panel would review a case once all appeals had been exhausted. The standard of review would necessarily be more generous than the restrictive prejudice requirements used by the federal and state courts. If the Panel believes that under today's standards, the trial of the defendant would more likely than not have had a different result, then it would pass the case to the Governor with a recommendation that clemency be granted.

Regardless of the Panel's decision, the attorneys for both sides would be allowed to supplement the record and argue their position for or against clemency to the Governor, who would still be the final decision-maker.

3) Strengthen substantive and procedural justice in clemency proceedings.

Substantive Justice. A study published in 1957 identified seven reasons provided by North Carolina Governors for commuting a death sentence. In fifty-four cases of commutation from 1939 to 1954, the stated reasons fell in the following order of frequency:¹⁷² responsible officials and/or jury urged commutation (44.4%), mental condition of the offender (31.5%), crime was not premeditated (27.8%), victim's poor character or contribution to the crime (25.9%), age of the offender or his underprivileged status (22.9%), evidence did not justify the death penalty or was of a doubtful nature (22.9%) and community urged commutation (5.6%).¹⁷³

These grounds for clemency have been abandoned by Governors in the post-Furman era. Four of the five cases in which North Carolina

¹⁷² Note that some commutations were supported by more than one reason.

¹⁷³ Elmer H. Johnson, *Selective Factors in Capital Punishment*, 36 Soc. Forces 165, 167 (1957-58).

Governors granted clemency involved questions of innocence, role in the crime, or reasonable doubt. To even a layman, cases such as these are the easy ones. Of course, clemency should be granted where there is a question regarding guilt. To most, such a decision is not merciful; it is morally required.

The fifth clemency was granted by Governor Easley in a case of blatant racism.¹⁷⁴ Robert Bacon, a black man, was pressured by Bonnie Clark, a white woman, into killing her husband, who she said was abusing her. All three were in a car when they began arguing. Bacon picked up a knife and stabbed the victim repeatedly. Bacon got death; Clark got life. The jury was all-white. Evidence revealed that, during deliberations, some jurors made racial jokes and derogatory comments regarding bi-racial relationships.¹⁷⁵ Governor Easley commuted Bacon's sentence to LWOP stating, "I am satisfied that the prosecutors and judges acted fairly and professionally in this case. However, as Governor, my review of this matter in its totality causes me to conclude that the appropriate sentence for the defendant is life without parole."¹⁷⁶

The restrictive view of clemency held by North Carolina Governors over the past twenty-five years is attributable to the "political climate that encourage[d] 'tougher' criminal penalties and the erroneous belief that clemency is unnecessary today because death row inmates receive 'super due process' in the courts."¹⁷⁷ These more enlightened times beg for a return to the traditional, broader functions of clemency—to correct an injustice and to prevent excessive punishment.

¹⁷⁴ Robert Bacon was one of seven execution dates in Easley's first year of being Governor. His first date, May 18, 2001, was stayed when the North Carolina Supreme Court agreed to hear an issue raised by Bacon and two other death row inmates—that Governor Easley could not be impartial given his former office as Attorney General, prosecuted their cases in post-conviction litigation. The petition was denied. Bacon's date was rescheduled for October 5.

¹⁷⁵ Amnesty International, *Death Penalty / Legal Concern: Robert Bacon, Black, Aged 41*, Aug. 31, 2001, <http://www.amnesty.org/es/library/asset/AMR51/130/2001/es/dom-AMR511302001en.pdf> (last visited Apr. 3, 2009).

¹⁷⁶ *Robert Bacon Chronology of Events*, N.C. Dep't of Corr., http://www.doc.state.nc.us/dop/deathpenalty/bacon_chronology.htm (last visited Apr. 3, 2009).

¹⁷⁷ A.B.A SECTION OF INDV. RIGHTS & RESP'S, *DEATH WITHOUT JUSTICE: A GUIDE FOR EXAMINING THE ADMINISTRATION OF THE DEATH PENALTY IN THE UNITED STATES* 23 (2001).

In 2001, the ABA made eleven recommendations for improvement of capital clemency proceedings.¹⁷⁸ Those addressing substantive justice include:

1. The clemency decision-making process should not assume that the courts have reached the merits on all issues bearing on the death sentence in a given case; decisions should be based upon an independent consideration of facts and circumstances.
2. The clemency decision-making process should take into account all factors that might lead the decision maker to conclude that death is not the appropriate punishment.
3. Clemency decision makers should consider as factors in their deliberations any patterns of racial or geographic disparity in carrying out the death penalty in the jurisdiction
5. Clemency decision makers should consider as factors in their deliberations an inmate's possible rehabilitation or performance of significant positive acts while on death row.¹⁷⁹

Governors (and parole boards) in other states recently seem comfortable with granting clemency in cases to correct or prevent a range of injustices:

- The state parole board of Georgia commuted [Willie] Hall's death sentence to life without parole . . . after six jurors testified that they would have chosen life without parole were it offered at trial. Hall's excellent behavior in prison and no criminal record prior to the murder was also a factor in the board's decision.¹⁸⁰
- [Oklahoma] Governor Brad Henry commuted the death sentence of Osvaldo Torres to Life without Parole on May 13, 2004. Henry said that it was "important to remember that the actual shooter in these horrific murders was also sentenced to death and faces execution." Henry also stated that he "concluded that there is a possibility a significant miscarriage of justice occurred . . . specifically that the violation of his Vienna Convention Rights contributed to trial counsel's ineffectiveness, that the jury did not hear significant evidence, and that the result of the trial is unreliable."¹⁸¹
- [On July 2, 2004, Indiana] Governor Joe Kernan commuted the death sentence of [Darnell] Williams to Life in prison without parole on the

¹⁷⁸ *Id.* at 27.

¹⁷⁹ *Id.*

¹⁸⁰ *Clemency*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/clemency> (citing Carlos Campos & Bill Rankin, *Murderer's Sentence Commuted*, ATLANTA JOURNAL-CONSTITUTION, Jan. 27, 2004, at 1B) (last visited Apr. 15, 2009).

¹⁸¹ Death Penalty Information Center, <http://www.deathpenaltyinfo.org/clemency> (citing John Greiner, *Henry Commutes Death Sentence*, OKLAHOMAN, May 14, 2004, at 1A) (last visited Apr. 15, 2009).

basis that Williams' co-defendant initially received a life sentence and thus executing Williams would be unfair.¹⁸²

- [On August 29, 2005, Indiana] Governor Mitch Daniels commuted the death sentence of [Arthur] Baird, who is severely mentally ill to life without parole because that sentence was not available at the time of Baird's sentencing. Furthermore, many of the jurors in the trial, and the family of the victims believe that Baird deserved life without parole due to his mental illness.¹⁸³
- [Tennessee] Gov[ernor] Phil Bredesen commuted the death sentence of Michael Joe Boyd, who had been sentenced to die on Oct. 24, 2007, to life in prison without parole Friday, citing ineffective legal counsel at his sentencing and procedural limitations on his appeals.¹⁸⁴
- [Kentucky] Gov[ernor] Ernie Fletcher commuted [Jeffery] Leonard's death sentence to a life sentence without parole in December 2007. Fletcher said Leonard was not provided adequate representation by his attorney, Fred Radolovich, who has admitted he didn't even know Leonard's name during the trial.¹⁸⁵
- The [Georgia] Board of Pardons and Paroles, [on May 22, 2008,] did not provide a reason for commuting Samuel Crowe's sentence to life without parole. However, considerable testimony from friends, pastors and even a former corrections officer was presented to the board emphasizing his exemplary behavior and deep remorse while on death row.¹⁸⁶
- [On July 24, 2008, f]ollowing the recommendation of the Oklahoma Pardon and Parole Board, Gov[ernor] Brad Henry granted clemency to Kevin Young, commuting his death sentence to life in prison without the possibility of parole. The Board's recommendation of clemency was based on several factors, including the disproportionality of the punishment, questionable witnesses, and a decision during the original trial to turn down a plea bargain that would have resulted in a life sentence.¹⁸⁷

¹⁸² *Clemency*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/clemency> (citing *National Briefing Midwest: Indiana: Governor Commutes Execution*, N.Y. TIMES, July 3, 2004, at A16) (last visited Apr. 15, 2009).

¹⁸³ *Clemency*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/clemency> (citing Keith Corcoran, *Daniels Spares Mentally Ill Killer; Man Who was to Die this Week will Spend Life in Prison; Debate on Issue Likely to Grow*, INDIANAPOLIS STAR, Aug. 30, 2005, at 1A) (last visited Apr. 15, 2009).

¹⁸⁴ *Clemency*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/clemency> (citing Milt Capps, *Governor Commutes Prisoner's Death Sentence*, THE NASHVILLE POST, Sept. 14, 2007, http://www.nashvillepost.com/news/2007/9/14/governor_commutes_prisoners_death_sentence) (last visited Apr. 15, 2009).

¹⁸⁵ *Clemency*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/clemency> (citing John Stamper, *101 Get Pardons, Commutations GOP Governor's Final Acts*, LEXINGTON-HERALD, Dec. 11, 2007, at A1) (last visited Apr. 15, 2009).

¹⁸⁶ *Clemency*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/clemency> (citing Rhonda Cook, *Killer Spared at Last Minute*, ATLANTA JOURNAL-CONSTITUTION, May 23, 2008, at 1A) (last visited Apr. 15, 2009).

¹⁸⁷ *Clemency*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/clemency> (citing Michael McNutt & Julie Bisbee, *Death Penalty: Henry Grants Parole*

- Most recently, on February 6, 2009, the Ohio Parole Board recommended to the Governor of Ohio that the death sentence of Jeffrey Hill be commuted to life with the possibility of parole. Hill stabbed his mother to death during a crack-cocaine binge. According to the Board's report, it found "compelling and unanimous opinion" of the family of victim Emma Hill that her son and killer should not be executed."¹⁸⁸

Another traditional function of clemency "has been to be a bellwether of emerging criminal justice norms, leading society in the direction of needed reform."¹⁸⁹ In other words, the Governor should be a leader in facilitating criminal justice reforms, particularly where a system has not yet incorporated the latest understanding of criminal justice policy, social science and physical science.¹⁹⁰ Governors in other states have recently provided such leadership by granting clemency to prevent the execution of the mentally ill, juveniles and much less culpable co-defendants.

- [In 2002, t]he [Georgia] Board of Pardons and Paroles voted to commute [Alexander] Williams's sentence to life without parole because he suffered from mental illness and was a juvenile at the time of the crime.¹⁹¹
- [In 2007, Texas] Governor Rick Perry concurred with the 6-1 recommendation from the Texas Board of Pardons and Paroles to commute [Kenneth] Foster's death sentence, stating: "I am concerned about Texas law that allowed capital murder defendants to be tried simultaneously and it is an issue I think the Legislature should examine." Foster did not kill the victim but drove the car carrying the shooter. He was tried at the same time as the actual shooter, who also received a death sentence.¹⁹²

Governor Easley missed his opportunity to be a bellwether when he remained oblivious to the growing understanding that execution of persons with mental retardation is cruel and unusual. Ernest McCarver was scheduled to be executed on March 2, 2001, for the stabbing death and robbery of a Concord cafeteria worker. McCarver's

Board's Request; Governor Spares 2nd Killer's Life; Jurors had Requested More Guidance During Trial, OKLAHOMAN, July 25, 2008, at 1A) (last visited Apr. 15, 2009).

¹⁸⁸ *Clemency*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/clemency> (citing Allan Johnson, *Clemency Recommended for Man who Stabbed Mother*, COLUMBUS DISPATCH, Feb. 6, 2009, at 02B) (last visited Apr. 15, 2009).

¹⁸⁹ Rapaport, *supra* note 93, at 360.

¹⁹⁰ See Elizabeth Rapaport, *Retribution and Redemption in the Operation of Executive Clemency*, 74 CHI-KENT L. REV. 1501, 1533-34 (2000).

¹⁹¹ David Firestone, *Georgia Will Not Execute Mentally Ill Killer*, N.Y. TIMES, Feb. 26, 2002, at 18A.

¹⁹² *Id.*

attorneys had substantial evidence that McCarver was mentally retarded and petitioned the Governor for clemency largely on this basis. At the time of his pending execution, legislation was pending in the State Legislature that would prohibit the execution of persons with mental retardation. McCarver asked for the opportunity to take advantage of this legislation. Easley denied clemency. Minutes later the United States Supreme Court granted a Stay of Execution¹⁹³ and, on March 26, granted certiorari on the question of the constitutionality of executing the mentally retarded.¹⁹⁴ In early August 2001, Governor Easley signed legislation into law banning the execution of persons with mental retardation, mooted McCarver's case before the Supreme Court.¹⁹⁵ McCarver remains on death row, awaiting his hearing on mental retardation.

Procedural Justice. U.S. Supreme Court Justice Anthony Kennedy approached the ABA with his concern over the "obsessive focus" given the "process for determining guilt or innocence, to the exclusion of what happens after a conviction has become final and the prisoner is taken away."¹⁹⁶ In particular, he noted "that the pardon process in recent years seems to have been 'drained of its moral force,' and that pardon grants have become 'infrequent,' he remarked memorably that '[a] people confident in its laws and institutions should not be ashamed of mercy.'¹⁹⁷ He asked the ABA "to consider a recommendation to reinvigorate the pardon process at the state and federal levels."¹⁹⁸ The result was the Kennedy Commission.

The Kennedy Commission's report—which addresses all criminal cases not just capital ones—urges states, *inter alia*, to expand use of the clemency power to commute sentences.¹⁹⁹ It specifically recommends the following:

¹⁹³ Estes Thompson, *Execution Stopped*, Associated Press Report, Mar. 2, 2001.

¹⁹⁴ *Ernest McCarver Chronology of Events*, N.C. Dep't of Corr., http://www.doc.state.nc.us/dop/deathpenalty/mccarver_chronology.htm (last visited Feb. 27, 2009).

¹⁹⁵ *Mental Retardation News and Developments: 2002-1999*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/mental-retardation-news-and-developments-2002-1999>.

¹⁹⁶ STEPHEN SALTZBURG, RES. 121C: RECOMMENDATION ON CLEMENCY, SENTENCE REDUCTION AND RESTORATION OF RIGHTS, ABA JUSTICE KENNEDY COMMISSION, REPORT TO THE HOUSE OF DELEGATES 3 (Aug. 2004), available at <http://www.abanet.org/media/kencomm/rep121c.pdf>.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *See id.* at 11.

Jurisdictions should also make clear the standards that govern applications for commutation and pardon; specify the procedures that an individual must follow in order to qualify for a grant of clemency; and ensure that clemency procedures are reasonably accessible to all persons. In this fashion, states may share information about “best practices,” and ensure that the pardon process can work to promote justice without jeopardizing safety, and to restore its “moral force.”²⁰⁰

The Kennedy Commission did not recommend what the standards should be or whether they should even be public. However, to insure a meaningful process and a public perception of such, some public representations should be made. Currently, nothing about the current capital clemency process in North Carolina assures either the petitioner or the public that the Governor provides meaningful review of every petition. Indeed, many a petitioner and his or her supporters have thought the opposite—that the process was a sham.

Governor Easley did all the wrong things to promote public confidence in the clemency process. He made as little information public as possible and veiled the process even to the prisoner’s lawyers.²⁰¹ He denied the clemency petitions of twenty-seven men, and generally did so with some form of the following statement: “Having carefully reviewed the facts and circumstances of this crime and conviction, I find no convincing reason to grant clemency and overturn the unanimous jury verdict affirmed by the state and federal courts.”²⁰² With this opaque statement, Easley avoided being held accountable for his decisions not only on substantive grounds but on procedural ones. His statements revealed nothing, given that *every* case comes to clemency with a unanimous jury voting for death and having been fully reviewed by the courts (barring a default)—conditions precedent for having an execution date.

The ABA’s report *Death Without Justice* included recommendations for improvement of clemency procedures:

²⁰⁰ *Id.*

²⁰¹ Over time, Governor Easley reduced the time available to defense counsel to present their clemency cases to as little as twenty minutes. (This time was supplemented by time counsel was given to talk to the Governor’s counsel.) Defense attorneys always met with the Governor first and the prosecution and the victims met with him afterwards. Defense counsel were not told what the prosecution’s arguments were and not given a chance to rebut them.

²⁰² A cursory internet search produces at least eleven cases in which Easley made a form of this statement.

7. Prior to clemency hearings, death row inmates' counsel should be entitled to compensation and access to investigative and expert resources. Counsel also should be provided sufficient time both to develop the basis for any factors upon which clemency might be granted that previously were not developed and to rebut any evidence that the State may present in opposing clemency.

8. Clemency proceedings should be formally conducted in public and presided over by the Governor or other officials involved in making the clemency determination.

.....

11. To the maximum extent possible, clemency determinations should be insulated from political considerations or impacts.²⁰³

While North Carolina governors need not have a public clemency hearing, they do have a responsibility to have a process that is fair and transparent, one in which prisoners and their lawyers are not required to shoot into the dark. As former Governor Terry Sanford stressed:

The courts of our state and nation exercise in the name of the people the power of administration of justice. The Executive is charged with the exercise in the name of the people of an equally important attitude of a healthy society—that of mercy beyond the strict framework of the law. The use of executive clemency is not a criticism of the courts, either express or implied. I have no criticism of any court or any judge. Executive clemency does not involve the changing of any judicial determination. It does not eliminate punishment; it does consider rehabilitation. To decide when and where such mercy should be extended is a decision which must be made by the Executive. It cannot be delegated even in part to anyone else,²⁰⁴ and thus the decision is a lonely one. It falls to the Governor to blend mercy with justice, as best he can, involving human as well as legal considerations, in the light of all circumstances after the passage of time, but before justice is allowed to overrun mercy in the name of the power of the state.²⁰⁵

Governor Perdue's actions in reviewing the dozens of capital clemency petitions that will come before her will be closely scrutinized. A

²⁰³ A.B.A SECTION OF INDV. RIGHTS & RESP'S, *supra* note 177, at 27.

²⁰⁴ Sanford did not mean to suggest that a separate body could not assist in fact-finding. Since 1917, Governors have had mechanisms for getting advice on clemencies. For example, in 1917, the legislature created a Board of Parole to give advisory aid, and in 1925 it created a Commissioner of Pardons. See CHEEK, *supra* note 8, at 68. In 1953, the General Assembly created a Board of Paroles and in 1955 the Parole Commission. See *Post Release Supervision and Parole Commission: Historical Perspective*, N.C. Dep't of Corr., <http://www.doc.state.nc.us/parole/history.htm> (last visited Apr. 3, 2009). Pre-Furman Governors relied on these entities to conduct investigations in death penalty cases.

²⁰⁵ Messages, Addresses and Public Papers of Governor Terry Sanford, 1961-1965, 552 (M.F. Mitchell, ed. 1966).

full hearing should be held on each case, notice of standards and procedures should be provided, and the basis for the Governor's decision should be made available to the public, even if in a summary fashion.

CONCLUSION

Twenty-five years ago, the Macintosh personal computer hit the market, *Ghostbusters* was one of the top movies of the year, Ronald Reagan was president and AIDS "broke out." North Carolina was in a crime wave, and it began its experimentation with the death penalty in earnest. Getting an inmate to the execution chamber had been slow, but executions had begun.

Over the past twenty-five years, many prisoners have been sent to North Carolina's death row and many have been removed, some of whom were innocent. Forty-two men and one woman have been executed. After numerous court battles and millions of dollars, reforms have been slowly enacted to attempt to make the death penalty system fairer. The public fell out of love with the death penalty. The medical profession stood up to participating in executions. A huge mass of humanity condemned to death passed through the death penalty machinery and a *de facto* moratorium blocked their date with the executioner.

Clemency is an act of mercy, not even necessarily deserved. It says more about the values of a community and of a governor, than those of the condemned. The trying times that will face the Governor post-moratorium demand a reevaluation of how the final review of capital cases is conducted. As the recent elections have proven, the people of North Carolina are ready for change and are ready for leadership not driven by politics. The history of executions in North Carolina over the past twenty-five years provides a wealth of insight into the evolved discomfort level of North Carolinians with the death penalty. Hopefully, the accumulated information will assist the Governor in developing a just and transparent system of addressing the known injustices of North Carolina's death penalty system.

