Evidence and Arguments about Prison Life in Capital Cases

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During the second phase of a capital trial, the jury must decide whether to sentence the defendant to death or to life in prison. The jury's perception of prison life may influence that decision. If the jury believes that prison life is comfortable, it may be more inclined to impose a death sentence, while if it believes that prison life is difficult, it may be more likely to return a verdict of life in prison. But is the quality of prison life relevant to any aggravating or mitigating circumstance? Should the parties be permitted to introduce evidence about, and to argue about, what prison life is like? This post tackles those questions.

What is prison life evidence? Prison life evidence concerns the quality of life in prison, including the amenities and activities that are available, or are not available, to inmates. Either party may seek to introduce such evidence, and the witnesses through whom it might be introduced include correctional officials, prison consultants, and inmates. As noted at the end of this post, prison life evidence is not the same as evidence about *the defendant's ability to adapt* to prison life.

Is it admissible? Courts generally have ruled that prison life evidence is not admissible. At a capital sentencing hearing, the rules of evidence don't apply, and any evidence that is "probative" may be admitted. G.S. 15A-2000(a)(3). The jury's task is to identify and weigh aggravating and mitigating circumstances, so "probative" evidence means evidence that is relevant to one or more such circumstances. Prison life evidence doesn't bear on any of the enumerated aggravating factors in the statute, so I don't see any basis for the State to introduce such evidence. Nor does such evidence relate to any of the enumerated mitigating circumstances. And although the statute contains a catchall mitigating circumstance, G.S. 15A-2000(f)(9) ("Any other circumstance arising from the evidence which the jury deems to have mitigating value."), prison life evidence doesn't seem to fit there, either. The Supreme Court has held that a defendant is entitled to present, as a mitigating circumstance, "any aspect of a defendant's character or record and any of the circumstances of the offense" that may serve to support a sentence less than death. *Lockett v. Ohio*, 438 U.S. 586 (1978). But prison life evidence has nothing to do with the defendant's character or record or the circumstances of the offense, and so appears to fall outside the scope of mitigation.

I am not aware of a North Carolina case on point, but courts in at least three other states have addressed this issue, and all have ruled that evidence about prison life is inadmissible:

- *State v. Kleypas*, 40 P.3d 139 (Kan. 2001) (trial court correctly excluded "evidence regarding the conditions and effects of a life sentence in the Kansas correctional system"; such evidence was not mitigating in itself and was "too far removed" from the defendant's ability to adapt to prison life to be admissible in support of that mitigating circumstance; the court did note that "[s]uch evidence might be admissible in rebuttal to counter . . . evidence produced by the State showing that life in prison is . . . easy")
- *People v. Ervin*, 990 P.2d 506 (Cal. 2000) (citing previous California precedents and ruling that the trial court correctly excluded testimony from a "prison consultant" concerning "the security, classification, and management of inmates sentenced to prison for life without possibility of parole")
- *Cherrix v. Commonwealth*, 513 S.E.2d 642 (Va. 1999) (defendant sought to introduce evidence regarding "the general nature of prison life" through "an expert penologist, several Virginia corrections officials, a

criminologist, a sociologist, and an individual serving a life sentence"; the trial court properly excluded this evidence as "not relevant mitigation evidence")

A few readers may be interested in this motion in limine by the prosecution in a Colorado case, seeking to exclude prison life evidence.

What about arguments related to prison life? There are a number of North Carolina cases about the propriety of closing arguments referring to the quality of prison life. All of the cases I found concern remarks made by the prosecutor, though the courts' rulings appear to apply equally to remarks by defense counsel. I've summarized the cases below, but in general, (1) arguments about prison life that aren't supported by the evidence are improper, and (2) absent an objection, they aren't normally *so* improper as to require the trial judge to intervene or to require reversal on appeal.

My sense is that the more detailed the arguments are, and the more they refer to specific activities and amenities, or to specific privations and hardships, that are not in evidence, the more troubling they are. General remarks that are obviously true are not very concerning. For example, an argument by the State that "in prison, the defendant will enjoy nutritious meals and an opportunity to interact with other inmates" is relatively benign, as is a defense argument that "in prison, the defendant will be behind bars, locked away from the free world with time to think about what he has done." On the other hand, detailed and possibly erroneous recitations of leisure activities that will be available to the defendant, or of difficulties that the defendant will face, are more likely to be objectionable.

Here are the cases on point, from older to newer. The newer cases seem to reflect a bit more skepticism about arguments about prison life.

- *State v. Reeves*, 337 N.C. 700 (1994) (during closing argument, the prosecutor stated that if the defendant were sentenced to life in prison, he would enjoy a "cozy little prison cell" with television, "air conditioning and three meals a day"; the defendant did not object at trial but on appeal argued that there was no evidence in the record to support these claims; the supreme court ruled that "[t]he prosecuting attorney was arguing that the defendant would lead a comfortable life in prison" and that "[i]f he used some hyperbole to describe that life it was not so egregious as to require the court to intervene *ex mero motu*")
- *State v. Alston*, 341 N.C. 198 (1995) (during closing argument, the prosecutor denigrated life in prison by stating that it is "difficult to be penitent with televisions, and basketball courts, and weight rooms"; this was not improper and simply "emphasized the prosecution's position that life in prison was not an adequate punishment")
- *State v. Holden*, 346 N.C. 404 (1997) (at a capital resentencing hearing, "a prison guard testified that defendant was permitted to watch television, play cards, lift weights, play basketball, go to the music room, and eat lunch with other inmates"; the admissibility of this evidence was not addressed in the opinion; at closing argument, over a defense objection that the argument was irrelevant and speculative, the prosecutor contended that "if the jury recommended life imprisonment, defendant would be able to watch television, play cards, play basketball, listen to music, and eat lunch with fellow inmates"; the supreme court found the argument permissible under *Alston* and stated that it was reasonable to infer that the defendant would continue to enjoy the privileges to which the guard testified)
- *State v. Smith*, 347 N.C. 453 (1998) (briefly, citing *Alston*, the supreme court ruled that the trial judge did not err by failing to intervene *ex mero motu* when the prosecutor argued "that if defendant were sentenced to life in prison, he would spend his time comfortably doing things such as playing basketball, lifting weights, and watching television")
- *State v. May*, 354 N.C. 172 (2001) (citing *Smith* and *Alston*, the supreme court ruled that although "the prosecutor improperly argued facts not in the record" by asserting that the defendant would play cards, go the gym, and watch TV while in prison, the impropriety was not so severe as to require the trial judge to intervene without a defense objection)
- *State v. Taylor*, 362 N.C. 514 (2008) (although the prosecutor argued facts outside the record by remarking

> "that defendant would potentially be able to do the following while in prison: visit with his mother and sisters, eat his meals and drink his coffee, watch the sun rise, exercise, watch television, read, draw, receive an education, and enjoy the fresh air," the comments were not so grossly improper as to require *ex mero motu* intervention by the trial judge)

Ability to adapt to prison life is a separate question. Evidence of the defendant's ability to adapt to prison life is admissible generally is admissible in mitigation. *Skipper v. South Carolina*, 476 U.S. 1 (1986) (explaining that "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination"); *State v. Green*, 336 N.C. 142 (1994) (trial court erred in refusing to submit the nonstatutory mitigating circumstance that the defendant "will continue to adjust well to prison life and be a model prisoner"). Some facts about prison life might be admissible in support of this mitigating circumstance, but this post doesn't attempt to identify or classify the facts that would be admissible for that purpose.