Criminal Law - Death Penalty: Jury Discretion Bridled

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INTRODUCTION

The Eighth Amendment, applicable to the States through the Fourteenth Amendment, assures that the State's power to punish be "exercised within the limits of civilized standards." Although imposition of the death penalty does not per se constitute cruel and unusual punishment, the Eighth Amendment does forbid its imposition in the unbridled discretion of the jury, or as mandatory upon conviction for a specific offense, such as first degree murder.

The Eighth Amendment requires that the jury be given discretion in capital cases, but this discretion must be guided with objective standards. North Carolina's attempt to conform to this constitutional standard is found in N.C. Gen. Stat. §§ 15A-2000 to 2003, effective June 1, 1977.

1. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. U.S. CONST. amend. VIII.
7. Id.

§ 15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—
(a) Separate Proceedings on Issue of Penalty.—
(1) Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. A capital felony is one which may be punishable by death.
(b) Sentence Recommendation by the Jury.—Instructions deter-
mined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its deliberation in determining sentence. In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

After hearing the evidence, arguments of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:

1. Whether any sufficient aggravating circumstance or circumstances are enumerated in subsection (e) exist;
2. Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and
3. Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

(c) Findings in Support of Sentence of Death.—When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

1. The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and
2. That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and
3. That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

(d) Review and Judgement of Sentence.—

1. The judgement of conviction and sentence of death shall be subject to automatic review by the Supreme Court of North Carolina pursuant to procedures established by the Rules of Appellate Procedure. In its review, the Supreme Court shall consider the punishment imposed as well as any errors assigned on appeal.
2. The sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court upon a finding that the record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death, or upon a finding that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor or upon a finding that the sentence of death
G.S. 15A-2000 prevents a jury from recommending a sentence of death unless it has answered three crucial issues, involving the presence or absence of aggravating and mitigating factors, affirmatively beyond a reasonable doubt. In *State v. Pinch,* the North Carolina Supreme Court held that it is proper to instruct the jury that it has a duty to recommend the death penalty if it answers these issues affirmatively. This holding is inconsistent with the interpretation given G.S. § 15A-2000 by numerous trial courts, that have construed the statute to mean that if these issues were an-

is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The Supreme Court may suspend consideration of death penalty cases until such time as the court determines it is prepared to make comparisons required under the provisions of this section.

(3) If the sentence of death and the judgement of the trial court are reversed on appeal for error in the post-verdict sentencing proceeding, the Supreme Court shall order that a new sentencing hearing be conducted in conformity with the procedures of this Article.

§ 15A-2002. *Capital offenses; jury verdict and sentence.*—If the recommendation of the jury is that the defendant be sentenced to death, the judge shall impose a sentence of death in accordance with the provisions of Chapter 15, Article 19 of the General Statutes. If the recommendation of the jury is that the defendant be imprisoned for life in the State’s prison, the judge shall impose a sentence of imprisonment for life in the State’s prison.


Recently, the North Carolina Supreme Court declined to reconsider its holdings in *Pinch,* *Williams,* and *Smith* with respect to this issue. See State v. McDougal, No. 86A81, *slip op.* at 34-35 (N.C. April 5, 1983). Justice Exum again dissented as to sentence for the reasons stated in *Pinch,* saying “I continue to think that a jury never has a duty to recommend death no matter how it answers the issue.” No. 86A81, *slip op.* at 10 (N.C. April 5, 1983) (Exum, J. dissenting as to sentence).
answered affirmatively, the jury could, but was not required, to recommend the death penalty.13

THE CASE

On October 17, 1979, defendant, a nineteen year old male, shot and killed two men at a motorcycle clubhouse in Greensboro.14 The defendant was subsequently arrested in California, and during the flight back to North Carolina made a full confession to the murders.15 Upon defendant's motion, the cases were joined for trial. At the trial stage of North Carolina's bifurcated procedure in capital cases,16 the jury returned verdicts of guilty on both counts.

At the penalty stage, both the prosecutor and the trial judge advised the jury that it had a duty to recommend a sentence of death if it found three things: (1) that one or more statutory aggravating circumstances existed; (2) that the aggravating circumstances were substantial enough to warrant the death penalty; and (3) that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt.17 The jury was also advised that it had a duty to recommend a sentence of life imprisonment if it did not find any one of those three things.18

The jury recommended the sentence of death in both cases, and the trial judge imposed the death penalty. The convictions and death sentences were subject to automatic review by the North Carolina Supreme Court.19

Among numerous assignments of error on appeal, defendant contended that the foregoing instructions were improper, on the basis that they "prejudicially withdrew from the jury its final option . . . to recommend a life sentence notwithstanding its earlier findings."20 The North Carolina Supreme Court rejected this contention and upheld the challenged instructions. The convictions and sentences of death were affirmed.

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13. Id. at 42, 292 S.E.2d at 232 (Exum, J., dissenting); see e.g., State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981) (Record at 192) ("you may recommend death").
14. 306 N.C. at 6, 292 S.E.2d at 211.
15. Id. at 6-7, 292 S.E.2d at 212.
17. 306 N.C. at 32-33, 292 S.E.2d at 226-227.
18. Id. at 33, 292 S.E.2d at 227.
20. 306 N.C. at 33, 292 S.E.2d at 227 (citing Defendant's Brief at 75).
BACKGROUND

When the Eighth Amendment was adopted in 1791, the States uniformly followed the common-law practice of making death mandatory for certain crimes.21 The States gradually limited the classes of capital offenses, but it was not until 1838 that a state first granted juries sentencing discretion in capital cases.22 By the turn of the century, 23 states and the Federal Government had made death sentences discretionary for first degree murder and other offenses.23 All remaining jurisdictions replaced their mandatory death statutes with discretionary jury sentencing by 1963.24

Before 1949, North Carolina imposed a mandatory death sentence on any person convicted of rape or first degree murder.25 In that year the General Assembly modified the rape and murder statutes, and granted juries the discretion to recommend life sentences in all capital cases.26

In 1972 the United States Supreme Court decided Furman v. Georgia.27 In Furman, three Negro defendants, each convicted of

21. 428 U.S. at 289 (Woodson contains an excellent brief history of mandatory death penalty statutes in the United States at 289-293).
22. Id. at 291. Tennessee in 1838, followed by Alabama in 1841 and Louisiana in 1846, were the first states to abandon mandatory death sentences in favor of discretionary death penalty statutes.
23. Id.
24. Id.
25. Id. at 299.
26. Id. at 299-300. This modification was proposed by a study commission created by the General Assembly. The study commission noted that only three other states still retain mandatory death penalty statutes, and that frequently juries refused to convict under such laws because they believed the defendant, although guilty, should not suffer death. Id. (citing Report of the Special Commission For the Improvement of the Administration of Justice, North Carolina, Popular Government 13 (Jan. 1949).
27. 408 U.S. 238 (1972) (per curiam). (Douglas, J. concurring stated that it is cruel and unusual punishment to apply the death penalty selectively to minorities, and that because of the discriminatory application of the statutes they were unconstitutional in their application. Brennan, J. concurring stated that punishment was cruel and unusual if it did not comport with human dignity, and that it was a denial of human dignity for a state arbitrarily to subject a person to an unusually severe punishment which society did not regard as acceptable. Stewart, J. concurring, stated that the Eighth and Fourteenth Amendments forbid the death penalty to be “wantonly and freakishly” imposed on a “capriciously selected random handful.” White, J. concurring, stated that as administered, the death penalty was so infrequently imposed that the threat of execution was too
rape or murder, were sentenced to death under a Georgia statute which gave juries discretion whether to impose the death penalty, but provided no standards as to how this discretion was to be exercised. In a per curiam opinion expressing the views of five members of the Court, it was held that the imposition of the death penalty in these circumstances constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.28

The North Carolina Supreme Court considered the effect of Furman on the North Carolina criminal statutes the following year in State v. Waddell.29 In that case, the court held unconstitutional the provision of the rape statute that gave the jury the option of returning a verdict of guilty without capital punishment, but held further that this provision was severable so that the statute survived as a mandatory death penalty law.30 The court suggested that the General Assembly delete the provision from its criminal statutes, and held that in the interim trial judges were not to instruct juries that they had discretion to recommend life imprisonment.31 The General Assembly subsequently amended the statutes to eliminate the dispensing power of the jury in capital cases.32

The constitutionality of North Carolina’s mandatory death penalty laws was challenged in Woodson v. North Carolina,33 one of a quintet34 of death penalty cases decided by the United States Supreme Court on July 2, 1976. The Court held that North Caro-

attenuated to be of substantial service to criminal justice. Marshall, J. concurring, stated that the death penalty violated the Eighth Amendment because it was an excessive and unnecessary punishment and because it was morally unacceptable to the people of the United States.)

28. Id.
30. Id. at 444-45, 194 S.E.2d at 28. (The court cited Bank v. Lacy, 188 N.C. 25, 123 S.E. 475 (1924) which said “The invalidity of one part of a statute does not nullify the remainder when the parts are separable, and the invalid part was not the consideration or inducement for the Legislature to enact the part that is valid.”)
31. 282 N.C. at 444-45, 194 S.E.2d at 28.
32. 428 U.S. at 300.
34. Also decided were Roberts v. Louisiana, 428 U.S. 325 (1976) (plurality opinion); Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion); Proffitt v. Florida, 428 U.S. 242 (1976); and Jurek v. Texas, 428 U.S. 262 (1976) (plurality opinion). (In Roberts, the Court struck down a mandatory death penalty statute. The statutes in Gregg, Proffitt and Jurek, which gave varying degrees of discretion to juries in capital cases, were upheld).
lina's mandatory death sentence constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. According to the United States Supreme Court, under contemporary standards of decency, death is viewed as an inappropriate punishment for a substantial portion of convicted first degree murderers. Mandatory death sentences are consequently inconsistent with the Eighth and Fourteenth Amendments' requirement that the State's power to punish be "exercised within the limits of civilized standards." The Court held further that in capital cases the "fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensible part of the process of inflicting the penalty of death."

In response to Woodson, the General Assembly enacted N.C. Gen. Stat. §§ 15A-2000 to 2003, effective June 1, 1977. These death penalty statutes provide for a separate sentencing proceeding upon conviction of a capital felony. The jury is required to render a sentence recommendation based upon (1) whether enumerated aggravating circumstances exist, and (2) whether any enumerated mitigating circumstances exist which outweigh the aggravating circumstances. When the jury recommends a sentence of death, the foreman must sign a writing on behalf of the jury which shows (1) the statutory aggravating circumstances which the jury finds beyond a reasonable doubt, (2) that the statutory aggravating circumstances are sufficiently substantial to call for the death penalty, and (3) that the mitigating circumstances are insufficient to outweigh the aggravating circumstances (hereinafter referred to as the "subsection (c) issues").

The trial courts initially construed the death penalty statutes to mean that if the jury answered the three subsection (c) issues affirmatively it could, but was not required, to recommend the

35. 428 U.S. at 305.
36. Id. at 295-96.
37. Id. at 288 (citing Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion).
38. Id. at 304.
39. See supra note 8.
death penalty.\textsuperscript{43} The First Pattern Jury Instruction promulgated after the statute provided that if the jury answered the three subsection (c) issues affirmatively then it "may recommend the death penalty."\textsuperscript{44} A subsequent revision emphasized the point by providing that the jury "may, although it need not, recommend that the defendant be sentenced to death."\textsuperscript{45}

As a consequence of the North Carolina Supreme Court's decision in \textit{State v. Goodman},\textsuperscript{46} the Pattern Jury Instruction was changed to provide that if the jury affirmatively answered the subsection (c) issues, it would be its "duty to recommend that the defendant be sentenced to death."\textsuperscript{47} The issue in \textit{Goodman} was whether the trial judge erred in failing to instruct the jury that it might recommend a sentence of life imprisonment even though it found the aggravating circumstances outweighed those in mitigation.\textsuperscript{48} Upholding the trial judge's ruling, the court rejected defendant's contention that otherwise the jury would mathematically balance the two types of factors and impose the death penalty whenever aggravating factors outnumbered those in mitigation.\textsuperscript{49} The court viewed the proposed instruction as informing the jury that it could disregard the procedures outlined in N.C. Gen. Stat. § 15A-2000.\textsuperscript{50} However, the court did not expressly hold that the jury must recommend death whenever it answers the subsection (c) issues affirmatively.

\textbf{ANALYSIS}

In conformity with the revised Pattern Jury Instructions, the jury in \textit{Pinch} was advised that if it answered this subsection (c) issues affirmatively, it had a \textit{duty} to recommend the death penalty.\textsuperscript{51} The majority, in an opinion by Justice Copeland, held that the jury was correctly informed that it had a \textit{duty} to recommend a sentence of death if it made the three findings necessary to sup-

\begin{itemize}
  \item \textsuperscript{43} 306 N.C. at 42, 292 S.E.2d at 232.
  \item \textsuperscript{44}  Id. (citing N.C.P.I. Crim. 150.10 p.5 (June 1977)).
  \item \textsuperscript{45}  Id. (citing N.C.P.I. Crim. 150.10 p.4 (Replacement, May 1979)).
  \item \textsuperscript{46}  298 N.C. at 34, 257 S.E.2d at 590.
  \item \textsuperscript{47}  306 N.C. at 43, 292 S.E.2d at 233 (citing N.C.P.I. Crim. 150.10 pp.3-4 (Replacement, May 1980)).
  \item \textsuperscript{48}  298 N.C. at 34, 257 S.E.2d at 590.
  \item \textsuperscript{49}  \textit{Id}.
  \item \textsuperscript{50}  \textit{Id}. at 35, 257 S.E.2d at 590.
  \item \textsuperscript{51}  306 N.C. at 32-33, 292 S.E.2d at 226-227.
\end{itemize}
port such a sentence under G.S. § 15A-2000. According to the majority, the jury "had no such option to exercise unbridled discretion and return a sentencing verdict wholly inconsistent with the findings it made pursuant to G.S. § 15A-2000(c)." A jury may not "arbitrarily impose or reject a sentence of death," but "may only exercise guided discretion in making the underlying findings required for a recommendation of the death penalty . . . (emphasis original)." The majority considered Goodman as implicitly answering the defendant's contention that the instruction was improper.

Justice Exum, dissenting as to sentence, found himself in strong disagreement with the majority as to the proper construction to be given G.S. § 15A-2000. To Justice Exum, the statute is designed simply to insure that certain specific (subsection (c)) prerequisites are met before the death penalty is imposed.

Its only prerequisites for the imposition of life imprisonment are that the jury base such a decision (subsection (b)) on a weighing against each other of various aggravating and mitigating circumstances which it may find to exist. Although the jury may not recommend death without specifically, and in writing, answering subsection (c) issues affirmatively, even if it does so it may yet recommend life.

Justice Exum supported this interpretation through analysis of G.S. § 15A-2000. Subsection (b) provides that the jury "must consider" any aggravating or mitigating circumstances, and render a sentence recommendation "based upon" these circumstances. Subsection (c) provides that only "when the jury recommends a sentence of death" must it answer the three subsection (c) issues affirmatively and in writing. This statutory scheme, Justice Exum believed, evidenced a clear legislative intent to "strike a balance between fairness to the individual defendant and consistency among the cases in which the death penalty is imposed," and "to avoid the extremes of mandatory death penalties or unbridled dis-

52. Id. at 34, 292 S.E.2d at 227.
53. Id. at 33, 292 S.E.2d at 227.
54. Id.
55. Id. at 33-34, 292 S.E.2d at 227.
56. Id. at 46, 292 S.E.2d at 234.
57. Id.
58. Id. at 40, 292 S.E.2d at 231.
59. Id.
60. Id. at 40-41, 292 S.E.2d at 231.
cretionary action by juries." Nothing in this scheme, maintained Justice Exum, suggested a legislative intent to require the jury to return a death sentence even if it should answer the subsection (c) issues affirmatively. Subsection (b) only requires that the jury's recommendation be "based upon" consideration of aggravating and mitigating factors, "not decreed by them." It was illogical to hold that, if affirmative answers to the subsection (c) issues are prerequisite to a jury's recommendation of death, then death must be recommended whenever the prerequisites are met.

Goodman did not support the holding of the majority, according to Justice Exum. The defendant was arguing, in effect, that the court should explain to the jury that it could ignore the consideration which the statute says it must consider in recommending a life or death sentence. Such an instruction "goes far beyond the ... instruction actually given ... in Goodman, that if the jury answered the three subsection (c) issues affirmatively and unanimously, it 'may then recommend the death penalty.'"

The majority's interpretation of G.S. § 15A-2000 apparently was based on the fear that otherwise the statute would be subject to constitutional attack that, as in Furman, the jury could decide between life and death in its unbridled discretion. In Justice Exum's view, however, permitting the jury to recommend a life sentence even though the subsection (c) issues were answered affirmatively is not the type of arbitrary determination found wanting in Furman. In support of this proposition he cited the decisions of the United States Supreme Court in Bullington v. Missouri and Gregg v. Georgia.

Bullington involved the interpretation of a Missouri death penalty statute very similar to G.S. § 15A-2000. In that case the Court noted that the jury "is instructed that it is not compelled to impose the death penalty, even if it decides that a sufficient aggra-

61. Id.
62. Id. at 41, 292 S.E.2d at 232.
63. Id.
64. Id.
65. Id. at 43, 292 S.E.2d at 233.
66. Id. at 43-44, 292 S.E.2d at 233.
67. Id. at 33-34, 38, 292 S.E.2d at 227, 230.
68. Id. at 38, 292 S.E.2d at 230.
70. 428 U.S. 153 (1976) (plurality opinion).
vating circumstance or circumstances exist and that it or they are not outweighed by any mitigating circumstance or circumstances."72 Justice Exum pointed out that, although the question was not raised, there was no suggestion that such a statute would be unconstitutional.73

In Gregg, the Court considered a Georgia death penalty statute74 which provided that the jury could return a death sentence only if it found the existence of one or more specified aggravating circumstances, but could recommend mercy without finding the existence of mitigating factors. The defendant argued on appeal that the statute violated Furman. The Court saw this contention as a misinterpretation of Furman, saying that "the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice."75 Answering the defendant's contention that other discretionary decisions76 involved in prosecution of murder cases unfairly resulted in some candidates for the death penalty escaping it, the Court said, "Nothing in any of our cases suggest that the decision to afford an individual defendant mercy violates the Constitution."77

These decisions, argued Justice Exum, clearly indicated that the majority's interpretation is not constitutionally required.78

Analysis of G.S. § 15A-2000 strongly supports the interpretation advanced by Justice Exum. Although subsection (b) requires the jury to consider aggravating and mitigating factors and to base it recommendation on these factors79 nowhere does the statute provide that the jury must return a recommendation of death if it answers the three subsection (c) issues affirmatively. If the jury

72. 451 U.S. at 434-35.
73. 306 N.C. at 46, 292 S.E.2d at 235. (In Bullington, the defendant was given life imprisonment at the penalty phase, and later gained a retrial on the issue of guilt. The Court held that because the sentencing proceeding at the first trial was like the trial on the question of guilt, the Double Jeopardy Clause prevented a retrial of the penalty phase.)
75. 428 U.S. at 203.
76. E.g. the jury's option to convict of a lesser included offense; the prosecutor's authority to plea bargain; and the fact that the Governor may commute the death sentence.
77. 428 U.S. at 199.
78. 306 N.C. at 46, 292 S.E.2d at 234.
has considered aggravating and mitigating factors, its action is not arbitrary merely because it answers the subsection (c) issues but nonetheless recommends life imprisonment. The jury has simply decided that, after careful consideration of all relevant factors, the death penalty could be imposed, but it instead will afford mercy to the defendant.

The emphasis in G.S. § 15A-2000 is upon insuring that no defendant be sentenced to death unless the jury has (1) carefully considered all relevant circumstances and (2) found that the aggravating circumstances are not outweighed by those in mitigation. The language of the statute does not suggest an attempt by the General Assembly to insure that a defendant will be sentenced to death whenever the death penalty could constitutionally be imposed. Because G.S. § 15A-2000 does not create a "substantial risk of arbitrariness or caprice" in the imposition of the death penalty, the "isolated decision of a jury to afford mercy," as permitted under Justice Exum's interpretation, is free of constitutional difficulty.

The majority maintains that the jury may not "arbitrarily or capriciously impose or reject a sentence of death". Clearly, neither the holding of the United States Supreme Court in Furman, nor the plain language of G.S. § 15A-2000 permit the arbitrary imposition of the death penalty. However, Bullington and Gregg strongly suggest that a statute which permits arbitrary rejection of the death penalty is not unconstitutional under the Eighth and Fourteenth Amendments. The statute upheld in Gregg, for example, did not permit imposition of the death penalty unless the jury found the existence of one or more aggravating circumstances, but the jury could recommend mercy regardless of the number and severity of the aggravating circumstances found to exist. Moreover, G.S. § 15A-2000 is not such a statute, because the jury must consider aggravating and mitigating circumstances and base its decision upon them.

The respective roles of the trial judge and the North Carolina Supreme Court in imposition and review of the death sentence provide additional support for Justice Exum's interpretation of

80. 428 U.S. at 203.
82. 306 N.C. at 33, 292 S.E.2d at 227.
G.S. § 15A-2000. G.S. § 15A-2002 provides that the judge "shall" impose the sentences recommended by the jury. G.S. § 15A-2000 (d)(2) requires the North Carolina Supreme Court to overturn the death sentence if the jury's findings are not supported by the record or are disproportionate to the penalty imposed in similar cases. Finally, G.S. § 15A-2000(d)(3) provides that if the sentence of death is reversed on appeal, a new sentencing hearing shall be ordered. The foregoing provisions indicate that the trial judge must impose the sentence recommended by the jury, and the North Carolina Supreme Court is limited to reviewing sentence recommendations of death. Absent is any statutory provision for review of sentences of life imprisonment. Consequently, both the trial judge and the North Carolina Supreme Court are bound by the jury's recommendation of life imprisonment, regardless of the jury's findings on the subsection (c) issues. It appears incongruous to instruct the jury that it is required to recommend the death penalty if it answers the subsection (c) issues affirmatively, because if it fails to do so the North Carolina Supreme Court is powerless to correct the error.

An argument can be made that the majority's interpretation of G.S. §§ 15A-2000 to 2003 to require recommendation of the death penalty if the jury answers the subsection (c) issues affirmatively in effect creates a mandatory death sentence. However, if so it is not the type of mandatory death sentence invalidated in Woodson, because the sentence would impose only after "consideration of the character and record of the defendant and the circumstances of the particular offense." The North Carolina statute in Woodson was struck down because these factors were not considered. The majority's interpretation of G.S. § 15A-2000 is probably constitutional under the Eighth and Fourteenth Amendments, but appears inconsistent with the language of the statute, and the jury should

83. See supra note 8.
84. Id.
85. Id.
86. The court conceded the point in State v. Williams, where it noted that in several cases the jury had indeed recommended life imprisonment after answering the subsection (c) issues affirmatively, and that this "issue was error favorable to the defendant from which the State could not appeal." 305 N.C. at 689, 292 S.E.2d at 263. See State v. Taylor, 298 N.C. 405, 259 S.E.2d 502 (1979); State v. King, 301 N.C. 186, 270 S.E.2d 98 (1980).
87. See supra notes 33-38 and accompanying text.
88. Id.
not be instructed that, if it answers the subsection (c) issues affirmatively, it then becomes its duty to recommend a sentence of death.

What will be the actual impact of the instruction approved in Pinch on the decisions of juries in sentencing proceedings? Jurors may well interpret "duty" in its moral sense rather than as expressing an actual requirement that they return a recommendation of death if they answer the subsection (c) issues affirmatively. Whether a jury will actually recommend a sentence of death when, for perhaps inarticulable reasons, it strongly feels the defendant should be sentenced to life imprisonment appears doubtful. Of course, the jury can always circumvent the majority's interpretation by answering one or more of the subsection (c) issues negatively, regardless of its actual findings on the subsection (c) issues.

Conclusion

In holding that the jury was correctly advised that it had the duty to recommend a sentence of death if it found (1) that one or more statutory aggravating circumstances existed; (2) that the aggravating circumstances were substantial enough to warrant the death penalty; and (3) that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt, the Pinch majority adopts an interpretation of G.S. § 15A-2000 which is difficult to support. The majority, rather than engaging in a careful analysis of the statute, simply relied in Goodman. Unfortunately, Goodman did not involve the precise issue of concern in Pinch, and the decision in Goodman itself is at least questionable.

If the intent of the General Assembly was in fact to require the imposition of the death penalty whenever the subsection (c) issues are answered affirmatively, modification of G.S. § 15A-2000 to insure that result is relatively simple. The jury should be instructed that if all three subsection (c) issues are answered affirmatively, the court shall sentence the defendant to death, but if one or more subsection (c) issues are answered negatively, then the court shall sentence the defendant to life imprisonment. The jury would make written findings on the subsection (c) issues and submit these findings to the trial judge, who would then impose the appropriate sentence. In other words, the jury’s role would be limited to making the underlying findings required in subsection (c), and would not include making the sentence recommendation. This procedure would make it impossible for the jury to answer the sub-
section (c) issues affirmatively without the death penalty being imposed.

J. Craig Young