MENTAL RETARDATION* IN CAPITAL CASES

Judge Paul G. Gessner
May 2012

INTELLECTUAL DISABILITIES* IN CAPITAL CASES

*** The current trend among clinicians in the mental health professions is to substitute the term "Intellectual Disability" for "Mental Retardation".**

A QUICK HISTORY

In 1989 the United States Supreme Court held in Penry v. Lynaugh, 492 U.S. 302 (1989) that the execution of mentally retarded criminals did not violate the Eighth Amendment prohibitions of cruel and unusual punishment. In their ruling the court cited that there was not sufficient evidence of a "national consensus" that the practice violated "standards of decency". At that time Maryland and Georgia were the only two states with statutes prohibiting the execution of the mentally retarded.

Over the next twelve years more states enacted legislation prohibiting the practice of executing the mentally retarded. North Carolina joined those states when N.C. Gen Stat.§15A-2005 became law in October of 2001. North Carolina was the twentieth state to enact such legislation. At the time N.C. Gen. Stat.§15A-2005 became law, McCarver v. North Carolina 533 U.S. 975 (2001) which addressed the issue of mentally retarded capital defendants was pending before the court. As a result of North Carolinas legislation, the court dismissed the McCarver case as moot. The Supreme Court then granted a writ of certiorari in Atkins v. Virginia which addressed essentially the same issues.

The landmark decision of the United States Supreme Court in Atkins v. Virginia 536 U.S. 304 (2002) established that executions of mentally retarded criminals were cruel and usual punishment and violated the Eighth Amendment of the United States Constitution. Among other things, the court cited the apparent change in societies view of the practice of executing the mentally retarded, as well that they were "not persuaded that the execution of mentally retarded criminals

will measurably advance the deterrent or the retributive purpose of the death penalty." The justices left it to the states to create the procedural mechanism to deal with the issue.

N.C. Gen Stat.§15A-2005 defines mental retardation and establishes the process that the courts are to follow when mental retardation is an issue in capital cases.

N.C. Gen Stat.§15A-2006 was enacted at the same time and established the "reach back" procedure for inmates on North Carolina's death row to seek relief from their death sentence on the basis of mental retardation.

WHAT IS MENTAL RETARDATION?

According to the American Association on Intellectual and Developmental Disabilities (AAIDD), there are between seven and eight million Americans that are intellectually disabled and that about one in ten families are affected.

N.C. Gen. Stat. §15A-2005 defines mental retardation as significantly subaverage general intellectual functioning, existing concurrently with significant limitations in adaptive functioning, both of which were manifested before the age of 18. Significantly subaverage general intellectual functioning is defined as an intelligence quotient of 70 or below and significant limitations in adaptive functioning exists when there is significant limitations in two or more adaptive skill areas. The statute specifically identifies ten adaptive skill areas; communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure skills and work skills.

North Carolina's statutory definition of mental retardation is consistent with nationally recognized clinical definitions. In determining whether an individual has significant subaverage intellectual functioning, mental health professionals typically administer a battery of tests to determine the intelligence

quotient, or IQ. N.C. Gen Stat. §15A-2005(2) does not specify a specific test to be utilized, only that the test be an individually administered, scientifically recognized standardized intelligence quotient test administered by a licensed psychiatrist or psychologist. The most common and widely recognized tests are the Wechsler Adult Intelligence Test (WAIS) and the Stanford-Binet (SB5). Currently the WAIS is in its fourth edition (WAIS-IV). In addition to the standardized tests, clinicians will often administer tests to determine whether a subject is malingering.

It is important to note that there are two issues that may be brought to your attention when hearing evidence of IQ testing; the Flynn Effect, and whether a bright line analysis applies to IQ scoring. The Flynn effect is a theory which emphasizes the fact that average intelligence quotient (IQ) scores have risen over generations. It is estimated that there is at least a three point increase in the scores each generation. This may be attributed to heightened awareness of diet, a greater emphasis on education, and the test taker being more familiar with the test over time. Standardized tests are periodically adjusted in order to maintain the average result at 100 and to compensate for fluctuations. There is also considerable debate whether the courts should apply a bright line test to the statutory standard of an IQ of 70, or if we should consider a range of probabilities. For example, the test result may be a 70, and the administering clinician may testify that there is a 95% likelihood that the score is between 67 and 75. There is no direct answer to these questions in the existing appellate decisions.

In addition to assessing whether an individual has significant subaverage general intellectual functioning, it is necessary to determine whether they have significant limitations in two or more adaptive skill areas. There are a variety of tests and testing methods available for a clinician to utilize in assessing limitations in adaptive functioning. Some commonly used tests are the Adaptive Behavioral

Assessment System, known as ABAS-II which measures strengths and weaknesses in all ten of the adaptive skill areas, and the Wide Range Achievement Test, known as the WRAT-III which measures reading recognition, spelling and arithmetic computation. Further interviews and review of all available information will likely assist the clinician in formulating their opinion. Educational, medical and prison records are likely to be reviewed if available.

Finally, the statute and the widely accepted clinical criteria require that the significant subaverage general intellectual functioning and limitations in adaptive functioning manifest before the age of 18. This distinguishes mental retardation from other conditions such as dementia or traumatic head injuries which may occur at any time. Familiarity with testing of adolescents may become necessary if it is alleged that subaverage general intellectual functioning was identified at an early age. Some examples of tests for children are the Wechsler Intelligence Scale for Children (WISC) test or the Wechsler Preschool and Primary Scale of Intelligence (WPPSI). It is important to determine that the correct test was administered, that it was age appropriate, and the version was current at the date of administration.

THE PROCESS

Typically the defendant will file a pretrial motion setting forth their contention that the defendant is mentally retarded and a request for a pretrial hearing and determination by the court N.C. Gen. Stat. §15A-2005 (c) requires the motion to be supported by affidavits.

The State may consent to the matter being heard pretrial. If the State consents to a pretrial hearing the court is required to order that the hearing take

place. If the State does not consent to a pretrial hearing then it is within the discretion of the trial court whether to order a pretrial hearing. It is worth noting the difference in this process and that set forth in N.C. Gen. Stat. §15A-959. N.C. Gen. Stat. §15A-959(c) establishes the procedures for pretrial determination of the defense of insanity. That pretrial determination ***may*** be made pretrial upon motion by the defense and consent of the State.

At a pretrial hearing pursuant to N.C. Gen. Stat. §15A-2005(c) the burden of production and persuasion is on the defendant to demonstrate mental retardation by clear and convincing evidence. If the defendant prevails and the court finds by clear and convincing evidence that the defendant has demonstrated mental retardation, the court is required to declare the case noncapital. If the defendant fails to show by clear and convincing evidence that the defendant is mentally retarded, the case may proceed as a capital case. The pretrial determination of the trial court does not preclude the defendant from raising any legal defense during trial.

If the defendant offers evidence of mental retardation during the sentencing hearing the court is required to submit a special issue to the jury as to whether the defendant is mentally retarded. This issue is submitted, considered and answered by the jury prior to the jury considering aggravating and mitigating factors as they determine their sentencing recommendation. A significant difference exists between the pretrial determination being made by the court and the determination made during the trial by the jury. That difference is that while the defendant again has the burden of persuasion and production to the jury, the standard changes from the clear and convincing used pretrial to the jury finding mental retardation by a preponderance of the evidence.

There is some difference of opinion among judges about the most efficient procedure to use when dealing with the issue of mental retardation being determined by the jury at trial. The issue centers on whether the bifurcated trial and sentencing hearing becomes trifurcated, or whether the process remains bifurcated. The general statutes do not specifically address the issue, other than to require that the special issue be submitted to the jury for their determination before considering aggravating and mitigating factors. Arguably, the court could proceed without trifurcating the proceeding. However, because the defendant has the burden of production and persuasion on the issue of mental retardation it is likely less confusing to the jurors to trifurcate the issue of mental retardation and instruct them separately, if necessary, on the sentencing. The language in N.C. Gen. Stat. 15A-2005(e) seems to indicate that the legislature contemplated a trifurcated proceeding, specifically; "this special issue shall be considered and answered by the jury prior to the consideration of aggravating or mitigating factors and the determination of sentence." Further, North Carolina Pattern Jury Instruction 150.05 and the cautionary language associated with that particular instruction suggests that a trifurcated proceeding should be followed. With the shifting burden of production and persuasion it may be logical to simplify the process for the jury by trifurcating the process. Another consideration may be that the evidence of aggravating circumstances could influence the jury and their deliberation on the mental retardation issue. The North Carolina Supreme Court addressed the issue of a bifurcated or unified sentencing proceeding in State v. Ward, 364 N.C. 157 (2010) and held "..we hold that our State's trial judges have the discretion to determine whether to bifurcate the issues of mental retardation and sentence."

The North Carolina Supreme Court has also provided some guidance for the trial judge when instructing the jury in a mental retardation hearing. "The trial court should instruct the jury incompliance with N.C.G.S. § 15A-2005(e) that "[i]f the jury determines the defendant to be mentally retarded, the court shall declare

the case noncapital and the defendant shall be sentenced to life imprisonment." State v. Locklear, 363 N.C. 438 (2009)

Another concern is what procedure to follow when the jury is unable to reach a unanimous decision on the issue of mental retardation. This issue has not been addressed by the appellate courts. In one instance, after determining that the jury was deadlocked the trial judge declared the case non-capital and imposed a life sentence.

SELECTED STATUTES

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2001

SESSION LAW 2001-346
SENATE BILL 173

AN ACT TO PROVIDE THAT A MENTALLY RETARDED PERSON CONVICTED OF FIRST DEGREE MURDER SHALL NOT BE SENTENCED TO DEATH.

The General Assembly of North Carolina enacts:

SECTION 1. Article 100 of Chapter 15A of the General Statutes is amended by adding a new section to read:

"**§ 15A-2005. Mentally retarded defendants; death sentence prohibited.**

(a) (1) The following definitions apply in this section:

a. Mentally retarded. – Significantly subaverage general intellectual functioning, existing concurrently with significant limitations in adaptive functioning, both of which were manifested before the age of 18.

b. Significant limitations in adaptive functioning. – Significant limitations in two or more of the following adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure skills and work skills.

c. Significantly subaverage general intellectual functioning. – An intelligence quotient of 70 or below.

(2) The defendant has the burden of proving significantly subaverage general intellectual functioning, significant limitations in adaptive functioning, and that mental retardation was manifested before the age of 18. An intelligence quotient of 70 or below on an individually administered, scientifically recognized standardized intelligence quotient test administered by a licensed psychiatrist or psychologist is evidence of significantly subaverage general intellectual functioning; however, it is not sufficient, without evidence of significant limitations in adaptive functioning and without evidence of manifestation before the age of 18, to establish that the defendant is mentally retarded.

(b) Notwithstanding any provision of law to the contrary, no defendant who is mentally retarded shall be sentenced to death.

(c) Upon motion of the defendant, supported by appropriate affidavits, the court may order a pretrial hearing to determine if the defendant is mentally retarded. The court shall order such a hearing with the consent of the State. The defendant has the burden of production and persuasion to demonstrate mental retardation by clear and convincing evidence. If the court determines the defendant

to be mentally retarded, the court shall declare the case noncapital, and the State may not seek the death penalty against the defendant.

(d) The pretrial determination of the court shall not preclude the defendant from raising any legal defense during the trial.

(e) If the court does not find the defendant to be mentally retarded in the pretrial proceeding, upon the introduction of evidence of the defendant's mental retardation during the sentencing hearing, the court shall submit a special issue to the jury as to whether the defendant is mentally retarded as defined in this section. This special issue shall be considered and answered by the jury prior to the consideration of aggravating or mitigating factors and the determination of sentence. If the jury determines the defendant to be mentally retarded, the court shall declare the case noncapital and the defendant shall be sentenced to life imprisonment.

(f) The defendant has the burden of production and persuasion to demonstrate mental retardation to the jury by a preponderance of the evidence.

(g) If the jury determines that the defendant is not mentally retarded as defined by this section, the jury may consider any evidence of mental retardation presented during the sentencing hearing when determining aggravating or mitigating factors and the defendant's sentence.

(h) The provisions of this section do not preclude the sentencing of a mentally retarded offender to any other sentence authorized by G.S. 14-17 for the crime of murder in the first degree."

SECTION 2. G.S. 15A-2000(b) reads as rewritten:

"(b) Sentence Recommendation by the Jury. – Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its deliberation in determining sentence. The court shall give appropriate instructions in those cases in which evidence of the defendant's mental retardation requires the consideration by the jury of the provisions of G.S. 15A-2005. In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

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

(1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and

(3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

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; provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation."

SECTION 3. Article 100 of Chapter 15A of the General Statutes is amended by adding a new section to read:

"**§ 15A-2006. Request for postconviction determination of mental retardation.**

In cases in which the defendant has been convicted of first-degree murder, sentenced to death, and is in custody awaiting imposition of the death penalty, the following procedures apply:

(1) Notwithstanding any other provision or time limitation contained in Article 89 of Chapter 15A, a defendant may seek appropriate relief from the defendant's death sentence upon the ground that the defendant was mentally retarded, as defined in G.S. 15A-2005(a), at the time of the commission of the capital crime.

(2) A motion seeking appropriate relief from a death sentence on the ground that the defendant is mentally retarded, shall be filed:

a. On or before January 31, 2002, if the defendant's conviction and sentence of death were entered prior to October 1, 2001.

b. Within 120 days of the imposition of a sentence of death, if the defendant's trial was in progress on October 1, 2001. For purposes of this section, a trial is considered to be in progress if the process of jury selection has begun.

(3) The motion, seeking relief from a death sentence upon the ground that the defendant was mentally retarded, shall comply with the provisions of G.S. 15A-1420. The procedures and hearing on the motion shall follow and comply with G.S. 15A-1420."

SECTION 4. Sections 1 and 2 of this act become effective October 1, 2001, and apply to trials docketed to begin on or after that date. Section 3 of this act becomes effective October 1, 2001, and expires October 1, 2002. Section 4 of this act is effective when it becomes law.

In the General Assembly read three times and ratified this the 25th day of July, 2001.

s/ Beverly E. Perdue
President of the Senate

s/ James B. Black
Speaker of the House of Representatives

s/ Michael F. Easley
Governor

Approved 3:14 a.m. this 4th day of August, 2001

§ 15A-959. Notice of defense of insanity; pretrial determination of insanity.

(a) If a defendant intends to raise the defense of insanity, the defendant must file a notice of the defendant's intention to rely on the defense of insanity as provided in G.S.

15A-905(c) and, if the case is not subject to that section, within a reasonable time prior to trial. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make other appropriate orders.

(b) In cases not subject to the requirements of G.S. 15A-905(c), if a defendant intends to introduce expert testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether the defendant had the mental state required for the offense charged, the defendant must within a reasonable time prior to trial file a notice of that intention. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make other appropriate orders.

(c) Upon motion of the defendant and with the consent of the State the court may conduct a hearing prior to the trial with regard to the defense of insanity at the time of the offense. If the court determines that the defendant has a valid defense of insanity with regard to any criminal charge, it may dismiss that charge, with prejudice, upon making a finding to that effect. The court's denial of relief under this subsection is without prejudice to the defendant's right to rely on the defense at trial. If the motion is denied, no reference to the hearing may be made at the trial, and recorded testimony or evidence taken at the hearing is not admissible as evidence at the trial. (1973, c. 1286, s. 1; 1977, c. 711, s. 25; 2004-154, s. 10.)