

Mental Retardation* in Capital Cases

A review of the current law in
North Carolina

Judge Paul G. Gessner
Conference of Superior Court Judges
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*Intellectual Disability

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

A Few Statistics.....

- Approximately 2.5 to 3 percent of American population is affected.
- 6 to 7.5 million citizens
- 40-50% of the time the etiology has no identifiable origin.

❖ (www.aaid.com)

Levels Of Intellectual Disability

| <u>IQ</u> | <u>Classification</u> |
|------------|--|
| • Under 20 | Profound |
| • 20-34 | Severe |
| • 35-49 | Moderate |
| • 50-69 | Mild |
| • 70-84 | Borderline Intellectual Functioning |

A Quick Legal History.....

- Penry v. Lynaugh, 492 U.S. 302(1989) Executing the mentally retarded does not violate the Eighth Amendment. There was not sufficient evidence of a “national consensus” that the practice violated “standards of decency”.
- Atkins v. Virginia 536 U.S. 304 (2002) established that the application of capital punishment upon mentally retarded criminals was cruel and unusual punishment.
- So...what happened?

N.C. Gen. Stat. 15A-2005

- “Notwithstanding any provision of law to the contrary, no defendant who is mentally retarded shall be sentenced to death” N.C. Gen. Stat. 15A-2005(b)
- This statute became effective eight months before the Atkins decision.
- North Carolina joined 19 other states with similar legislation.
- *McCarver v. North Carolina*, 533 U.S. 975 (2001)

Definition of Intellectual Disability

- 1. Significantly Subaverage General Intellectual Functioning,
- 2. Existing concurrently with significant limitations in adaptive functioning, and
- 3. Both of which were manifested before the age of 18.

❖ N.C. Gen. Stat 15A-2005

Significant Subaverage Intellectual Functioning

- An intelligence quotient of 70 or below.
- Must be an individually administered, scientifically recognized test.
- Administered by a licensed psychologist or psychiatrist

Commonly Utilized Tests

- Stanford-Binet Intelligence Scales (SB5)
- Wechsler Adult Intelligence Scale (WAIS-IV)
- **BEWARE:** There is an abbreviated test, the Wechsler Abbreviated Scale of Intelligence (WASI)

Additional Tests

- Wechsler Intelligence Scale for Children (WISC) for ages 6-16, and
- Wechsler Preschool and Primary Scale of Intelligence (WPPSI) for ages 2½ to 7¼

Some Considerations.....

- The Flynn Effect: The Flynn effect is a theory which emphasizes the fact that average intelligence quotient (IQ) scores have risen over generations.
- Do we apply a “bright line test” or do we consider a range?

Significant Limitations in Adaptive Functioning

- The Statute requires significant limitation in two or more areas of adaptive functioning.
- Adaptive Skill areas identified by statute;
 - Self-care
 - Home living
 - Social skills
 - Community use
 - Self Direction
 - Health and Safety
 - Functional academics
 - Communication
 - Leisure skills
 - Work Skills

Evaluating Adaptive Functioning

- A Psychologist or Psychiatrist is not required by statute
- You will likely see....
 - Client interviews,
 - Practical exercises (map reading)
 - Scientifically administered tests (Wide Range Achievement Test 3rd Revision-WRAT-III)
 - Adaptive Behavior Assessment System (ABAS-II) a series of interviews with individuals that have spent significant time with the client
 - A thorough review of all available records (school, medical, prison...)
 - Interviews with any relevant individuals

Manifesting *before* age 18

- Intellectual disabilities are considered to be developmental
- A broad view of all available relevant data may be used to establish this third prong (school records, WASI, WPPSI)
- This distinguishes MR from other forms of brain damage that occur later in life. (head trauma, dementia)

Procedural Matters

- ...Now what do I do...??
- N.C.G.S. 15A-2005 requires the defense to file a motion, supported by appropriate affidavits setting forth their claim.

Pretrial v. Jury Determination

- NCGS 15A-2005 establishes that the issue may be determined;
- pretrial,
- or by the jury,
- or, potentially both.

Pretrial Hearing Process

- The court ***MAY*** order a pretrial hearing upon receipt of the motion.
- The court ***SHALL*** order a pretrial hearing with the consent of the state.
- Compare and contrast this process with NCGS 15A-959(c), the insanity defense.
- ...but, wait! See Locklear 363 N.C. 438 at 462.

The Pretrial Hearing

- The burden of production and persuasion is on the defendant.
- The standard is *by clear and convincing evidence*.
- *CAVEAT:* in an MAR pursuant to 15A-2006 the standard is preponderance of the evidence as set out in 15A-1420.

The Effect of the Pretrial Hearing...

- If the defense meets their burden the court SHALL declare the case noncapital. (NCGS 15A-2005 (c))
- If the defense fails to meet its burden they are not precluded from raising any legal defense at trial. (NCGS 15A-2005(d))

The Jury Determination

- “...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 by this section..”

❖ NCGS 15A-2005 (e)

Bifurcated v. Trifurcated ??

- This special issue SHALL be considered and answered by the jury prior to the consideration of aggravating and mitigating factors and the determination of sentence.
- N.C.P.I. 150.05 seems to support a trifurcated proceeding.
- You can infer from the language of NCGS 15A-2005(g) that the legislature contemplated a trifurcated proceeding. (If the jury does not find MR, that evidence may be considered in sentencing hearing)

Why Trifurcated??

- The defendant has the burden of production and persuasion to demonstrate mental retardation to the jury by a **preponderance of the evidence.**

– NCGS 15A-2005(e)

- K.I.S.S.

A few final issues....

- What if the jury hangs?
- Instructions- “the trial court should instruct the jury in compliance 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.” Locklear

RESOURCES

- *State v. Poindexter* 359 N.C. 287 (2005)
- *Atkins v. Virginia* 536 U.S. 304 (2002)
- *McCarver v. North Carolina* 533 U.S. 975 (2001)
- *State v. Locklear* 363 N.C. 438 (2009)
- www.aaid.com
- www.apa.org
- Mental Retardation and the Death Penalty: A Guide to State Legislative Issues James W. Ellis, Regents Professor of Law, University of New Mexico School of Law