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WORST OF TIMES, AND BEST OF TIMES: THE EIGHTH  
AMENDMENT IMPLICATION OF INCREASED  
PROCEDURAL RELIABILITY ON EXISTING  
DEATH SENTENCES

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INTRODUCTION .....	95
I. REFORMS TO NORTH CAROLINA’S SYSTEM OF CAPITAL LITIGATION.....	98
II. WHEN DO SIGNIFICANT IMPROVEMENTS IN PROCEDURAL RELIABILITY RENDER PRIOR CONVICTIONS AND SENTENCES UNCONSTITUTIONAL? .....	102
A. <i>North Carolina’s Reforms Go beyond Existing Constitutional Requirements</i> .....	102
B. <i>Should Evolving Standards of Decency Under the Eighth Amendment Include Evolving Standards of Procedural Reliability?</i> .....	106
CONCLUSION .....	112

INTRODUCTION

Juries in North Carolina have sentenced 199 defendants to death.<sup>1</sup> In the comparable eight years beginning in 2001, the total is forty-seven, which is a reduction of more than 75%.<sup>2</sup> These figures become

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<sup>1</sup> See *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. 8, 2009).

<sup>2</sup> *Id.*; Dan Kane, *In N.C., death penalty gets rarer*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 30, 2008, at A1 (“This year, 13 juries could have chosen death for defendants. Only one in Forsyth County did. Last month, a jury there gave the death sentence to James Ray Little III for shooting a cab driver to death two years ago in Winston-Salem.”); Gary L. Wright, *Murderer sentenced to death in 1984 slaying*, CHARLOTTE OBSERVER, Feb. 23, 2009, <http://www.charlotteobserver.com/local/story/556227.html> (last visited Mar. 7, 2009).

even more striking when one takes into account that the forty-seven inmates sentenced to death since 2001 include fourteen sentenced that year, and only five in the two years from January 1, 2007 until now.<sup>3</sup> This reduction can only partially be explained by the reduction in the number of murders;<sup>4</sup> there must therefore be reasons North Carolina has increasingly turned away from the death penalty as the appropriate punishment for murder.<sup>5</sup> For those who represent defendants charged with capital murder, these are the best of times.

It is beyond the scope of this paper, and the skills of this author, to provide a statistically valid analysis of all of the reasons that may account for this reduction in imposition of the death penalty. However, even without statistical analysis, the trend follows significant procedural reforms to capital litigation; these reforms have greatly increased the reliability of capital trials. While other changes—including the increasing skepticism of the general population about the reliability of our system of justice<sup>6</sup>—may account for some of the reduction in death sentences, it appears that the reforms account for a significant portion of the change. If the death penalty is indeed to be reserved for the “worst of the worst,” then these reforms have helped prosecutors, judges and jurors more narrowly define that class of defendants for whom capital punishment should be considered. This is not to say that death sentences are now always the result of reliable trials; serious mental illness, the impact of race, and other issues continue to plague

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<sup>3</sup> See Death Penalty Information Center, *supra* note 1; Kane, *supra* note 2, at A1; Wright, *supra* note 2.

<sup>4</sup> State Bureau of Investigation reports indicate that there were 491 cleared murder cases in 1998, compared to 443 in 2007.

<sup>5</sup> Some of the reduction is due to the elimination of death as a punishment for defendants under the age of eighteen, and those who are mentally retarded. While these changes were significant, they account for a small fraction of the defendants who face capital trials. See *Roper v. Simmons*, 543 U.S. 551 (2005) (capital punishment for crimes committed while under the age of eighteen violates the Eighth Amendment); *Atkins v. Virginia*, 536 U.S. 304 (2002) (execution of the mentally retarded violates the Eighth Amendment).

<sup>6</sup> The phenomenon of exonerating innocent people sent to death row appears to have affected the willingness of jurors to impose the death penalty. In the author’s own experience in selecting jurors for capital trials, jurors are increasingly aware of the possibility of mistakes in identifying the perpetrator of a murder. Jurors also express concern about sentencing someone to death who may later be found innocent. Of course, this new found skepticism is a direct result of procedural changes—and advances in science—that have allowed counsel to expose mistakes that would have gone uncorrected in prior years.

capital litigation. The process of identifying those who should not properly be viewed as the “worst,” however, has greatly improved.

As these reforms have been changing the rate at which defendants have been sentenced, those who received death sentences prior to the reforms are working their way through the post-conviction process. There are currently a significant number of inmates in North Carolina who face execution in the near future, and they were all sentenced to die under the pre-reform system.<sup>7</sup> Many of these inmates would not receive the death penalty if their cases were tried today.<sup>8</sup> For the scores of inmates who wait for their execution, and whose convictions and sentences have been found to have been obtained in conformity with the constitutional standards in place at the time of their trials, these are the worst of times.

The question, then, that policy makers and courts should confront is this: should we execute scores of inmates for crimes that would not warrant the death penalty if they were tried today? One possible answer lies in the implications that increased procedural reliability has on a possible Eighth Amendment claim challenging these death sentences. If the evolving standards of decency justify removing classes of defendants—many already sentenced to death—from the reach of the death penalty, do evolving standards of procedural reliability require the same result for those sentenced under what is now viewed as an antiquated system?

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<sup>7</sup> See N.C. Dep’t of Corr., Offenders on Death Row, (Feb. 24, 2009), <http://www.doc.state.nc.us/dop/deathpenalty/deathrow.htm> (last visited Mar. 7, 2009).

<sup>8</sup> N.C. GEN. STAT. § 14-17 (2008) defines first-degree murder as the only crime punishable by death. In the wake of this statute and the United States Supreme Court’s decision in *Roper* the only inmates who remain on death row are those who committed first-degree murder and were at or above the age of eighteen when the crime was committed. N.C. GEN. STAT. § 15A-2005 allows capital defendants to pursue being declared mentally retarded in a pre-trial hearing. A pre-trial hearing requires prosecutorial consent. N.C. GEN. STAT. § 15A-2006 allowed capital defendants sentenced before October 1, 2001 to challenge their status post-conviction. However, this provision expired on October 1, 2002. After the United States Supreme Court’s decision in *Atkins*, death row inmates were again able to challenge their mental status post-conviction, without being subject to North Carolina’s statutorily imposed date limitation. The requirements of N.C. GEN. STAT. § 15A-2005, however, still must be met for an inmate’s sentence to be reduced from death. Since *Atkins*, sixteen inmates have had their death sentences reduced. See *Sentence Reversals in Mental Retardation Cases*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/sentence-reversals-mental-retardation-cases> (last visited Mar. 8, 2009). Presumably, there are a number of inmates who have yet to file for appropriate relief or who are not considered mentally retarded as a matter of law.

## I. REFORMS TO NORTH CAROLINA'S SYSTEM OF CAPITAL LITIGATION

This author first represented a defendant in a capital case in 1988, when I was appointed to represent a defendant convicted of shooting and killing a man he found on a date with the defendant's estranged wife. The defendant was sentenced to death, and I was appointed to represent him on his appeal to the North Carolina Supreme Court. Although I had clerked for a federal appellate judge, and presumably had some basic level of appellate experience, I had handled only one appeal to the North Carolina Supreme Court, and had no real-world experience in a capital case.

In 1988, some seventeen inmates were sentenced to death,<sup>9</sup> and there was little in the way of formal overview of the qualifications of lawyers representing capital defendants. Trial lawyers were appointed by the local judge, and the defendant was as likely to get counsel who were inexperienced, unwilling to do the work necessary to defend a capital case, or even drunk, as they were likely to get an experienced capital trial lawyer who had the time and ability to try the case.<sup>10</sup> The local judge determined what resources counsel would get to hire experts and investigators, and how much counsel themselves would be paid. Defense counsel often undertook to do their own mitigation investigation, or simply obtained a mental health expert to evaluate their client without any meaningful thought as to what that evaluation might entail. District Attorneys could not allow a defendant to plead guilty in a first-degree murder case and receive a life sentence unless there were no aggravating circumstances.<sup>11</sup> In essence, the only available plea in a capital case was to second-degree murder, which was unpalatable to many prosecutors and to the families of victims. Jurors who were called upon to make the decision whether to sentence a defendant to

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<sup>9</sup> See Death Penalty Information Center, *supra* note 1.

<sup>10</sup> The court in *Ivarsson v. Office of Indigent Def. Servs.*, 156 N.C. App. 628, 577 S.E.2d 650 (N.C. Ct. App. 2003) discusses the system before the implementation of the Indigent Defense Services Commission ("IDS") in 2000. Under the previous system, trial court judges appointed attorneys only where there "was a complete absence of counsel in a criminal matter involving an indigent defendant." Prior to IDS, there were no statewide regulations or mechanisms for ensuring that appointed attorneys performed adequately. Many decisions, such as attorney appointment, access to resources, and attorney fees rested solely within the discretion of the trial court judge. See N.C. GEN. STAT. § 7A-452 (1988).

<sup>11</sup> *State v. Rorie*, 348 N.C. 266, 270-71, 500 S.E.2d 77, 81 (1998) (citing N.C. GEN. STAT. § 15A-2000 (1997); *State v. Lawson*, 310 N.C. 632, 643-44, 314 S.E.2d 493, 500-01 (1984)).

death were told that the only other option was a “life” sentence;<sup>12</sup> when they asked if this meant life with the possibility of parole, they were told that they should act as if the sentence was a sentence of life in prison, leaving them to speculate about how quickly the defendant could be released.<sup>13</sup> Capital defendants were not entitled to open file discovery, either before or after they were sentenced to death.<sup>14</sup> Juveniles who were sixteen and seventeen were subject to the death penalty—and were in fact sentenced to death—as were inmates who were mentally retarded.<sup>15</sup>

In short, the system provided little in the way of meaningful safeguards to ensure that defendants facing the ultimate punishment had the resources necessary to defend themselves, and placed prosecutors and jurors in the position of choosing between death and a sentence that might result in the release of the defendant back into the community. Not surprisingly, rarely a month passed in which a jury did not sentence a defendant to death in North Carolina,<sup>16</sup> and by the early 1990’s, the average was more than two death sentences each month.<sup>17</sup>

My experiences mirrored the times—I was not only “lead” counsel in my first capital appeal, I was the only counsel. No other attorney had responsibility to ensure that I knew what I was doing as I assembled the Record on Appeal, drafted the brief and prepared for oral argument. I was assured no set rate of compensation, so I invested my time on the hope that I would be fairly paid. Although I was committed to my client, and presumably reasonably bright, I struggled. At

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<sup>12</sup> *State v. Conner*, 241 N.C. 468, 469, 85 S.E.2d 584, 586 (1955) (“In determining guilt and in resolving the question of life imprisonment . . . the question of what afterwards may happen to a prisoner by way of commutation, pardon, or parole is no concern of the jury.”).

<sup>13</sup> *See generally id.*

<sup>14</sup> In 1996, the North Carolina General Assembly enacted N.C. GEN. STAT. § 15A-1415(f) which provided defendants sentenced to death with open access to law enforcement and prosecutorial files. This included access to the prosecutor’s work product. In 2004, the enactment of N.C. GEN. STAT. §§ 15A-902-910 provided all criminal defendants with open-file access at the trial level. Prior to 1996, no law existed mandating open-file access for criminal defendants at either the appellate or trial level.

<sup>15</sup> The United States Supreme Court held in *Thompson v. Oklahoma*, 487 U.S. 815 (1988) that the execution of minors less than 16 years of age violated the Eighth Amendment’s prohibition on “cruel and unusual punishment.” Subsequently, the Court held in *Roper* that the execution of minors less than 18 years of age violated the Eighth Amendment. In 2001, with the enactment of N.C. GEN. STAT. § 15A-2005, the North Carolina General Assembly banned execution of the mentally retarded.

<sup>16</sup> *See* Death Penalty Information Center, *supra* note 1.

<sup>17</sup> *See id.*

that point in my career, I had handled only a few appeals, and argued only one case before the state's highest court. My client got lucky; the United States Supreme Court decided *McKoy v. North Carolina*,<sup>18</sup> and my client was one of a number of inmates who received new capital sentencing hearings as a result.

The situation today is very different, and clients are not as dependent on luck to obtain a fair hearing. Over the years, I continued to represent clients in capital cases, at the trial level, on direct appeal and in post-conviction. The changes have been both incremental and profound. Since I began representing defendants in capital cases, North Carolina has:

(1) Enacted a sentence of Life Without Parole as the only alternative for a sentence of death in first-degree murder cases. This became effective October 1, 1994.<sup>19</sup>

(2) Granted death-sentenced inmates the right to open file discovery for the purpose of developing and pursuing claims in post-conviction. This was effective June 21, 1996.<sup>20</sup>

(3) Granted District Attorneys the discretion to not seek death in first-degree murder cases, even when there is evidence of an aggravating circumstance. This went into effect July 1, 2001.<sup>21</sup>

(4) Created the Indigent Defense Services Commission ("IDS"), under which IDS has developed the following standards governing the qualifications of defense counsel: requiring counsel to seek consultations with the Center for Death Penalty Litigation prior to trial, assuming responsibility of appointing and compensating counsel through the Office of the Capital Defender, providing increased training and supervision of attorneys, and assuming responsibility for allocating the

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<sup>18</sup> *McKoy v. North Carolina*, 494 U.S. 433 (1990). The defendant in *McKoy* was convicted of first-degree murder of a deputy sheriff, and sentenced to death. The North Carolina Supreme Court affirmed the defendant's conviction and the United States Supreme Court granted certiorari. At the time, North Carolina's sentencing scheme only limited jurors from considering mitigating circumstances that were not unanimously found to exist. In essence, even if all the jurors found that "some mitigating circumstances" existed, they were not allowed to give effect to such evidence unless "they unanimously find the existence of the same circumstance." The Supreme Court reasoned that the scheme was unconstitutional under the Eighth Amendment as it impermissibly limited the jurors' consideration of relevant mitigating evidence.

<sup>19</sup> N.C. GEN. STAT. § 14-17 (2008).

<sup>20</sup> *Id.* § 15A-1415(e)-(f).

<sup>21</sup> *Id.* § 15A-2004.

resources for experts, investigators and other expenses incurred in defending a capital trial.<sup>22</sup> IDS became active July 1, 2001.<sup>23</sup>

(5) Provided for post-conviction DNA testing, as of October 1, 2001.<sup>24</sup>

(6) Provided pre-trial open file discovery, which is not limited to capital cases, effective October 1, 2004.<sup>25</sup>

While North Carolina continues to improve its criminal justice system by reforming identification procedures and the procedures for recording interrogations, the reforms listed above already appear to have altered the landscape of capital litigation. An inmate charged with a capital offense will have two lawyers, both of whom have been found qualified after a review by the Capital Defender.<sup>26</sup> Counsel will be given the resources to retain a mitigation investigator, a fact investigator, and other needed experts.<sup>27</sup> IDS, through the Capital Defender and Appellate Defender, will ensure that counsel have qualified attorneys with whom to consult during the preparation and trial of the case.<sup>28</sup> Counsel will have access to open file discovery in preparing for trial, and the District Attorney will have the option of either offering a plea to life without parole (“LWOP”), or trying the case non-capitally.<sup>29</sup> In the event that the case proceeds to a capital sentencing hearing, the jury will know that death is only warranted if a sentence that truly places the defendant in prison for the rest of his life is not sufficient.<sup>30</sup> Finally, prosecutors seeking the death penalty will know that their files will be examined by post-conviction counsel, giving prosecutors an added incentive to make full disclosure before trial rather than risk a

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<sup>22</sup> N.C. R. IND. DEF. SERV. Rule 2A (App.) (2009).

<sup>23</sup> N.C. GEN. STAT. § 7A-498 (2008).

<sup>24</sup> *Id.* § 15A-269.

<sup>25</sup> *See id.* §§ 15A-902-910.

<sup>26</sup> N.C. R. IND. DEF. SERV. Rule 2A.2 (2009).

<sup>27</sup> N.C. R. IND. DEF. SERV. Rule 2D.1 (2009).

<sup>28</sup> *See generally* N.C. R. IND. DEF. SERV. Rule 2A (App.) (2009).

<sup>29</sup> N.C. GEN. STAT. §§ 15A-902, 2001, 2004 (2008).

<sup>30</sup> *Id.* § 15A-2000(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) [t]he statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and (2) [t]hat the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and (3) [t]hat the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.”).

reversal during post-conviction.<sup>31</sup> All of these changes have combined to produce a system in which the various actors have better access to resources and information, and have more flexibility in deciding whether death is the appropriate punishment. This has contributed to the significant reduction in death sentences.

## II. WHEN DO SIGNIFICANT IMPROVEMENTS IN PROCEDURAL RELIABILITY RENDER PRIOR CONVICTIONS AND SENTENCES UNCONSTITUTIONAL?

### A. *North Carolina's Reforms Go Beyond Existing Constitutional Requirements*

It has taken some time for each of the reforms to have an impact on capital litigation in North Carolina. It took time for juries to believe that LWOP meant that the defendant would not get out of prison. It took time for District Attorneys to become comfortable resolving capital cases with pleas to LWOP. It took time for IDS to make a difference in the quality of representation, and for open-file discovery to become a reality. However, many 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. There are now well over 100 inmates on North Carolina's death row who were sentenced to death before 2001, and many of them have gone through all, or most, of their post-conviction remedies without relief.<sup>32</sup> Indeed, cases have often ruled that the level of practice made possible by the reforms is not constitutionally required. For example:

(1) Appointed counsel in a capital case in North Carolina must meet the criteria set forth in the I.D.S. Standards for Lead and Associate Trial Counsel in Capital Cases, which require a showing of the requisite level of knowledge and experience, including trial experience and familiarity with using experts in scientific, medical, mental health, social history and pathology evidence. The A.B.A. Guidelines also set forth a requirement that counsel be skilled and experienced.<sup>33</sup> The appointment of an inexperienced lawyer, however, is not itself a basis for finding a violation of the Sixth Amendment right to the effective

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<sup>31</sup> N.C. R. IND. DEF. SERV. Rule 2C.2 (2009).

<sup>32</sup> N.C. Dep't of Corr., *supra* note 7.

<sup>33</sup> See AMERICAN BAR ASSOCIATION, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Guideline 5.1 ("Qualifications of Defense Counsel") (2003).



assistance of counsel.<sup>34</sup> Rather, the defense must show both deficient performance and prejudice, with the accompanying burden of showing that counsel's decisions were not strategic, and that the mistakes counsel made are sufficiently prejudicial to warrant relief.<sup>35</sup>

(2) It would be unthinkable for a capital trial to commence now without significant work being done by a trained mitigation investigator. Mitigation investigators bring skills in identifying and exploring issues such as child abuse, sex abuse, and substance abuse, and in collecting documents and interviewing witnesses about these subjects. These skills are simply not possessed by most trial lawyers, who also often lack the time it takes to track down witnesses and develop the relationship needed to get the witnesses to open up about painful subjects. IDS now recognizes the need for the involvement of a trained mitigation investigator in preparing a capital trial, and will authorize reasonable resources to enable defense counsel to retain a mitigation investigator.<sup>36</sup> The need for a trained mitigation investigator is made clear by the A.B.A. Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases.<sup>37</sup> However, the Fourth Circuit has ruled that failure to retain a mitigation investigator is not by itself grounds for finding that a capital defendant received the ineffective assistance of counsel.<sup>38</sup>

(3) Counsel appointed to represent a capital defendant in North Carolina now have the resources to obtain a proper forensic mental health evaluation by a qualified expert, who will assist the defense in preparing for trial.<sup>39</sup> A forensic mental health evaluation, of course, should only be performed by a properly trained mental health professional, and cannot be considered complete until the professional has been given access to all of the required data, including underlying records of prior treatment, access to information from lay witnesses

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<sup>34</sup> *Kandies v. Polk*, 385 F.3d 457 (4th Cir. 2004), *vacated*, 545 U.S. 1137 (2005).

<sup>35</sup> *Strickland v. Washington*, 466 U.S. 668 (1984).

<sup>36</sup> See INDIGENT DEF. SERVS., STANDARDS FOR MITIGATION SPECIALISTS IN CAPITAL DEFENSE CASES (2005), <http://www.aoc.state.nc.us/www/ids/Rules%20&%20Procedures/Performance%20Guidelines/MitigationStandards.pdf>.

<sup>37</sup> See, e.g., ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Guideline 4.1(A)(1) ("The Defense Team and Supporting Services") (2003) ("The defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1, an investigator, and a mitigation specialist."). The need for specialized assistance in mitigation investigation was recognized in the 1989 version of the guidelines as well, in Guideline 8.1.

<sup>38</sup> See *Kandies*, 385 F.3d 457.

<sup>39</sup> N.C. R. IND. DEF. SERV. Rule 2D.1 (2009).

with knowledge of the defendant, and information relating to the crime that may impact the evaluation. The expert is part of the defense, and not only assists in presenting expert testimony to the jury, but also assists counsel in preparing to meet evidence presented by the State. This level of professional assistance is not constitutionally required.<sup>40</sup> For example, in *State v. Page*,<sup>41</sup> Defendant, a Vietnam veteran, was arrested and charged with murder after he began firing seemingly random shots from his apartment, and then fired at the police, striking and killing one officer. Defendant had been treated prior to the crime by two mental health professionals, one of whom had a license suspension. The trial court denied Defendant funds to hire a forensic mental health professional, and Defendant was forced to rely on the non-forensic evaluations performed by his treating experts, who were fact witnesses, with the accompanying impeachment by the State based upon the license suspension. The North Carolina Supreme Court found that Defendant was not entitled to an independent, forensic evaluation on these facts. The Fourth Circuit denied habeas relief on this issue, finding no right to a forensic expert.<sup>42</sup> Similarly, in *Campbell v. Polke*,<sup>43</sup> the trial court refused to appoint an expert to examine Defendant and assist the defense in preparation for trial. Rather, Defendant was examined by a doctor at the state psychiatric hospital, who performed a neutral examination in which anything Defendant said was subject to disclosure to the State. The Fourth Circuit rejected the claim that this evaluation deprived Defendant of his constitutional rights, noting that a defendant is not entitled to the effective assistance of an expert, and that a neutral expert satisfies the dictate of *Ake*.

(4) The open file discovery statute grants all defendants access to the “complete files” of “all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant,” including discovery of information needed to prepare to meet expert testimony offered by the State.<sup>44</sup> The statutory right to discovery goes beyond the constitutional requirements of

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<sup>40</sup> See *Ake v. Oklahoma*, 470 U.S. 68, 74 (1985) (“when the defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist’s assistance on this issue if the defendant cannot otherwise afford one.”).

<sup>41</sup> *State v. Page*, 346 N.C. 689, 488 S.E.2d 225 (1997).

<sup>42</sup> *Page v. Lee*, 337 F.3d 411 (4th Cir. 2003).

<sup>43</sup> *Campbell v. Polke*, 447 F.3d 270 (4th Cir. 2006).

<sup>44</sup> N.C. GEN. STAT. § 15A-903 (2008).

*Brady v. Maryland*.<sup>45</sup> *Brady* requires disclosure of exculpatory evidence, and results in reversal only when the evidence that is not disclosed is material, a standard about which judges and defense counsel often disagree. N.C. Gen. Stat. §15A-903 requires disclosure without regard to the exculpatory nature of the evidence or its materiality to the preparation of a defense. The breadth of this discovery right is illustrated by the decision in *State v. Tuck*.<sup>46</sup> *Tuck* was arrested after a victim reported that two men stole his van during an armed robbery; the driver of the van – Cofield – was arrested, but no second person was found. Cofield told the police that he acted alone. Cofield pled guilty, and was called as a witness for the defense at *Tuck*'s trial. When Cofield claimed that he did not know *Tuck*, the prosecution impeached him with a statement made to the police the day before the crime in which he told a law enforcement officer that he knew *Tuck*. The statement was not disclosed to the defense. The North Carolina Court of Appeals held that all statements of a co-defendant – which Cofield was – had to be turned over to the defense under §15A-903. Similarly, in *State v. Dunn*, the Court held that a defendant was entitled to discovery of material needed to prepare to meet expert testimony about forensic testing done by the State.<sup>47</sup> True open file discovery is often crucial to the preparation of an effective defense, and to advising a defendant on the merits of a plea agreement. *Brady*, of course, does not create a constitutional right to this level of open file discovery.

(5) District Attorneys now have the discretion to allow a capital defendant to plead guilty and receive a sentence of life without parole; there is no independent constitutional right on the part of a capital defendant to this discretion.<sup>48</sup> The option of sentencing a capital defendant to life without parole itself reduces the chance that a prosecutor will seek death simply as a way of ensuring that the defendant is never released, or that a jury will return a sentence of death for the same reason. A defendant who committed his crime prior to this legislative change cannot receive the benefit of the increased reliability this brings to capital sentencing. Noting the obvious *ex post facto* problem, the court, in *State v. Conner*, rejected the argument that a jury should have been given the option of sentencing a defendant to life without

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<sup>45</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

<sup>46</sup> *State v. Tuck*, 664 S.E.2d 27 (N.C. Ct. App. 2008).

<sup>47</sup> *State v. Dunn*, 571 S.E.2d 650 (N.C. Ct. App. 2002).

<sup>48</sup> N.C. GEN. STAT. § 15A-2004 (2008).

parole although the crime was committed before the effective date of the change to life without parole.<sup>49</sup>

B. *Should Evolving Standards of Decency Under the Eighth Amendment Include Evolving Standards of Procedural Reliability?*

The fact that these reforms are not independently required by the United States Constitution does not mean that they do not make a difference in the outcome of capital cases. It is impossible to have represented capital defendants fifteen to twenty years ago, and represent them now, and not recognize the significant increase in the quality of defense counsel, the increase in the resources and discovery available to the defense, and the impact of D.A. discretion and life without parole as an alternative sentence. These changes have increased the reliability of capital litigation, and contributed to the reduction in death sentences. In short, many inmates now sitting on North Carolina's death row would not be there if tried and sentenced today. If our standard for what is an acceptable level of reliability in capital trials and sentencing has evolved, does the Eighth Amendment permit death sentences imposed under the old system to be carried out?

That the Eighth Amendment requires consideration of the evolving standards of decency is well known.<sup>50</sup> However, we tend to think of this evolution in terms of standards governing the classes of defendants and crimes eligible for the death penalty, and not as addressing the procedures by which eligible defendants are actually sentenced to death. The opinions of the United States Supreme Court, however, provide a basis for extending the application of evolving standards of decency to increases in the reliability of capital trials and sentencing.

The Eighth Amendment proscribes the infliction of "cruel and unusual punishments."<sup>51</sup> On its face, it appears to set limits on the type of punishment that can be inflicted, rather than on the procedures that must be followed in determining whether a given defendant receives the punishment. The United States Supreme Court, however, has clearly examined, under the Eighth Amendment, the procedures that are used to determine who lives and who dies. As observed in *Furman v. Georgia*: "It would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates

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<sup>49</sup> State v. Conner, 480 S.E.2d 626 (N.C. 1997).

<sup>50</sup> Trop v. Dulles, 356 U.S. 86, 101 (1958).

<sup>51</sup> U.S. CONST. amend. VIII.

against him by reason of his race, religion, wealth, social position, or class, *or if it is imposed under a procedure that gives room for the play of such prejudices.*"<sup>52</sup> In many respects, *Furman* was a decision on the procedural protections that must be afforded capital defendants. This determination was reflected in the Court's decision in *Gregg v. Georgia*, in which the Court noted that "[w]hen a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed."<sup>53</sup> As to *Furman*, the *Gregg* Court observed:

While *Furman* did not hold that the infliction of the death penalty *per se* violates the Constitution's ban on cruel and unusual punishments, it did recognize that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice. Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.<sup>54</sup>

Similarly, in striking down a system that imposed mandatory death sentences, the Court in *Woodson v. North Carolina*<sup>55</sup> observed both that mandatory capital punishment implicated the need for extra reliability in the litigation process, and had been rejected by a growing consensus of jurisdictions. "Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."<sup>56</sup> *Woodson* observed that mandatory death sentences do not avoid the arbitrary infliction of death as a punishment, as juries nullify the law by refusing to convict in some cases.<sup>57</sup> In striking mandatory death as a permissible punishment, the Court recounted the fact that mandatory death had been rejected by almost every jurisdiction:

The history of mandatory death penalty statutes in the United States thus reveals that the practice of sentencing to death all persons convicted of a particular offense has been rejected as unduly harsh and unworkably rigid. The two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society — jury determinations and legislative enactments — both point conclusively to the repudiation of automatic death sentences.<sup>58</sup>

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<sup>52</sup> *Furman v. Georgia*, 408 U.S. 238, 242 (1972) (emphasis added).

<sup>53</sup> *Gregg v. Georgia*, 428 U.S. 153, 187 (1976).

<sup>54</sup> *Id.* at 188.

<sup>55</sup> *Woodson v. North Carolina*, 428 U.S. 280 (1976).

<sup>56</sup> *Id.* at 305.

<sup>57</sup> *Id.* at 303.

<sup>58</sup> *Id.* at 292-93.

There is clearly strong precedent for the idea that the Eighth Amendment looks not only to classes of defendants and crimes in determining the constitutionality of capital punishment, but also to the reliability of the litigation process. The question remains whether society's choice to increase the reliability of the process can, at some point, create a constitutional requirement that the process be followed, and if so whether defendants sentenced to death without the benefits of the procedures can seek relief.

The Eighth Amendment has long been understood as incorporating evolving standards of decency, and what may have been acceptable under the Eighth Amendment in the past is not necessarily acceptable now. In *Trop v. Dulles*,<sup>59</sup> in which the Court ruled that loss of citizenship cannot be imposed as a punishment for a criminal conviction, the Court held that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."<sup>60</sup> Evolving standards of decency have been a principal focus of the Court in examining whether a class of defendants, such as those under eighteen years of age or the mentally retarded, or a class of crimes, such as felony murder or the rape of a child, can be constitutionally punished by death. In *Roper v. Simmons*,<sup>61</sup> in holding that imposition of the death penalty for defendant under the age of eighteen at the time of the crime violated the Eighth Amendment, the Court explicitly relied on these changing standards in reversing course from its earlier holding in *Stanford v. Kentucky*,<sup>62</sup> observing that:

The prohibition against "cruel and unusual punishments," like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual.<sup>63</sup>

Similarly, the Court, relying on the evolving standards of decency, restricted the application of the death penalty in *Atkins v. Virginia*,<sup>64</sup> in which the Court held the death penalty disproportionate under the

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<sup>59</sup> *Trop v. Dulles*, 356 U.S. 86 (1958).

<sup>60</sup> *Id.* at 101.

<sup>61</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>62</sup> *Stanford v. Kentucky*, 492 U.S. 361 (1989).

<sup>63</sup> *Roper*, 543 U.S. at 560-61 (quoting *Trop*, 356 U.S. at 100-01 (plurality opinion)).

<sup>64</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002).

Eighth Amendment for those with mental retardation; in *Enmund v. Florida*,<sup>65</sup> in which the Court struck down the death penalty for an accomplice who did not himself kill or intend to kill; and most recently in *Kennedy v. Louisiana*,<sup>66</sup> in which the Court rejected the death penalty for child rape that did not result in death. All of the cases, however, consider categorical exclusion from capital punishment of classes of defendants, defined by a shared characteristic, or classes of crimes, rather than an evolution in the procedures used to identify a particular defendant as worthy of the ultimate sanction.

While evolution of procedural safeguards has received less attention in the Eighth Amendment jurisprudence, there is support for relying on increased reliability in procedures as a basis for building that reliability into the requirements of the Eighth Amendment. Perhaps the clearest example is the decision in *Gardner v. Florida*.<sup>67</sup> *Gardner* involved a challenge to the use of information contained in a confidential report, which had not been disclosed to the defense, by a judge in overriding a jury's recommendation of a life sentence. The Court was confronted with its prior decision, authored by Justice Black, in *Williams v. New York*,<sup>68</sup> in which the Court approved the use of such a confidential report in a capital sentencing hearing. Although *Williams* could be distinguished on the basis that the judge in that case discussed the information in the report in open court, the Supreme Court did not rely on that as the basis for its ruling.<sup>69</sup> Rather, the Court made explicit reference to the evolution in the acceptable procedures used in imposing the death penalty:

It is also significant that Mr. Justice Black's opinion recognized that the passage of time justifies a re-examination of capital-sentencing procedures. As he pointed out: "[A]n automatic and commonplace result of convictions – even for offenses today deemed trivial." Since that sentence was written almost 30 years ago, *this Court has acknowledged its obligation to re-examine capital-sentencing procedures against evolving standards of procedural fairness in a civilized society*.<sup>70</sup>

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<sup>65</sup> *Enmund v. Florida*, 458 U.S. 782 (1982).

<sup>66</sup> *Kennedy v. Louisiana*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 2641 (2008), *modified and reh'g denied*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1 (2008).

<sup>67</sup> *Gardner v. Florida*, 430 U.S. 349 (1977).

<sup>68</sup> *Williams v. New York*, 337 U.S. 241 (1949).

<sup>69</sup> *Gardner*, 430 U.S. at 357.

<sup>70</sup> *Id.* at 356-57 (quoting *Williams*, 337 U.S. at 247-48) (emphasis added).

Similarly, in *Beck v. Alabama*,<sup>71</sup> the Court held that a sentence of death may not be constitutionally imposed after a jury verdict of a capital offense when the jury was not permitted to consider a lesser-included offense that was supported by the evidence. This appears to have been based upon the Eighth Amendment, as the Court specifically declined to hold that due process requires a lesser included offense instruction in a non-capital case.<sup>72</sup> The Court explicitly looked to the near universal acceptance of this procedural safeguard, as well as the intrinsic value of the safeguard in preventing a jury from improperly convicting a defendant of a capital crime when the only other option is a complete acquittal.

While we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process, the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard. That safeguard would seem to be especially important in a case such as this. For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense-but leaves some doubt with respect to an element that would justify conviction of a capital offense-the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.

Such a risk cannot be tolerated in a case in which the defendant's life is at stake. As we have often stated, there is a significant constitutional difference between the death penalty and lesser punishments:

"[D]eath is a different kind of punishment from any other which may be imposed in this country. . . . From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."

To insure that the death penalty is indeed imposed on the basis of "reason rather than caprice or emotion," we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case.<sup>73</sup>

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<sup>71</sup> *Beck v. Alabama*, 447 U.S. 625 (1980).

<sup>72</sup> *Id.* at 638.

<sup>73</sup> *Id.* at 637-38 (quoting *Gardner*, 430 U.S. at 357-58 (opinion of Stevens, J)).



In *Spaziano v. Florida*,<sup>74</sup> the Court held that the Eighth Amendment does not require that a jury make the capital sentencing decision. Important for purposes of our analysis, was the fact that the Court reached this decision with explicit recognition of the importance of “contemporary standards of decency” in evaluating procedures adopted by the state in capital sentencing.

We also acknowledge the presence of the majority view that capital sentencing, unlike other sentencing, should be performed by a jury. As petitioner points out, 30 out of 37 jurisdictions with a capital sentencing statute give the life-or-death decision to the jury, with only 3 of the remaining 7 allowing a judge to override a jury’s recommendation of life. The fact that a majority of jurisdictions have adopted a different practice, however, does not establish that contemporary standards of decency are offended by the jury override. The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws. “Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment” is violated by a challenged practice.<sup>75</sup> In light of the facts that the Sixth Amendment does not require jury sentencing, that the demands of fairness and reliability in capital cases do not require it, and that neither the nature of, nor the purpose behind, the death penalty requires jury sentencing, we cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional.<sup>76</sup>

Similarly, in *Caldwell v. Mississippi*,<sup>77</sup> the Court held that the Eighth Amendment is violated when the jury is given misleading information as to the role of the appellate court in reviewing a death sentence. In reaching this decision, the Court observed that there was almost uniform rejection by the state court’s of this type of conduct. In *Mills v. Maryland*,<sup>78</sup> the Court prohibited a state from requiring jury unanimity in a finding that a mitigating circumstance exists. The Court reasoned that requiring unanimity prevents jurors from considering legitimate mitigation based upon a lone hold-out, and that this undercuts reliability of capital sentencing.<sup>79</sup> In *Mills*, the Court analyzed the likelihood that the jury understood that they had to be unanimous, and the impact such an understanding would have.<sup>80</sup> The Court also observed:

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<sup>74</sup> *Spaziano v. Florida*, 468 U.S. 447 (1984).

<sup>75</sup> See *Enmund v. Florida*, 458 U.S. 782, 797; *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion).

<sup>76</sup> *Spaziano*, 468 U.S. at 463-64.

<sup>77</sup> *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

<sup>78</sup> *Mills v. Maryland*, 486 U.S. 367 (1988).

<sup>79</sup> *Id.* at 384.

<sup>80</sup> *Id.*

The decision to exercise the power of the State to execute a defendant is unlike any other decision citizens and public officials are called upon to make. *Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case.* The possibility that petitioner's jury conducted its task improperly certainly is great enough to require resentencing.<sup>81</sup>

The Supreme Court, then, has certainly recognized that standards of procedural fairness and reliability evolve, and that this evolution may be considered in determining the minimum procedures required under the Eighth Amendment when a state seeks death as punishment.

#### CONCLUSION

There are, of course, hurdles to establishing that the significant reforms enacted by North Carolina reflect an evolution in procedural fairness that should be recognized under the Eighth Amendment. Litigation on this issue would need to establish that similar reforms have been enacted in other death penalty states, to establish that North Carolina's changes reflect a growing consensus as to the need for heightened reliability in capital trials and sentences. Seeking relief for those sentenced under the pre-reform system also faces a hurdle under *Teague v. Lane*,<sup>82</sup> and *State v. Zuniga*,<sup>83</sup> which block application of new constitutional rules to inmates whose convictions are final, subject to narrow exceptions. Those hurdles, however, may not be insurmountable. The basic unfairness of executing inmates sentenced to death, who would not face a death sentence in the capital system we now have, requires close examination and study, and the Eighth Amendment implications of these changes should not be overlooked.

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<sup>81</sup> *Id.* at 383-84 (emphasis added).

<sup>82</sup> *Teague v. Lane*, 489 U.S. 288 (1989).

<sup>83</sup> *State v. Zuniga*, 444 S.E.2d 443 (N.C. 1994).