JUROR RESPONSIBILITY IN CAPITAL SENTENCING: A "RECOMMENDATION" FOR NORTH CAROLINA

In the United States, a criminal defendant can be sentenced to death only upon a finding by the jury. Thus, jurors make one of the most vital decisions in all capital cases. The Eighth Amendment to the United States Constitution requires that each juror engage in a truly deliberative process when considering punishment in a capital case. Yet jurors use a variety of linguistic mechanisms to make the sentencing deliberation easier on themselves. These mechanisms allow jurors to diffuse their sense of individual responsibility within the sentencing process, which is in direct conflict with the Eighth Amendment. Although mitigation of responsibility is nearly inevitable within this context, it is often exacerbated by language used throughout the criminal trial. This Note uses the capital sentencing statute, jury instructions, and case law in North Carolina to critically examine the linguistic mechanisms employed by jurors throughout the capital sentencing process.

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I. INTRODUCTION

Capital punishment is the ultimate sentence that a jury can decide upon—a decision so important that the Supreme Court of the United States emphasized its magnitude in *Caldwell v. Mississippi*.[1] The strategic use of linguistics by attorneys can guide jurors' thought processes and feelings associated with sentencing in capital cases.[2] Therefore, in *Caldwell*, the Supreme Court made clear that the Eighth Amendment requires that those who are ultimately responsible for determining whether to sentence a defendant to death must understand the significance of that decision, ensuring a deliberative process.[3] North Carolina's capital sentencing statute[4] conflicts with the Eighth Amendment's protection set forth in *Caldwell* as it does not lend itself to ensuring a truly deliberative process. The statutory language—particularly the use of the term "sentence recommendation"[5]—allows members of the jury to mitigate their own feelings of responsibility for deciding to sentence an individual to death.[6] In addition to the sentencing deliberation stage itself, this statutory language influences attorneys' strategies and jurors' feelings of ultimate responsibility at multiple stages of trial.[7]

The purpose of this Note is to analyze the effectiveness of North Carolina's capital sentencing statute in light of *Caldwell*. Part II briefly addresses the history of the death penalty in the United States before exploring the issue, holding, and rationale in *Caldwell*. Part III presents North Carolina's capital sentencing statute and looks at how it functions in practice. Part IV analyzes capital sentencing in North Carolina through the relation of linguistic mechanisms to jurors' mitigation of sentencing responsibility throughout trial, finding tension between the statute's influence and *Caldwell*. In light of this analysis, further suggestions are briefly explored at the end.

II. BACKGROUND

A. A Brief History of Capital Punishment in the United States Judicial System

Capital punishment in the United States has long been an area of controversy to which even the courts were not immune.[8] The evolution of capital punishment through our judicial system, including rulings that placed limitations on the availability of capital punishment in particular cases, reflects both the judicial system's and

1. 472 U.S. 320 (1985).
2. *See infra* Subpart II.C.
3. *See Caldwell*, 472 U.S. at 341.
4. N.C. GEN. STAT. § 15A–2000(b) (2018).
5. *Id.*
6. *See infra* Subpart IV.A.
7. *See infra* Part III.
8. *See infra* Subpart II.A.

society's view that the death penalty is punishment of the ultimate magnitude.[9] The United States is currently the only Western country applying the death penalty[10] with use by twenty-nine states, the federal government, and the military.[11] Capital punishment in the United States was unconstitutional from 1972–1976 based on the case of *Furman v. Georgia*,[12] in which the Supreme Court issued a per curiam opinion holding that: "the imposition and carrying out of the death penalty . . . constitute[s] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[13] In 1976, this decision was overturned in *Gregg v. Georgia*[14] when the Supreme Court decided that the death penalty did not "invariably violate the Constitution."[15]

Although capital punishment was sought after and enforced again, evolving standards of decency and morality influenced the Supreme Court to place limitations on its availability in certain types of cases.[16] The Supreme Court decided *Penry v. Lynaugh*[17] in 1989, holding that the Eighth Amendment does not categorically prohibit executing "mentally retarded" defendants convicted of capital offenses.[18] However, in *Atkins v. Virginia*,[19] the Supreme Court abrogated *Penry*, holding that application of the death penalty in cases where the defendant was "mentally retarded" categorically violated the Eighth Amendment.[20] *Stanford v. Kentucky*[21] is another case that was later overturned. In *Stanford*, the Supreme Court held that "neither a historical nor a modern societal consensus" supported the contention that the Eighth Amendment prohibited imposition of the death penalty on defendants who were sixteen or seventeen years

9. *See* Roper v. Simmons, 543 U.S. 551, 578 (2005) (holding the death penalty unconstitutional for juveniles who committed their crimes under the age of eighteen); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding the death penalty unconstitutional for "mentally retarded" defendants).

10. *See The Death Penalty in 2017: Facts and Figures*, AMNESTY INT'L (Apr. 12, 2018).

11. *States and Capital Punishment*, NAT'L CONFERENCE OF STATE LEGISLATURES (June 12, 2019), http://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx

12. 408 U.S. 238 (1972).

13. *Id.* at 239–40.

14. 428 U.S. 153 (1976).

15. *Id.* at 169.

16. *See* Roper v. Simmons, 543 U.S. 551 (2005) (finding capital punishment unconstitutional in cases where the defendant was a juvenile at the time of offense); Atkins v. Virginia, 536 U.S. 304 (2002) (finding capital punishment unconstitutional in cases where the defendant is "mentally retarded").

17. 492 U.S. 302 (1989).

18. *See id.* at 335.

19. 536 U.S. 304 (2002).

20. *See id.* at 321.

21. 492 U.S. 361 (1989).

old at the time they committed the crime.[22] In *Roper v. Simmons*,[23] the Supreme Court determined that eighteen is "the age at which the line for death eligibility ought to rest," holding that the Eighth and Fourteenth Amendments prohibit the imposition of the death penalty on juvenile offenders.[24] The Supreme Court has understood the topic of the death penalty to be highly contentious, considering "evolving standards of decency that mark the progress of a maturing society" in addressing Eighth Amendment arguments related to the cruel and unusual nature of punishment.[25]

B. Caldwell v. Mississippi[26]

Bobby Caldwell was convicted of capital murder and sentenced to death in a bifurcated proceeding pursuant to Mississippi's capital punishment statute.[27] In closing argument at the sentencing stage, counsel for Caldwell emphasized the jury's responsibility in calling for the execution of another individual.[28] The prosecution responded in closing argument by encouraging the jury not to view itself as responsible for determining whether Caldwell would die, as a death sentence would ultimately be reviewed by the Mississippi Supreme Court.[29] On appeal, the Mississippi Supreme Court affirmed the conviction and the death sentence, relying on *California v. Ramos*[30] to reject the argument that the prosecutor's statements violated the Eighth Amendment.[31] The United States Supreme Court granted certiorari to address the issue and vacated the death sentence, finding that the prosecutor's comments violated the Eighth Amendment and concluding that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere."[32]

Throughout its reasoning, the Supreme Court quoted the case relied upon by the Mississippi Supreme Court—*California v. Ramos*[33]—reiterating the gravity of capital punishment, distinguishing it from any other punishment, and stressing the necessity of sound deliberation in determining whether to impose it.[34] "[T]he qualitative difference of death from all other punishments

22. *Id.* at 380.
23. 543 U.S. 551 (2005).
24. *Id.* at 574.
25. *Id.* at 560–61.
26. 472 U.S. 320 (1985).
27. *Id.* at 324.
28. *See id.*
29. *Id.* at 325–26.
30. 463 U.S. 992 (1983).
31. *Caldwell*, 472 U.S. at 326.
32. *Id.* at 328–29.
33. *Ramos*, 463 U.S. at 992.
34. *Caldwell*, 472 U.S. at 329.

requires a correspondingly greater degree of scrutiny of the capital sentencing determination."[35] In *Ramos*, the Court explained that the State's procedure in imposing the death sentence was its principal concern "[i]n ensuring that the death penalty is not meted out arbitrarily or capriciously . . . ."[36] The *Caldwell* Court then referenced several decisions in which limitations were placed on capital punishment, explaining that such limitations were "rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion."[37] This rationale provided the basis for the Court's determination that the Eighth Amendment requires those who are deciding whether to sentence a defendant to death to fully comprehend their responsibility in making that decision.[38]

C. The Role of Linguistics in Mitigating Responsibility in Death Penalty Sentencing

The law is made up of language that shapes the ways in which individuals are viewed.[39] In capital trials, if not all criminal trials, defendants are viewed as heinous individuals or criminals as a result of the use of particular language.[40] Through language, defendants are dehumanized.[41] Most importantly, language in capital trials aids juries in carrying out the burden of sentencing someone to death—a punishment that the "United States legitimates . . . in part by requiring laypeople to mete it out."[42] In this sense, the government and the jury are able to collaborate in rendering a death sentence.[43] Throughout trial and into sentencing deliberations, the jury negotiates its feelings toward and involvement in rendering a death verdict in complex ways.[44]

The jury's responsibility for a defendant's death in a capital case is particularly ambiguous, as it is largely removed in many aspects from the execution itself.[45] While the Supreme Court has attempted to remedy this through several cases, including *Caldwell*, language remains the "primary vehicle of law's power and action" in mitigating jurors' responsibility for sentencing decisions.[46] Legal language throughout capital trials minimizes the reality and finality of the

35. *Id.* (quoting *Ramos*, 463 U.S. at 998–99).
36. *Ramos*, 463 U.S. at 999.
37. *Caldwell*, 472 U.S. at 329.
38. *See id.* at 341.
39. *See* ROBIN CONLEY, CONFRONTING THE DEATH PENALTY: HOW LANGUAGE INFLUENCES JURORS IN CAPITAL CASES 6 (2016).
40. *See id.*
41. *Id.*
42. *Id.* at 7–8.
43. *See id.* at 9.
44. *See id.*
45. *Id.* at 163.
46. *Id.* at 164.

execution, which enables jurors to better distance themselves from the moral burden of taking another's life.[47] The influence of language on juror responsibility is prevalent throughout all stages of trial.[48] Through this manipulation of language, several linguistic mechanisms and processes enable juries to translate legal rules into a rejection of accountability for their sentencing decisions.[49]

Agency is a key linguistic mechanism in capital trials.[50] "Legal language is an especially potent technology of power, as the state's authority over knowledge and, in the case of the death penalty, over life, is made possible in large part through law's language."[51] This authority is carried out through various individuals and entities, or agents, including the jury.[52] There are different ways of encoding agency in language (e.g., active voice vs. passive voice) that either emphasize or diminish an entity's responsibility for an action, and jurors in capital trials both use and interpret language to shape their agency.[53] In fact, language "provide[s] a whole spectrum of means for expressing varied degrees of agency, often allowing jurors to couch their individual accountability within institutional actors."[54]

Passive constructions in linguistics lend themselves to mitigated agency.[55] Within the context of capital trials, jury instructions for sentencing tend to reduce the jury's role, allowing jurors to disclaim responsibility in their sentencing decisions.[56] The jury can view a death sentence as a decision that had to be made, leaving out that it was the one that actually made that decision.[57] Through this passive construction, the jury is able to completely remove itself from association with the act of rendering a sentence of death.[58] Further, jurors are able to use language to mitigate responsibility by referring to death sentences as "verdicts" or "decisions."[59]

The judicial process and setup of a capital case itself encourage the linguistic mechanism of collective agency.[60] It is unclear "the degree to which Supreme Court decisions and statutory law require jurors to take individual responsibility for their decisions about

47. *See id.* at 164–65.
48. *See id.* at 165.
49. *See id.* at 164–65.
50. *See generally id.* at 165–67 (discussing language and agency in regard to jurors in capital trials).
51. *Id.* at 165.
52. *See id.*
53. *See id.* at 166.
54. *Id.* at 167.
55. *See generally id.* at 188–89 (discussing passive constructions and mitigated agency in regard to jurors in capital trials).
56. *See id.* at 188.
57. *See id.* at 189.
58. *See id.*
59. *Id.*
60. *See id.* at 194.

defendants' lives."[61] Not only can individual jurors view themselves as part of the jury as a whole, but the jury itself can also be viewed as one agent among others (i.e., the judge and the state) in the carrying out of a death sentence.[62] When giving instructions on sentencing verdicts, judges and attorneys typically address the jury as a whole, rather than individually as jurors.[63] Since juries are to be representative of societal values, jurors' sentencing decisions can be seen as collective in two ways: their assumed representation of community sentiment and the unanimity requisite in delivering a death sentence.[64] Moreover, members of a jury are provided a sense of anonymity, particularly in regard to their personal deliberations, which further diminishes individual accountability for decisions made or actions taken as a jury member.[65]

Linguistic mechanisms for mitigating responsibility in capital trials do not go unnoticed by defense attorneys, who themselves try to use language that invokes a heightened sense of responsibility among jurors.[66] In particular, defense attorneys attempt to combat collective agency in sentencing responsibility among jurors.[67] Throughout several stages of trial, defense attorneys may do so by continually emphasizing that the sentencing decision is one that is to be heavily assessed and individually made.[68] However, despite efforts by defense attorneys, jurors often "report[] feeling pressured to come to a unanimous decision and thus [do] not hold out in a defense of their own individual opinions."[69] Ultimately, given the requirement of unanimity in capital sentencing and the notion of juries as representative of community values, it may be counterintuitive and unlikely to expect jurors to consider their decisions to be truly individual acts.[70]

III. N.C. GEN. STAT. § 15A–2000(B)

As a state with the death penalty, North Carolina has a capital sentencing statute.[71] N.C. Gen. Stat. § 15A–2000(b) explains the process through which the jury must render a "sentence recommendation":

> (b) *Sentence Recommendation* by the Jury. — Instructions determined by the trial judge to be warranted by the evidence

61. *Id.* at 191.
62. *See id.*
63. *Id.* at 190.
64. *Id.* at 191.
65. *Id.* at 192.
66. *See id.* at 193.
67. *Id.*
68. *See id.*
69. *Id.* at 193–94.
70. *Id.* at 194.
71. N.C. GEN. STAT. § 15A–2000(b) (2018).

> shall be given by the court in its charge to the jury prior to its deliberation in determining sentence. . . .
>
> After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a *sentence recommendation* to the court. . . .
>
> The *sentence recommendation* must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the *sentence recommendation* by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the *sentence recommendation* returned.
>
> If the jury cannot, within a reasonable time, unanimously agree to its *sentence recommendation*, the judge shall impose a sentence of life imprisonment. The judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its *sentence recommendation*.[72]

Since going into effect in 1977, there have been forty-three executions in North Carolina under the current statute.[73]

Per the Supreme Court's holding in *Hurst v. Florida*,[74] the Sixth Amendment requires a jury—as opposed to a judge—to find the facts necessary in imposing a sentence of death.[75] Moreover, "a jury's mere recommendation is not enough."[76] *Hurst* explored the capital sentencing scheme of Florida's statute at the time, which provided that notwithstanding the jury's recommendation to impose a death sentence, the trial judge was required to hold a separate hearing in order to determine whether sufficient aggravating factors existed to justify a sentence of death.[77] Unlike the Florida statute, North Carolina's capital sentencing statute requires the jury to find each fact required to impose a sentence of death.[78] While the court, ultimately, imposes the sentence of death, it does not make any independent findings of fact and is bound by the sentencing recommendation of the jury.[79]

North Carolina's capital sentencing statute and its language influence trials in more ways than just the procedural and legal requirements the jury must consider when it deliberates. The statutory language referring to a "sentence recommendation" is prevalent throughout the pattern jury instructions on death penalty

72. *Id.*

73. *Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/executions-overview/number-of-executions-by-state-and-region-since-1976 (last visited Dec. 19, 2019).

74. 136 S. Ct. 616 (2016).

75. *Id.* at 619.

76. *Id.*

77. *Id.* at 619–20.

78. N.C. GEN. STAT. § 15A–2000(b) (2018).

79. *Id.*; *see also* State v. Johnson, 259 S.E.2d 752, 762 (N.C. 1979).

sentencing.[80] The jurors' sentence is referred to only as a "recommendation" throughout the instructions.[81] When referring to the jury's communication of their determination, the verb "recommend" is utilized instead of a more definitive verb, such as "find" or "conclude."[82] In fact, in line with the statute, the word "impose" is used only in reference to the role of the court or the law in actually enacting or calling for the death sentence.[83]

Within the first paragraph of the jury instructions is the statement: "Your recommendation will be binding upon the Court. If you unanimously recommend that the defendant be sentenced to death, the Court will impose a sentence of death. If you unanimously recommend a sentence of life imprisonment, the Court will impose a sentence of life imprisonment."[84] However, this is the only mention of the sentencing recommendation's *binding* nature.[85] The instructions proceed and conclude without emphasizing this point again.[86] As final repetition and reinforcement of the statutory language, the form the jury receives for deliberation is entitled "Issues and Recommendation as to Punishment."[87]

IV. THE IMPLICATIONS OF NORTH CAROLINA'S CAPITAL SENTENCING STATUTE ON JURY RESPONSIBILITY CONFLICTS WITH THE EIGHTH AMENDMENT PER *CALDWELL*

A. North Carolina's Capital Sentencing Statute and its Influence Throughout Trial are Conducive to Linguistic Mechanisms that Mitigate Juror Responsibility

North Carolina's capital sentencing statute is anything but firm in its conviction of the jury's responsibility in sentencing.[88] In capital cases in North Carolina, the jury does not render a "verdict" on sentencing, like it does in ruling on guilt or innocence.[89] Instead, the jury issues a "sentence recommendation."[90] Even using active voice, calling the jury's sentencing decision a mere "recommendation" allows the jury to mitigate its agency over the ultimate determination of life or death through the use of several linguistic mechanisms. A "recommendation" is defined as "a suggestion or proposal as to the

80. NORTH CAROLINA PATTERN JURY INSTRUCTIONS, CRIMINAL § 150.10 (N.C. COMM. ON PATTERN JURY INSTRUCTIONS 2016) [hereinafter N.C. CRIMINAL JURY INSTRUCTIONS].
81. *See id.*
82. *See id.*
83. *See id.*
84. *Id.*
85. *See id.*
86. *See id.*
87. *Id.* § 150.10A.
88. *See* N.C. GEN. STAT. § 15A–2000(b) (2018).
89. *See* N.C. GEN. STAT. § 15A–1237 (2018).
90. § 15A–2000(b).

best course of action."[91] Additionally, to "recommend" is to "advise or suggest."[92] This language contains both a lack of authority in agency and finality.

This language is provided by statute, but as previously mentioned, it also exists in the relevant jury instructions and throughout the very form with which the jury records its decision as to sentencing.[93] What cannot be ignored is the prevalence with which this language permeates these sources. In regard to what the jury's sentencing deliberation ultimately produces, the statute strictly refers to a "sentence recommendation."[94] The form on which the jury's ultimate decision is recorded is itself titled "Issues and Recommendation as to Punishment."[95] Even more striking is the extreme use of this language in the pattern jury instructions on sentencing, which is given before the jury leaves the courtroom to deliberate. In the jury instructions alone, the words "recommendation" and some form of the verb "recommend" are referenced twenty-two times in regard to the jury.[96] When you add the references to the "Issues and Recommendation as to Punishment" form in the jury instructions, that number increases to twenty-nine, at the minimum.[97]

Putting this into context, the jury instructions refer to the jury as the agent exercising direct authority over the defendant's ultimate sentence/punishment a total of twenty times.[98] A majority of those times,[99] the verb "recommends"[100] is used to exemplify the exercise of such authority—e.g., "Members of the Jury . . . it is now your duty to *recommend* to the Court whether the defendant should be sentenced to death or to life imprisonment."[101] Of the fewer times that a verb other than "recommends" is used for the same purpose, that verb is only used in reference to the sentencing or punishment "recommendation"—e.g., "When you retire to *deliberate* your *recommendation* as to punishment . . . ."[102] In each of the twenty instances in which the jury is described as having direct agency over the defendant's sentence, the jury is either explicitly "recommending"

91. *Recommendation*, LEXICO, https://www.lexico.com/en/definition/recommendation (last visited Dec. 19, 2019).

92. *Recommend*, LEXICO, https://www.lexico.com/en/definition/recommend (last visited Dec. 19, 2019).

93. *See supra* Part III.

94. *See* § 15A–2000(b).

95. *See* N.C. CRIMINAL JURY INSTRUCTIONS, *supra* note 80, § 150.10A.

96. *See* N.C. CRIMINAL JURY INSTRUCTIONS, *supra* note 80.

97. *See id.* The number varies depending on each case and which aggravating and mitigating circumstances are applicable.

98. *See id.*

99. *See id.* (thirteen times).

100. *See id.* (including other forms and tenses).

101. *See id.* (emphasis added).

102. *See id.* (emphasis added).

the sentence or making a sentencing "recommendation."[103] The heavy use and influence of the "recommendation" language in regard to the jury is never offset or balanced out with firmer, more definitive language.[104] Thus, the jury instructions never effectively convey to the jury the magnitude and finality of its decision to sentence someone to death.

Use of darker language, such as "death penalty" or a "sentence of death," as being a potential result of the sentencing procedure occurs a total of ten times in the jury instructions.[105] Of these ten times, the jury is never referred to as having agency over reaching this result, with that responsibility falling on the trial court and the law instead.[106] In fact, in nine of the ten mentions, the law is the entity that is seemingly given agency over whether or not a sentence of death will be reached—e.g., "Our *law* identifies the *aggravating circumstances* which might *justify a sentence of death*."[107] Additionally, the verb "impose" is used in reference to the "death penalty" or a "sentence of death" five of the ten times.[108] The trial court is the only other agent ever mentioned in the jury instructions or relevant statute that "imposes" anything—e.g., "[t]he Court will impose a sentence of death."[109] Thus, even when not explicitly mentioned, the trial court may be viewed as bearing at least some responsibility for reaching a death penalty verdict or a sentence of death—strictly by its association with the word "impose."

As previously mentioned, jurors in capital cases use language to mitigate their responsibility by choosing to view their ultimate determination as a "verdict" or "decision."[110] This better allows juries to distance themselves from the heightened accountability associated with rendering a "death sentence" or finding for an "execution."[111] In North Carolina, capital juries can employ this linguistic mechanism with ease. The statutory language that saturates trial and sentencing deliberations not only assists with but calls for juries to refer to and view their sentencing decisions as "recommendations."[112] One of the last statements issued to the jury does not even reference the word "sentence," instead instructing "when you are ready to make a recommendation, have your foreperson write in your recommendation as directed on the 'Issues and Recommendation'

103. *See id.*

104. *See id.* (e.g., for you to sentence the defendant to death, instead of "For you to recommend that the defendant be sentenced to death . . . .").

105. *See id.* ("If you unanimously recommend that the defendant be sentenced to death, the Court will impose a sentence of death.").

106. *See id.*

107. *See id.* (emphasis added).

108. *Id.*

109. *Id.*; *see* N.C. GEN. STAT. § 15A–2000(b) (2018).

110. *See supra* text accompanying note 59.

111. *See supra* text accompanying note 59.

112. *See* § 15A–2000(b).

form."[113] A "recommendation," by its very nature, allows for even further distancing of responsibility than a "verdict," "decision," or "sentence."[114]

While it may seem natural for the statutory language to be reflected in the jury instructions and the sentencing form, it is neither required nor necessary, particularly when it has the effect of being as misleading as that of North Carolina's. Florida provides a telling comparison. Florida's capital sentencing statute is largely similar to North Carolina's, with emphasis also being placed on the fact that the jury "recommends" the sentence.[115] Florida's capital sentencing statute also refers to the jury's sentence as a "recommendation."[116] However, in stark contrast to North Carolina, Florida's pattern jury instructions do not use any form of the verb "recommend" nor do they ever refer to the jury's sentence as a "recommendation."[117] Instead, Florida's jury instructions focus on the jury's role in "deciding" the defendant's sentence, referring to the jury's sentence as its "decision."[118]

Contrary to North Carolina's jury instructions, Florida's jury instructions also include a provision where the trial court explicitly calls the jurors' attention to their sentencing responsibility and the magnitude of the decision before them:

> The fact that the jury can make its decision on a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you vote, you should carefully consider and weigh the evidence, realizing that a human life is at stake, and bring your best judgment to bear in reaching your verdict.[119]

Departing even further from North Carolina, the form that is used by the jury in recording its sentence is titled "Jury Verdict Form–Death Penalty."[120] This form also makes no use of any "recommendation" language, instead calling the jury's sentence a "verdict."[121] Moreover, the verdict form plainly refers to the "death penalty" as the punishment, drawing jurors' attention to the finality and gravity of deciding to impose it.[122] Florida provides a clear example of using

113. N.C. CRIMINAL JURY INSTRUCTIONS, *supra* note 80.

114. *See supra* text accompanying note 59.

115. *See* FLA. STAT. § 921.141 (2019) ("[A]nd the jury shall make a recommendation to the court as to whether the defendant shall be sentenced to life imprisonment without the possibility of parole or death.").

116. *See id.*

117. *See* FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 7.11 (FLA. BAR 2019).

118. *See id.* ("You will be provided a form to reflect your findings and decision regarding the appropriate sentence.").

119. *See id.*

120. *See id.* § 3.12(e).

121. *See id.*

122. *See id.*

language other than that provided by statute in order to avoid misleading capital jurors as to their sentencing responsibility. Thus, North Carolina should not be excused from refining the language of its jury instructions or sentencing form simply because it would no longer align with the statutory language.

Referring to the sentence as a "recommendation" also inherently suggests such a determination is of a non-binding nature.[123] Yet, in capital cases in North Carolina (unlike in Florida), the trial judge is bound by the jury's sentencing recommendation.[124] While the binding nature of the jury's sentencing recommendation is provided for by statute and case law,[125] the real issue is in how this is practically communicated to the jury during trial and prior to sentencing deliberation. Although attorneys in capital cases are free to state this point to the jury in argument, the court only informs the jury of this when giving the instructions as to sentencing.[126] Moreover, the sentence recommendation's binding nature is only mentioned once at the beginning of those jury instructions.[127]

It is far-fetched to assume that this is enough for jurors to truly comprehend—or even remember—the binding nature of their decision. Throughout trial, juries are constantly being bombarded with an abundance of rules, facts, and instructions that all have the capabilities of being unclear, complex, and contradictory.[128] When mentally sifting through large quantities of information, individuals are more likely to remember information that has been repeated or reinforced.[129] A fleeting remark at the beginning of jury instructions about the sentencing recommendation being binding is not enough to effectively convey this information to the jury.[130] Moreover, this remark is followed by pages of further jury instruction rife with the "recommendation" language.[131] Thus, while its sentence being a "recommendation" is heavily emphasized to the jury, the binding nature of that recommendation is not.[132]

Even if one brief mention at the beginning of jury instructions was enough to effectively convey to jurors that their sentencing recommendation is binding on the court, the statute and jury instructions still allow jurors to employ the linguistic mechanism of

123. *See supra* text accompanying note 81.
124. *See supra* text accompanying note 79.
125. *Id.*
126. *See* N.C. CRIMINAL JURY INSTRUCTIONS, *supra* note 80.
127. *See id.*
128. *See* Brian H. Bornstein & Edie Greene, *Jury Decision Making: Implications for and from Psychology*, 20 CURRENT DIRECTIONS PSYCHOL. SCI. 63, 63 (2011).
129. *See* Katharina Leitner, *Repeat It to Keep It: Third Time's a Charm!*, BRAIN-FRIENDLY.COM, https://blog.brain-friendly.com/2017/03/repeat-it-3-times/ (last visited Dec. 19, 2019).
130. *See id.*
131. *See* N.C. CRIMINAL JURY INSTRUCTIONS, *supra* note 80.
132. *See id.*

collective agency in mitigating their sentencing responsibility. The word "impose" is used more rarely in both the statute and jury instructions, but it is always used in reference to the trial judge or court's actions rather than the jury's.[133] Thus, while the jury deliberates and recommends a sentence, law and procedure require the judge to be the one who ultimately imposes that recommendation.[134] In other words, sentencing in capital cases cannot be fully carried out without final imposition of the sentence by the trial judge. This allows the jury to shift and share the responsibility for sentencing with the trial judge, viewing the entire process as one requiring collective action.

B. The Influence of North Carolina's Capital Sentencing Statute on Jurors' Mitigation of Responsibility Implicates Caldwell *and the Eighth Amendment*

In analyzing Eighth Amendment concerns related to capital punishment, the Supreme Court in *Caldwell* relied extensively on precedent.[135] The Court stressed the history behind these concerns, citing various opinions that emphasized the gravity and finality with which sentencing a defendant to death is associated.[136] *Caldwell* explained that a death sentence determined by a "sentencer" who was led to believe that responsibility for such a determination ultimately rests elsewhere was constitutionally impermissible.[137] Citing case law, the Court explained that in regard to capital punishment, the Eighth Amendment requires sentencing discretion to be responsibly and reliably exercised.[138] A "greater degree of scrutiny" is required in determining whether the death penalty is warranted, as one of the Court's principal concerns is that capital punishment not be applied "arbitrarily or capriciously."[139] Consolidating the Court's rationale and overall holding in *Caldwell*, in order to eliminate arbitrariness and to pass constitutional muster, death penalty sentencing must be a deliberative process.[140] In other words, at the minimum, the Eighth Amendment requires due deliberation in capital sentencing.

As explained, jurors in capital trials employ a variety of linguistic mechanisms to mitigate their responsibility over the ultimate sentencing decision.[141] Eliminating juror mitigation of responsibility over capital sentencing in its entirety is probably infeasible, as jurors often engage these linguistic mechanisms involuntarily and the State

133. *See id.*; N.C. GEN. STAT. § 15A–2000(b).
134. *See* § 15A–2000(b).
135. *See supra* Subpart II.B.
136. *See id.*
137. Caldwell v. Mississippi, 472 U.S. 320, 328–29 (1985).
138. *See id.* at 329 (citing California v. Ramos, 463 U.S. 992, 998–99 (1983)).
139. *See id.*
140. *See supra* Subpart II.B.
141. *See supra* Subpart II.C.

will always have an interest in guiding jurors to do so. Thus, some juror mitigation of responsibility in sentencing is inherent and may not always lead to a lack of due deliberation in the sentencing procedure. However, many aspects of trial—e.g., attorneys' arguments, jury instructions—directly control the ease and extent with which jurors are able to mitigate their sentencing responsibility.[142] Such mitigation of this responsibility *can* reach a point to where jurors are failing to engage in a truly deliberative sentencing process, as required by the Eighth Amendment.[143] In fact, capital jurors may even mitigate their sentencing responsibility to such an extent that the sentencing process is entirely non-deliberative.[144]

North Carolina's capital sentencing statute refers to the jury's sentence as a "recommendation" and emphasizes that the jury "recommends" the punishment.[145] Looking at linguistics in this context "expose[s] the cultural and legal assumption about persons and punishment that guide state-sponsored killing and that permeate the criminal justice system more generally."[146] This statutory language—reinforced by the pattern jury instructions and the "Issues and Recommendation as to Punishment" form—misleads jurors into believing the ultimate responsibility for defendant's death lay elsewhere, in direct violation of *Caldwell*.[147] While the jury in *Caldwell* was misled by the prosecutor's statements in closing argument,[148] capital juries in North Carolina are misled by the statutory language itself. This language misleads jurors by emboldening mitigation of their sentencing responsibility to the point that consideration of appropriateness of punishment will be arbitrary and lack due deliberation. Such mitigation of sentencing responsibility is in direct conflict with the Eighth Amendment.

Dr. Robin Conley Riner, an anthropology professor who has conducted and published research on the use of language by jurors in Texas throughout capital trials and sentencing, finds the connection between North Carolina's statutory language and an Eighth Amendment *Caldwell* violation easy to make:

> I think . . . telling jurors that their decision is a mere "recommendation" would violate the requirement of *Caldwell*.

142. *See id.*

143. *See* William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51, 74–75 (2003); Ross Kleinstuber, *"Only a Recommendation": How Delaware Capital Sentencing Law Subverts Meaningful Deliberations and Jurors' Feelings of Responsibility*, 19 WIDENER L. REV. 321, 340–41 (2013).

144. *See* Bowers & Foglia, *supra* note 143, at 84–85.

145. N.C. GEN. STAT. § 15A–2000(b).

146. CONLEY, *supra* note 39, at 9.

147. *See supra* Subpart IV.A.

148. Caldwell v. Mississippi, 472 U.S. 320, 325–26 (1985).

> In Texas, jurors are not told that their decisions are recommendations, but some of them still think this, or think that the judge has the power to override their decision. I can only imagine that if jurors are told that their decisions are in fact recommendations, this belief would be amplified.[149]

Dr. Conley Riner has found that, in general, death penalty jurors look for ways to lessen their responsibility and North Carolina's statutory language allows them to do so.[150]

Although scarce, *Caldwell* issues have been raised in North Carolina before. In *State v. Brown*,[151] the defendant argued that the trial court erred—both in jury instructions and on the verdict form—by repeatedly characterizing the jury's sentencing decision as a "recommendation."[152] Though the opinion makes no explicit reference or citation to *Caldwell*, the defendant contended that the use of this word was misleading, as it suggested to the jurors that they were serving in merely an advisory capacity regarding sentencing, when in fact their decision would be binding on the trial court.[153] The Supreme Court of North Carolina held that the trial court did not err in the sentencing phase by characterizing the jury's sentencing decision as a recommendation because the binding nature of this recommendation had been emphasized by defense counsel in closing argument and the judge had explicitly informed the jury of this during its instructions.[154] Citing these two reasons, the court dismissed the argument, stating, "[w]e fail to see how the jurors could have been less than fully aware of the legal effect of their decision regarding punishment."[155]

In the similar case of *State v. Garner*,[156] the defendant contended that the trial court erred by refusing to give his requested instruction that the jury's verdict "bound" the trial court and was not merely a recommendation.[157] This defendant cited *Caldwell*, arguing that this diminished the jury's sense of responsibility.[158] In finding the defendant's argument without merit, the Supreme Court of North Carolina stated that the pattern jury instructions—that it would be the jury's duty to recommend a sentence of death if the jury found that the mitigating circumstances were insufficient to outweigh the aggravating circumstances and that the aggravating circumstances

149. E-mail from Robin Conley Riner, Assoc. Professor, Marshall U., to Mark Rabil, Assoc. Professor, Wake Forest Univ. Sch. of Law (June 20, 2016, 10:09 AM) (on file with author).
150. *See id.*
151. 337 S.E.2d 808 (N.C. 1985).
152. *Id.* at 828.
153. *Id.*
154. *Id.*
155. *Id.*
156. 459 S.E.2d 718 (N.C. 1995).
157. *Id.* at 735.
158. *Id.*

were sufficiently substantial to call for the imposition of the death penalty—have been consistently upheld as constitutional.[159] The court did not further discuss this point in the opinion but cited three cases as precedent to support its conclusion: *State v. McDougall*,[160] *State v. Robbins*,[161] and *State v. Skipper*.[162]

The proposition in this Note can be distinguished from *Brown* and *Garner*. *Brown* and *Garner* were concerned with the constitutionality of the sentencing verdict form and/or specific jury instructions,[163] whereas this Note is concerned with the constitutionality of the relevant statutory language itself (which is reflected throughout trial, including in the jury instructions and sentencing verdict form). It does not appear that an argument about the statutory language itself potentially violating *Caldwell* has been directly addressed in North Carolina. Still, *Brown* and *Garner* raise sufficiently similar issues related to jurors' mitigation of sentencing responsibility to the point of constituting an Eighth Amendment violation.

The Supreme Court of North Carolina, in both *Brown* and *Garner*, failed to properly address the relevant Eighth Amendment/*Caldwell* issues, dismissing defendants' arguments with little to no adequate explanation.[164] In both cases, the minimal rationale given is weak, centered around faulty assumptions, or irrelevant to the precise point at issue. In *Brown*, the court could not fathom how the jury was less than aware of the binding nature of its sentencing recommendation when defense counsel stressed this point in closing argument and the judge had informed the jury of this in sentencing instructions.[165] The court inaccurately assumed both the defense counsel and the judge were effective in relaying this information to the jury. As discussed, in spite of explicit statements or points of emphasis, jurors are constantly employing other linguistic mechanisms to mitigate their sentencing responsibility.[166]

Even if the defense counsel's emphasis was still in mind when entering deliberations, many jurors are willing to disregard that emphasis, and whatever reservations it may have impressed upon them, when faced with the inherent pressure of reaching a unanimous decision.[167] Additionally, counsel for both parties give closing arguments before the jury receives instructions as to sentencing, and it has been established that the jury instructions are rife with the

159. *Id.*
160. 301 S.E.2d 308 (N.C. 1983).
161. 356 S.E.2d 279 (N.C. 1987).
162. 446 S.E.2d 252 (N.C. 1994).
163. *See Garner*, 459 S.E.2d at 735; State v. Brown, 337 S.E.2d 808, 828 (N.C. 1985).
164. *See Garner*, 459 S.E.2d at 735; *Brown*, 337 S.E.2d at 828.
165. *See Brown*, 337 S.E.2d at 828.
166. *See supra* Subpart II.C.
167. *See supra* text accompanying note 69.

"recommendation" language, yet scant in the reflection of the sentencing recommendation's binding nature.[168] Thus, no matter how much emphasis the defense counsel may put on the binding nature of the jury's sentencing recommendation, in a sense, such emphasis will be replaced by its lack of emphasis in the jury instructions. In regard to the court pointing to the judge's mention of the sentencing recommendation's binding nature in the jury instructions,[169] it has been established that this information is given only once at the very beginning of the lengthy instructions.[170] Lastly, it is worth noting that the defendant in *Brown* took issue with the sentencing form as well, which referred to the sentence as a "recommendation" and failed to disclose its binding nature.[171] As this form guides jurors in deliberation and is the instrument on which they record their ultimate decision, and in light of the ineffectiveness of the court's purported reasons, its influence on mitigating jurors' responsibility cannot be explained away.

Garner,[172] in which the defendant explicitly raised a *Caldwell* issue, also lacks sufficiently sound rationale. Additionally, the court's ultimate determination—i.e., the trial court did not err in refusing to give the instruction that the jury's verdict in a capital sentencing proceeding "bound" the trial court and was not merely a recommendation—seems to cut against *Brown*.[173] Still, the court reasoned that it has consistently upheld the constitutionality of the provision at issue in the pattern jury instructions,[174] citing *McDougall*,[175] *Robbins*,[176] and *Skipper*.[177] Yet, none of these cases involve or address *Caldwell*.

In relying on those three cases, the Supreme Court of North Carolina failed to adequately address the specific *Caldwell* issue raised in *Garner*. In *McDougall*, the court found that the jury was adequately instructed that before recommending the death sentence, it must be satisfied that the sentence is justified and appropriate upon consideration of the totality of the mitigating circumstances found by the jury.[178] The court reasoned that the charge and sentence procedure satisfied the requirements of N.C. Gen. Stat. § 15A–2000

168. *See* N.C. CRIMINAL JURY INSTRUCTIONS, *supra* note 80.
169. *See Brown*, 337 S.E.2d at 828.
170. *See supra* text accompanying notes 84–85.
171. *See Brown*, 337 S.E.2d at 828.
172. State v. Garner, 459 S.E.2d 718 (N.C. 1995).
173. *Compare id.* at 735 (upholding constitutionality of jury instructions based solely on the fact that said instructions have been consistently upheld in the past), *with Brown*, 337 S.E.2d at 828 (upholding constitutionality of jury instructions after considering relevant factual circumstances outside of precedent).
174. *See Garner*, 459 S.E.2d at 735.
175. State v. McDougall, 301 S.E.2d 308 (N.C. 1983).
176. State v. Robbins, 356 S.E.2d 279 (N.C. 1987).
177. State v. Skipper, 446 S.E.2d 252 (N.C. 1994).
178. *McDougall*, 301 S.E.2d at 326.

and *Lockett v. Ohio*,[179] which held that the death penalty should not be imposed when the "sentencer" may be prevented from considering all mitigating circumstances in making the ultimate life or death determination.[180] In *Robbins*, the defendant conceded that the instructions he took issue with substantially conformed with those upheld in *McDougall*.[181] Relying on *McDougall*, the court simply stated that it has consistently rejected the defendant's argument and did so here.[182] Lastly, in *Skipper*, the defendant argued that the trial court erred by instructing the jury that each juror "may" consider mitigating circumstances the juror found to exist when weighing the aggravating and mitigating circumstances, contending that the word "may" allowed some jurors to disregard relevant mitigating evidence they had previously found to exist.[183] The court upheld the pattern jury instructions as correct, relying on precedent which set forth that the instruction expressly instructs that the evidence in mitigation must be weighed against the evidence in aggravation.[184]

None of the defendants in *McDougall*, *Robbins*, or *Skipper* argued *Caldwell*—that the jury instructions misled jurors into believing responsibility for the defendant's sentence rested elsewhere.[185] Rather, the defendants argued that the jury instructions caused or allowed jurors to disregard relevant circumstances that were required by sentencing procedure.[186] While the focus of these arguments may go to Eighth Amendment concerns regarding due deliberation in sentencing, *Caldwell* is not implicated since jurors' sense of responsibility in sentencing was not raised as an issue. Thus, the Supreme Court of North Carolina, in rejecting the *Caldwell* claim brought up in *Garner*, relied on cases that framed the jury instructions issue as one of broader constitutionality, rather than the specific, narrow *Caldwell* issue that was actually raised.[187]

Overall, while there have not been arguments attacking the North Carolina capital sentencing statute's language directly, *Caldwell* and related concerns still exist within North Carolina's judicial history. Unfortunately, the Supreme Court of North Carolina has either been unable or unwilling to properly address the specific issue with satisfactory rationale. In light of the abundance of research and information related to the use of linguistic mechanisms in mitigating jurors' sentencing responsibility,[188] in addition to the ways in which North Carolina's capital sentencing statute's language

179. 438 U.S. 586 (1978).
180. *McDougall*, 301 S.E.2d at 326.
181. *Robbins*, 356 S.E.2d at 308–09.
182. *Id.* at 309.
183. State v. Skipper, 446 S.E.2d 252, 279 (N.C. 1994).
184. *Id.* at 280.
185. *See supra* text accompanying notes 178–84.
186. *See id.*
187. *See* State v. Garner, 459 S.E.2d 718, 735 (N.C. 1995).
188. *See supra* Subpart II.C.

promotes such mitigation,[189] it can be argued that the Supreme Court of North Carolina would decide *Brown* and *Garner* differently today if it were to take such information into consideration in addressing the precise *Caldwell* issue.

Although more research and interviews should be conducted with jurors post-trial to establish stronger conclusions, there is some anecdotal evidence that supports the contention that jurors in North Carolina capital cases do indeed engage in processes that allow for mitigation of sentencing responsibility.[190] Henry McCollum was unanimously sentenced to death by both juries that served in his original trial in 1983 and his retrial in 1991.[191] Yet, in 2014, Henry McCollum was exonerated.[192] In an effort to better understand how the system failed Henry McCollum, Kristin Collins of the Center for Death Penalty Litigation and a coworker spoke to jurors from both trials who had unwittingly sentenced the innocent man to death.[193] In regard to reaching out to these jurors, Ms. Collins stated, "[s]ome seemed relieved to finally talk through the trauma of trial, though none would let us use their names."[194]

As mentioned, the sense of anonymity provided to jurors in capital cases allows for the diminishment of individual accountability and provides a foundation for jurors to view their sentencing decisions as determinations that are not truly individual.[195] While it is important to take into account that McCollum's case ended in exoneration, increasing the anxiety jurors felt about remaining anonymous post-exoneration, it is clear that the sense of anonymity existed throughout trial as well. In other words, these jurors' ability to remain anonymous so many years later is possible due to the anonymity provided to them at the time of trial. While Ms. Collins remarked that some wanted to talk through the trial's trauma, she also noted that some viewed the experience as too painful to revisit.[196] It is clear that the significant burden associated with capital sentencing, which leads to jurors employing mechanisms to mitigate their responsibility, was very much present for jurors involved in the McCollum case.[197]

189. *See supra* Subpart IV.A.

190. *See* Kristin Collins, *He Spent 30 Years in Prison. How Did Jurors Get It Wrong?*, NEWS & OBSERVER (Sept. 6, 2018, 8:23 AM), https://www.newsobserver.com/opinion/article217880135.html.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *See supra* text accompanying note 65.

196. Collins, *supra* note 190.

197. *See id.*

C. Addressing Caldwell *in North Carolina: Suggestions Moving Forward*

North Carolina's capital sentencing statute and its influence throughout trial on jurors' mitigation of their sentencing responsibility clearly raises *Caldwell* and Eighth Amendment issues, which remain largely unresolved. The most obvious and straightforward solution is to change the statutory language, which would further be reflected in the jury instructions and sentencing verdict form. Alternatively, the statutory language may remain the same, but the language of the jury instructions and sentencing form could be reworked, similar to Florida.[198] Instead of a "recommendation," the jury's sentence should be referred to using a word that reflects its definitive and critical nature, such as "punishment" or "verdict." This would make it more difficult for jurors in capital cases to mitigate their responsibility when deliberating an appropriate sentence.

Still, because a change in statutory language, the jury instructions, and verdict form may be an unlikely or slow process, counsel for defendants may take matters into their own hands and request the court give a particular instruction to the jury. Such a request may be for the court to more extensively emphasize the binding nature of the jury's sentencing recommendation, or it may be for the court to refer to the jury's sentence as a "verdict" instead of a "recommendation" throughout the instructions. Although at first glance these requests seem to be precluded by decisions such as *Brown* and *Garner*, the defense counsel can properly distinguish these cases.[199] The defense counsel can further bolster support for granting its request by emphasizing the extent to which the current relevant language encourages the use of linguistic mechanisms that mitigate juror responsibility in sentencing.[200]

A potential solution that would extend beyond North Carolina exists in a question raised by Dr. Conley Riner: Should we require jurors to accept *individual* responsibility for their sentencing decisions?[201] This question was raised in response to the problematic shield of anonymity provided to jurors in capital cases, as well as to the amount of jurors that have reported giving into pressure to reach a unanimous sentencing decision.[202] Although a full discussion on what such a requirement would look like and how it would work in practice is beyond the scope of this Note, "[t]he finality and severe consequences of [jurors'] decisions . . . arguably warrant that their assessments be carefully and individually determined."[203] Requiring

198. *See supra* text accompanying notes 114–21.
199. *See supra* Subpart IV.B.
200. *See supra* Subpart IV.A.
201. *See* CONLEY, *supra* note 39 at 194.
202. *See id.* at 193–94.
203. *Id.* at 194.

jurors to focus on their individual responsibility for capital sentencing decisions would further *Caldwell* and the Eighth Amendment.

For now, perhaps the most important thing defense attorneys in capital cases can do is be aware of how prevalent juror mitigation of sentencing responsibility is throughout trial. While not necessarily the most effective solution, defense counsel should bring up and emphasize jurors' responsibility in sentencing whenever possible, but particularly in closing argument. While defense counsel in North Carolina capital cases should stress the binding nature of the jury's sentencing recommendation, counsel should also highlight jurors' individual role and responsibility in the process. Capital defense attorneys in other cases have done so by using language that explicitly involved jurors in the defendant's execution, or by "cut[ting] through the ambiguities of the judge's and prosecutor's language and portray[ing] the potential juror as the explicit agent of the defendant's death."[204] Defense counsel can heighten the juror's role in the defendant's death by referencing the execution itself—a reference that is ironically rare in capital trials.[205] Ultimately, in providing zealous representation to their client, defense counsel in capital cases should always take advantage of opportunities to remind the jurors of their responsibility and role in sentencing.

V. CONCLUSION

The Constitution and judicial history of capital punishment in the United States require that defendants in capital trials be afforded proper protections. The Eighth Amendment protection articulated in *Caldwell* is jeopardized by the language of North Carolina's capital sentencing statute and its influence throughout trial, as it incites jurors to engage in linguistic mechanisms that allow them to mitigate their sentencing responsibility to the point where they fail to engage in due sentencing deliberation. Through various forms of construction, emphasis, and repetition, capital jurors in North Carolina are free to mitigate their responsibility over the defendant's sentence with ease. While there is evidence of this being a concern in North Carolina, both the Supreme Court of North Carolina and the North Carolina legislature have failed to address or cure the particular issue. Although a solution that will not only be effective but also likely to be adopted is not readily clear, defense counsel in North Carolina capital cases must be cognizant of juror mitigation of responsibility and should attempt to combat this mitigation using

204. *Id.* at 179.
205. *Id.*

various strategies whenever possible throughout trial.

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