

**REPORT OF THE
VIRGINIA STATE CRIME COMMISSION**

Atkins v. Virginia

**A STUDY TO THE GENERAL ASSEMBLY OF
VIRGINIA**



**COMMONWEALTH OF VIRGINIA
RICHMOND
JANUARY 2003**

I. Authority

The *Code of Virginia*, §30-156, authorizes the Virginia State Crime Commission to study, report and make recommendations on all areas of public safety and protection. Additionally, the Commission is to study matters "... including apprehension, trial and punishment of criminal offenders." Section 30-158(3) provides the Commission the power to "... conduct studies and gather information and data in order to accomplish its purposes as set forth in §30-156. . .and formulate its recommendations to the Governor and the General Assembly."

Using the statutory authority granted to the Crime Commission, the staff conducted a study on the U. S. Supreme Court's decision in Atkins v. Virginia and the execution of the mentally retarded.

II. Executive Summary

The United States Supreme Court, in Atkins v. Virginia, ruled that it is a violation of the Eighth Amendment (cruel and unusual punishment) to impose a death sentence on someone who is mentally retarded. This decision explicitly overturned the Court's 1989 ruling on this issue, and stated that, "As was our approach ... with regard to insanity, 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.'" Consequently, the Virginia State Crime Commission formed a legislative Sub-Committee to examine this decision and draft legislation to bring Virginia's laws into conformity with this new constitutional mandate. Based upon the Sub-Committee's work, the Virginia State Crime Commission adopted the following recommendations and drafted model legislation to encompass them.

Recommendation 1

Amend §18.2-10 of the *Code of Virginia* to specify that a person who is mentally retarded is not eligible for the death penalty.

Recommendation 2

Amend the *Code of Virginia* to require the determination of mental retardation should be made by the jury as part of sentencing.

Recommendation 3

Amend the *Code of Virginia* to require the defendant bear the burden of proving his/her mental retardation using a standard of preponderance of the evidence.

Recommendation 4

Amend the *Code of Virginia* to include a definition of mental retardation which states:

“Mentally retarded” means a disability, originating before the age of 18 years, characterized by:

- (i) significantly sub-average intellectual functioning as expressed by performance on a standardized measure of intellectual functioning carried out in conformity with accepted professional practice, that is at least 2 standard deviations below the mean, considering the standard error of measurement for the specific instruments used and,*
- (ii) substantial limitations in adaptive behavior as expressed in conceptual, social, and practical adaptive skills.*

Recommendation 5:

Modify the definition of mental retardation in §37.1-1 to make the definition consistent throughout the *Code of Virginia*.

III. Methodology

The Virginia State Crime Commission utilized five research methodologies to examine how Virginia state courts will procedurally address the execution of mentally retarded offenders, as a result of the Atkins v. Virginia decision. First, a Sub-Committee of the Virginia State Crime Commission was formed, consisting of representatives of the various agencies and organizations concerned with the legal issues surrounding the execution of the mentally retarded. Specifically, the Sub-Committee consisted of Virginia state senators and delegates from the Crime Commission, the House Courts of Justice Committee and the Senate Courts of Justice Committee, as well as representatives from the private defense bar, the Public Defender Commission, the Governor’s Office, and academia.¹ The Sub-Committee met on three occasions to analyze the objective-driven research conducted by Crime Commission staff.

Second, staff reviewed the issues and factors addressed by the Supreme Court in the Atkins decision.² Third, staff conducted a national literary review on recent case law involving death penalty issues and the mentally retarded, as well as national studies on the definition of mental retardation. Fourth, other states’ statutes were examined to determine their definitions of mental retardation, as well as their handling of the procedural issues involved in the execution of the mentally retarded. Finally, a Clinical Advisory Group was established to assist the Sub-Committee with the development of Virginia’s definition of mental retardation in a legal setting. The Clinical Advisory Group was under the direction of the Director of the Institute of Law and Psychiatry.

¹ See Appendix A for Sub-Committee membership.

² See Appendix B for Atkins v. Virginia opinion.

IV. Background

The United States Supreme Court, in Atkins v. Virginia,³ ruled that it is a violation of the Eighth Amendment (cruel and unusual punishment) to impose a death sentence on someone who is mentally retarded. This decision explicitly overturned the Court's 1989 ruling on this issue.⁴ In Atkins, the Court based its opinion on two main points.⁵ First, the Court noted "the consistency of the direction of change" in the fact that a growing number of states have prohibited capital punishment for the mentally retarded.⁶ Second, the Court made an independent evaluation that the mentally retarded have diminished capacities, and the justifications for capital punishment that exist for other defendants do not exist for the mentally retarded.⁷

In examining the recent legislative trend of other states, the Supreme Court noted that in those states that currently have the death penalty; eighteen expressly prohibit the execution of the mentally retarded, as does federal legislation applicable to capital federal crimes.⁸ Additionally, of those states that theoretically allow for the execution of the mentally retarded, some have not carried out an execution in decades,⁹ and of those that do carry out regular executions, the execution of mentally retarded defendants is extremely rare.¹⁰

In addition to this "national trend," the Court discussed the general culpability of the mentally retarded, and how the usual justifications for the death penalty do not apply to them. In dicta, the Court stated that the mentally retarded can be criminally responsible and should be punished when they commit crimes. However, because of disabilities in reasoning, judgment, and impulse control, the mentally retarded act with lesser moral culpability.¹¹ While the mentally retarded may know the difference between right and wrong, they have "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others."¹² The Court also discussed how the mentally retarded tend to be "followers rather than leaders,"

³ Atkins v. Virginia, 536 U.S. ___, 122 S. Ct. 2242 (2002). Further cites will be to the Supreme Court Reporter.

⁴ Penry v. Lynaugh, 492 U.S. 302 (1989).

⁵ "[W]e shall first review the judgment of legislatures that have addressed the suitability of imposing the death penalty on the mentally retarded and then consider reasons for agreeing or disagreeing with their judgment." Atkins v. Virginia, 122 S. Ct. 2242, 2248 (2002).

⁶ Atkins, 122 S. Ct. at 2249.

⁷ Atkins, 122 S. Ct. at 2250-52.

⁸ The states noted by the Supreme Court as expressly prohibiting the death penalty for the mentally retarded are: Georgia, Maryland, Kentucky, Tennessee, New Mexico, Arkansas, Colorado, Washington, Indiana, Kansas, New York, Nebraska, South Dakota, Arizona, Connecticut, Florida, Missouri, and North Carolina. Atkins, 122 S. Ct. at 2248.

⁹ The Supreme Court identifies New Hampshire and New Jersey as two such states. Atkins, 122 S. Ct. at 2249.

¹⁰ The Supreme Court states that there have only been five defendants, with a known IQ less than 70, that have been executed since Penry was decided. Atkins, 122 S. Ct. at 2249.

¹¹ Atkins, 122 S. Ct. at 2251.

¹² Id., at 2250.

holding that their “deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.”¹³

Based upon the social purposes served by the death penalty, the Supreme Court noted two justifications for its imposition: retribution and the deterrence of capital crimes by others.¹⁴ Neither justification exists, according to the Supreme Court, when dealing with the mentally retarded. Just as the culpability of the “average murderer” is insufficient to justify the death penalty, so to does the lesser culpability of the mentally retarded not merit this form of retribution.¹⁵ Deterrence is not served by executing the mentally retarded, as their cognitive and behavioral impairments make it less likely that they can process the possibility of a death sentence when they act, and hence control their impulses.¹⁶

Finally, the Supreme Court discussed the possible errors that can occur in capital cases as a result of a defendant’s mental retardation: For example, there is a greater possibility of mentally retarded persons making false confessions, a lesser ability for them to make a persuasive showing of mitigation, a lesser ability to give meaningful assistance to their lawyers, the likelihood that they will make poor witnesses, and the possibility that their demeanor may create “an unwarranted impression of lack of remorse for their crimes.”¹⁷ Therefore, such defendants “in the aggregate face a special risk of wrongful execution.”¹⁸ In conclusion, the Court held that in “construing and applying the Eighth Amendment in the light of our ‘evolving standards of decency,’...such punishment is excessive and that the Constitution ‘places a substantive restriction on the State’s power to take the life of a mentally retarded offender.’”¹⁹

V. Definitions and Procedural Questions

The Virginia State Crime Commission was advised of the medical and forensic issues involved with determining mental retardation by a Clinical Advisory Group consisting of statewide mental health experts. The Clinical Advisory Group identified definitional criteria, causal and manifestation criteria, and practical assessment criteria for use in a legal, criminal justice environment.²⁰

Based on the examination of both forensic and legal topics, the Crime Commission addressed four main issues when deciding on the statutory parameters needed to respond to the Akins v. Virginia decision. These issues were:

- What is the appropriate definition of mental retardation for purposes of the death

¹³ Id., at 2250-51.

¹⁴ Atkins, 122 S. Ct. 2251, *citing* Gregg v. Georgia, 428 U.S. 153, 183 (1976).

¹⁵ Id. at 2251.

¹⁶ Id. at 2251.

¹⁷ Id. at 2252.

¹⁸ Id. at 2252.

¹⁹ Id. at 2252.

²⁰ See Appendix C for presentation materials.

- penalty;
- What point in the trial process should the issue of retardation be heard;
- Who should make the determination of mental retardation; and,
- What standard of proof should the defendant have to prove for mental retardation.

A discussion of each of these issues follows.

Issue 1: What is the Definition

Despite the extensive dicta that the Supreme Court issued in *Atkins*, the opinion does not give much specific guidance as to how the states should effect the Court’s mandate. While noting that “not all defendants who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus,”²¹ the Court ultimately stated:

As was our approach in *Ford v. Wainwright*, with regard to insanity, “we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.”²²

However, immediately preceding this passage, the Court states that disputes on this issue generally revolve around “determining which offenders are in fact retarded.” And, in the Court’s footnote for the indented passage, they write “The [various] statutory definitions of mental retardation are not identical, but generally conform to the clinical definitions set forth in n. 3, *supra*.”²³ Note 3, in turn, refers specifically to two of the standard definitions for mental retardation used by clinicians: the American Association of Mental Retardation (AAMR) definition, and the American Psychiatric Association (APA) definition. Thus, it could be interpreted that the Supreme Court is acknowledging that a definition of mental retardation should have some relationship to a clinical definition.²⁴

The Supreme Court appears to have emphasized the importance of clinical definitions in its discussion of mental retardation *vis-à-vis* current state statutes.²⁵ Most of the current state statutes define mental retardation as consisting of a three-pronged test, or having three components: (1) sub-average, general intellectual functioning, (2) substantial deficit in adaptive behavior, and (3) the condition must be manifested during the developmental period. (See Appendix E). These definitions comport with current

²¹ *Id.* at 2250.

²² *Id.* at 2250, additional citations omitted.

²³ *Id.* at 2250, n. 22.

²⁴ This was the approach initially adopted by the Clinical Advisory Group to the *Atkins* Sub-Committee, see Attachment D, and later adopted by both the Sub-Committee and the Crime Commission. The definition of “mental retardation” chosen is essentially the same as that currently put forth in the most recent edition of the AAMR manual. See R. Luckasson, *et al.*, Mental Retardation: Definition, Classification, and Systems of Supports (10th ed. 2002). The AAMR definition given by the Supreme Court in their *Atkins* opinion is from the 9th edition. *Atkins v. Virginia*, 122 S. Ct. 2242, 2245, n. 3 (2002). It should also be noted that Justice Scalia, in his dissent, interprets the majority’s opinion as concluding “that no one who is even slightly mentally retarded can have sufficient moral responsibility to be subjected to capital punishment for any crime.” *Atkins*, 122 S. Ct. at 2260.

²⁵ *Atkins v. Virginia*, 122 S. Ct. 2242, 2249-50 (2002).

clinical assessments of mental retardation.²⁶ Based upon the general discussion in the Atkins decision, and current clinical definitions, the Clinical Advisory Group recommended a similar three-pronged approach to defining mental retardation for purposes of capital trials. (See Appendix D). This definition was:

Mentally retarded means a disability, originating before the age of 18 years, characterized by:

- (iii) significantly sub-average intellectual functioning as expressed by performance on a standardized measure of intellectual functioning carried out in conformity with accepted professional practice, that is at least 2 standard deviations below the mean, considering the standard error of measurement for the specific instruments used and,
- (iv) substantial limitations in adaptive behavior as expressed in conceptual, social, and practical adaptive skills.

It was the recommendation of the both the Sub-committee and the Crime Commission to adopt the definition proposed by the Clinical Advisory Group.²⁷ In order to prevent inconsistencies in the *Code of Virginia*, it was also recommended that the definition of mental retardation found in Title 37.1 of the *Code* be modified to comport with the definition used in Title 18.2.

Issue 2: When is Determination Made

The Atkins opinion does not give any particular mandate as to when a determination of a defendant's possible mental retardation should be made in the criminal justice process. However, in the decision, the Court states that mentally retarded persons are frequently competent to stand trial and that "their deficiencies do not warrant an exception from criminal sanctions, but they do diminish their personal culpability."²⁸ Thus, as long as a state develops some type of procedural process that protects the defendant's Eighth Amendment rights not to be executed if mentally retarded, and that procedure comports with due process,²⁹ it will be acceptable.

A review of those states which currently have statutes prohibiting the execution of the mentally retarded reveals: eight of them make that determination either before trial, or during the guilt/innocence phase of the proceedings.³⁰ Nine states have the determination made after trial, during, or after sentencing.³¹ Two states allow the determination to be

²⁶ *Id.*

²⁷ While the Clinical Advisory Group definition included the phrase "substantial limitations in intellectual functioning," the Crime Commission decided to use "significant limitation," which is the precise language found in the actual AAMR definition.

²⁸ Atkins v. Virginia, 122 S. Ct. 2242, 2250-51 (2002).

²⁹ U.S. Const. amend. XIV.

³⁰ Ariz. Rev. Stat. § 13-703 (2002); Colo. Rev. Stat. § 16-9-402 (2002); GA Code Ann. § 17-7-131 (2001); Ind. Code § 35-36-9-3 (2002); KY Rev. Stat. Ann. § 532.135 (2002); NY Crim. Proc. Law § 400.27 (2002); S.D. Codified Laws § 23A-27A-26.3 (2002); and, Tenn. Code Ann. § 39-13-203 (2002).

³¹ Conn. Gen. Stat. Ann. § 53a-46a(h) (2002); Del. Code Ann. Tit. 11, § 402 (2002); FLA, Stat. Ann.

made twice, both before trial and during sentencing.³²

As the Atkins decision holds that a mentally retarded defendant who is charged with a capital crime can be tried, and punished (though not with a death sentence), the situation is analogous to a defendant who, because of extenuating circumstances, is found by a trier of fact to not be deserving of the death penalty. Adopting the mandate of Atkins to Virginia's current process of a bi-furcated trial in death penalty cases,³³ it is the recommendation of the Crime Commission that a determination of a defendant's ineligibility for the death penalty be made during sentencing proceedings. Such a process would be constitutional, and would involve the least modification of Virginia's current criminal process in capital cases.

Issue 3: Who should make the Determination

As with the procedural question of when the determination of mental retardation should be made, the Atkins decision is similarly silent as to whether such a factual determination of mental retardation should be made by a judge or a jury. A review of other state statutes reveals:

- 14 states have the determination made by a judge,³⁴
- 3 states have determination by a jury,³⁵ and
- 2 states allow the determination to be made by either a judge or jury.³⁶

It would appear, therefore, that there is no definite constitutional guidance as to a correct entity to make such findings of facts. However, in the recent case of Ring v. Arizona,³⁷ the Supreme Court held that it was unconstitutional for a state to allow a judge to determine the existence of aggravating factors, outside the jury. If a fact can "increase" the potential punishment for a crime, it must be determined by a jury.

While not completely dispositive of this issue, as it dealt with aggravating sentencing factors, rather than mitigating factors, the Ring opinion may indicate the United States Supreme Court will increasingly insist in the future that all factual determinations in capital trials be made by a jury. Therefore, it is the recommendation of the Crime Commission that Atkins determinations of mental retardation be made by

§921.137 (2001); KAN. Stat. Ann. § 21-4623 (2001); MD. Code Ann., Criminal Law §2-202; MO. Rev. Stat. § 565.030.1 (2001); Neb. Rev. Stat. § 28-105.01 (2002), N.M. Stat. Ann. § 31-20A-2.1 (2001); and, Wash. Rev. Code Ann. § 10.95.030 (2002).

³² Ark. Code Ann. § 5-4-618 (2002) and N.C. Gen. Stat. § 15A-2005.

³³ See Va. Code §§ 19.2-264.2, 19.2-264.4.

³⁴ Ariz. Rev. Stat. § 13-703 (2002); Colo. Rev. Stat. § 16-9-402 (2002); Del. Code Ann. Tit. 11, § 402 (2002); FLA. Stat. Ann. §921.137 (2001); GA Code Ann. § 17-7-131 (2001); Ind. Code § 35-36-9-3 (2002); KAN. Stat. Ann. § 21-4623 (2001); KY Rev. Stat. Ann. § 532.135 (2002); Neb. Rev. Stat. § 28-105.01 (2002), N.M. Stat. Ann. § 31-20A-2.1 (2001); NY Crim. Proc. Law § 400.27; S.D. Codified Laws § 23A-27A-26.3 (2002); Tenn. Code Ann. § 39-13-203 (2002); and, Wash. Rev. Code Ann. § 10.95.030 (2002).

³⁵ Conn. Gen. Stat. Ann. § 53a-46a(h) (2002); MD. Code Ann., Criminal Law § 2-202 (2002); and, MO. Rev. Stat. § 565.030.1 (2001);

³⁶ Ark. Code Ann. § 5-4-618 (2002) and N.C. Gen. Stat. § 15A-2005 (2002).

³⁷ Ring v. Arizona, 536 U.S. ___, 122 S. Ct. 2428 (2002).

juries, whenever there is a jury trial in a capital case.³⁸

Issue 4: What should be the Standard of Proof

As to what standard of proof the defendant must use, fourteen states have a standard of “preponderance of the evidence” that the defendant is mentally retarded.³⁹ Five states have a standard of “clear and convincing evidence.”⁴⁰ Unlike the previous procedural questions, there is constitutional guidance on the issue of the appropriate standard of proof.

In Cooper v. Oklahoma,⁴¹ the United States Supreme Court, in a unanimous decision, announced that a state could not compel a defendant to use the standard of “clear and convincing” evidence in establishing incompetence to stand trial. In reaching this decision, the Court discussed the problem with requiring defendants to meet a higher standard of proof than “preponderance of the evidence” when dealing with due process rights in criminal trials. If a higher burden is placed on defendants to establish their incompetency to stand trial, it could result in defendants who are “more likely than not” incompetent, but are still tried, convicted, and even executed, simply because they are unable to meet the higher standard. The Constitution does not permit this in situations where a fundamental right, such as due process, is involved.

It should also be noted that currently in Virginia, a defendant asserting an insanity defense must show by “the greater weight of the evidence,” a “preponderance” standard of proof, that he was insane at the time of trial.⁴² Competency in Virginia must also be proven by the defendant using a preponderance standard.⁴³ Because of the reasoning employed by the United States Supreme Court in Cooper, and because defendants currently employ a “preponderance” standard for insanity and competency claims, it is the recommendation of the Crime Commission that the defendant prove his Atkins claim of ineligibility for the death penalty using a preponderance of the evidence standard.⁴⁴

³⁸ Obviously, in those cases where the defendant and the prosecution opt for a bench trial, the trier of fact during sentencing would be the judge.

³⁹ Ark. Code Ann. § 5-4-618 (2002); Conn. Gen. Stat. Ann. § 53a-46a(h); GA Code Ann. § 17-7-131 (2001); KAN. Stat. Ann. § 21-4623 (2001); KY Rev. Stat. Ann. § 532.135 (2002); MD. Code Ann., Criminal Law § 2-202; MO. Rev. Stat. § 565.030.1 (2001); Neb. Rev. Stat. § 28-105.01 (2002), N.M. Stat. Ann. § 31-20A-2.1 (2001); NY Crim. Proc. Law § 400.27; N.C. Gen. Stat. § 15A-2005; S.D. Codified Laws § 23A-27A-26.3 (2002); Tenn. Code Ann. § 39-13-203 (2002); and, Wash. Rev. Code Ann. § 10.95.030 (2002).

⁴⁰ Ariz. Rev. Stat. § 13-703 (2002); Colo. Rev. Stat. § 16-9-402 (2002); Del. Code An. Tit. 11, § 4209 (2002); FLA. Stat. Ann. §921.137 (2001); and, Ind. Code § 35-36-9-4 (2002). However, it should be noted that these statutes were initially passed prior to the Atkins decision. At that time, there were no constitutional prohibitions on the execution of the mentally retarded, and these states were providing additional statutory protection to such defendants. Now that there is an Eighth Amendment prohibition against the execution of these defendants, it is no longer clear that the heightened standard of “clear and convincing evidence” remains constitutional.

⁴¹ 517 U.S. 348 (1996)

⁴² Shifflett v. Commonwealth, 221 Va. 760, 769 (1981).

⁴³ Va. Code § 19.2-169.1(e).

⁴⁴ An argument can be made that because of the decision in Ring v. Arizona, the Supreme Court has mandated that all “factors” which can contribute to a death penalty must not only be decided by a jury, but

Summary Decisions

In summary, the Sub-Committee and the Crime Commission made the following four decisions when drafting the statutory response to Akins v. Virginia:

- a clinical definition of mental retardation should be applied;
- the determination of mental retardation should be made during the sentencing phase after trial;
- the determination of mental retardation should be made by the jury; and
- the standard of proof that the defendant must bear should be one of a preponderance of the evidence.

A copy of the proposed legislation can be found in Appendix F.

VI. Conclusion and Recommendations

Based on the discussions and recommendations of the Atkins Sub-Committee, the Virginia State Crime Commission made the following recommendations as part of its proposal to address the United States Supreme Court's directives in Atkins v. Virginia.

Recommendation 1

Amend the § 18.2-10 of the *Code* to specify that a person who is mentally retarded is not eligible for the death penalty.

Recommendation 2

The determination of mental retardation should be made by the jury as part of sentencing.

Recommendation 3

The defendant should bear the burden of proving his/her mental retardation using a standard of preponderance of the evidence.

Recommendation 4

Amend the *Code of Virginia* to include a definition of mental retardation.

must be proven by the prosecution "beyond a reasonable doubt." 536 U.S. ___, 122 S. Ct. 2428 (2002); see also Apprendi v. New Jersey, 530 U.S. 466 (2000). However, Ring dealt with aggravating factors in the sentencing phase, not mitigating factors, such as mental retardation. Typically, the prosecution in criminal cases is not forced to prove the absence of facts or mitigating evidence. Additionally, the earlier Supreme Court case of Medina v. California, 505 U.S. 437, 452-53 (1992), held that it is not unconstitutional to require a defendant to prove his incompetency to stand trial, rather than shift the burden to the prosecution to prove the defendant is competent, once the issue has been raised. For these reasons, and because the issue of mental retardation is analogous to insanity, the Crime Commission decided to have the burden of proof in Atkins claims remain with the defendant.

Specifically,

Mentally retarded means a disability, originating before the age of 18 years, characterized by:

- (v) significantly sub-average intellectual functioning as expressed by performance on a standardized measure of intellectual functioning carried out in conformity with accepted professional practice, that is at least 2 standard deviations below the mean, considering the standard error of measurement for the specific instruments used and,*
- (vi) substantial limitations in adaptive behavior as expressed in conceptual, social, and practical adaptive skills.*

Recommendation 5:

Modify the definition of mental retardation in § 37.1-1 to make the definition consistent throughout the *Code*.

VII. Acknowledgements

The Virginia State Crime Commission extends its appreciation to the following agencies and individuals for their assistance and cooperation on this study.

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Appendix A

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Appendix B

regulatory authority of a State" does not encompass the authority of a political subdivision. For this reason, I respectfully dissent.



Daryl Renard ATKINS, Petitioner,

v.

VIRGINIA.

No. 00-8452.

Argued Feb. 20, 2002.

Decided June 20, 2002.

Defendant was convicted, in the Circuit Court, York County, N. Prentis Smiley, Jr., J., of capital murder and was sentenced to death. The Virginia Supreme Court affirmed the conviction, 257 Va. 160, 510 S.E.2d 445, and sentence, 260 Va. 375, 534 S.E.2d 312. Certiorari was granted. The Supreme Court, Justice Stevens, held that executions of mentally retarded criminals were "cruel and unusual punishments" prohibited by Eighth Amendment.

Reversed and remanded.

Chief Justice Rehnquist dissented and filed opinion in which Justices Scalia and Thomas joined.

Justice Scalia dissented and filed opinion in which Chief Justice Rehnquist and Justice Thomas joined.

1. Sentencing and Punishment ⇌1482

Punishment is "excessive," and therefore prohibited by Eighth Amendment, if it

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of

is not graduated and proportioned to offense. U.S.C.A. Const.Amend. 8.

See publication Words and Phrases for other judicial constructions and definitions.

2. Sentencing and Punishment ⇌1435

Claim that punishment is unconstitutionally excessive is judged by currently prevailing standards of decency. U.S.C.A. Const.Amend. 8.

3. Criminal Law ⇌1480, 1483

Determination of whether punishment in particular case is unconstitutionally excessive in light of evolving community standards should be informed by objective factors to maximum possible extent, with clearest and most reliable one being legislation enacted by country's legislatures. U.S.C.A. Const.Amend. 8.

4. Criminal Law ⇌1134(3)

Sentencing and Punishment ⇌1480

In deciding whether punishment in particular case is unconstitutionally excessive, Supreme Court may bring its own judgment to bear by asking whether there is reason to agree or disagree with judgment reached by citizenry and its legislators. U.S.C.A. Const.Amend. 8.

5. Sentencing and Punishment ⇌1642

Execution of mentally retarded criminal is unconstitutionally "cruel and unusual punishment." U.S.C.A. Const.Amend. 8.

Syllabus *

Petitioner Atkins was convicted of capital murder and related crimes by a Virginia jury and sentenced to death. Affirming, the Virginia Supreme Court relied on *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256, in rejecting Atkins' contention that he could not be sentenced to death because he is mentally retarded.

the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Held: Executions of mentally retarded criminals are "cruel and unusual punishments" prohibited by the Eighth Amendment. Pp. 2246–2252.

(a) A punishment is "excessive," and therefore prohibited by the Amendment, if it is not graduated and proportioned to the offense. *E.g., Weems v. United States*, 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793. An excessiveness claim is judged by currently prevailing standards of decency. *Trop v. Dulles*, 356 U.S. 86, 100–101, 78 S.Ct. 590, 2 L.Ed.2d 630. Proportionality review under such evolving standards should be informed by objective factors to the maximum possible extent, see, *e.g., Harmelin v. Michigan*, 501 U.S. 957, 1000, 111 S.Ct. 2680, 115 L.Ed.2d 836, the clearest and most reliable of which is the legislation enacted by the country's legislatures, *Penry*, 492 U.S., at 331, 109 S.Ct. 2934. In addition to objective evidence, the Constitution contemplates that this Court will bring its own judgment to bear by asking whether there is reason to agree or disagree with the judgment reached by the citizenry and its legislators, *e.g., Coker v. Georgia*, 433 U.S. 584, 597, 97 S.Ct. 2861, 53 L.Ed.2d 982. Pp. 2246–2248.

(b) Much has changed since *Penry's* conclusion that the two state statutes then existing that prohibited such executions, even when added to the 14 States that had rejected capital punishment completely, did not provide sufficient evidence of a consensus. 492 U.S., at 334, 109 S.Ct. 2934. Subsequently, a significant number of States have concluded that death is not a suitable punishment for a mentally retarded criminal, and similar bills have passed at least one house in other States. It is not so much the number of these States that is significant, but the consistency of the direction of change. Given that anticrime legislation is far more popular than legislation protecting violent criminals, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of leg-

islation reinstating such executions) provides powerful evidence that today society views mentally retarded offenders as categorically less culpable than the average criminal. The evidence carries even greater force when it is noted that the legislatures addressing the issue have voted overwhelmingly in favor of the prohibition. Moreover, even in States allowing the execution of mentally retarded offenders, the practice is uncommon. Pp. 2248–2250.

(c) An independent evaluation of the issue reveals no reason for the Court to disagree with the legislative consensus. Clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial, but, by definition, they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand others' reactions. Their deficiencies do not warrant an exemption from criminal sanctions, but diminish their personal culpability. In light of these deficiencies, the Court's death penalty jurisprudence provides two reasons to agree with the legislative consensus. First, there is a serious question whether either justification underpinning the death penalty—retribution and deterrence of capital crimes—applies to mentally retarded offenders. As to retribution, the severity of the appropriate punishment necessarily depends on the offender's culpability. If the culpability of the average murderer is insufficient to justify imposition of death, see *Godfrey v. Georgia*, 446 U.S. 420, 433, 100 S.Ct. 1759, 64 L.Ed.2d 398, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution. As to deterrence, the same cognitive and behavioral impairments that make mentally retarded defendants less morally culpable

also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information. Nor will exempting the mentally retarded from execution lessen the death penalty's deterrent effect with respect to offenders who are not mentally retarded. Second, mentally retarded defendants in the aggregate face a special risk of wrongful execution because of the possibility that they will unwittingly confess to crimes they did not commit, their lesser ability to give their counsel meaningful assistance, and the facts that they are typically poor witnesses and that their demeanor may create an unwarranted impression of lack of remorse for their crimes. Pp. 2250-2252.

260 Va. 375, 534 S.E.2d 312, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. REHNQUIST, C. J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and THOMAS, J., joined.

James W. Ellis, for the petitioner.

Pamela A. Rumpz, for the respondent.

For U.S. Supreme Court briefs, see:

2001 WL 1663817 (Pet.Brief)

2002 WL 63726 (Resp.Brief)

2002 WL 225883 (Reply.Brief)

Justice STEVENS delivered the opinion of the Court.

Those mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning,

1. Initially, both Jones and Atkins were indicted for capital murder. The prosecution ultimately permitted Jones to plead guilty to first-

judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants. Presumably for these reasons, in the 13 years since we decided *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), the American public, legislators, scholars, and judges have deliberated over the question whether the death penalty should ever be imposed on a mentally retarded criminal. The consensus reflected in those deliberations informs our answer to the question presented by this case: whether such executions are "cruel and unusual punishments" prohibited by the Eighth Amendment to the Federal Constitution.

I

Petitioner, Daryl Renard Atkins, was convicted of abduction, armed robbery, and capital murder, and sentenced to death. At approximately midnight on August 16, 1996, Atkins and William Jones, armed with a semiautomatic handgun, abducted Eric Nesbitt, robbed him of the money on his person, drove him to an automated teller machine in his pickup truck where cameras recorded their withdrawal of additional cash, then took him to an isolated location where he was shot eight times and killed.

Jones and Atkins both testified in the guilt phase of Atkins' trial.¹ Each confirmed most of the details in the other's account of the incident, with the important exception that each stated that the other had actually shot and killed Nesbitt. Jones' testimony, which was both more coherent and credible than Atkins', was obviously credited by the jury and was

degree murder in exchange for his testimony against Atkins. As a result of the plea, Jones became ineligible to receive the death penalty.

sufficient to establish Atkins' guilt.² At the penalty phase of the trial, the State introduced victim impact evidence and proved two aggravating circumstances: future dangerousness and "vileness of the offense." To prove future dangerousness, the State relied on Atkins' prior felony convictions as well as the testimony of four victims of earlier robberies and assaults. To prove the second aggravator, the prosecution relied upon the trial record, including pictures of the deceased's body and the autopsy report.

2. Highly damaging to the credibility of Atkins' testimony was its substantial inconsistency with the statement he gave to the police upon his arrest. Jones, in contrast, had declined to make an initial statement to the authorities.

3. The American Association of Mental Retardation (AAMR) defines mental retardation as follows: "Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18." *Mental Retardation: Definition, Classification, and Systems of Supports* 5 (9th ed.1992).

The American Psychiatric Association's definition is similar: "The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." *American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders* 41 (4th ed.2000). "Mild" mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70. *Id.*, at 42-43.

4. The doctor interviewed Atkins, members of his family, and deputies at the jail where he had been incarcerated for the preceding 18

In the penalty phase, the defense relied on one witness, Dr. Evan Nelson, a forensic psychologist who had evaluated Atkins before trial and concluded that he was "mildly mentally retarded."³ His conclusion was based on interviews with people who knew Atkins,⁴ a review of school and court records, and the administration of a standard intelligence test which indicated that Atkins had a full scale IQ of 59.⁵

The jury sentenced Atkins to death, but the Virginia Supreme Court ordered a sec-

months. Dr. Nelson also reviewed the statements that Atkins had given to the police and the investigative reports concerning this case.

5. Dr. Nelson administered the Wechsler Adult Intelligence Scales test (WAIS-III), the standard instrument in the United States for assessing intellectual functioning. AAMR, *Mental Retardation, supra*. The WAIS-III is scored by adding together the number of points earned on different subtests, and using a mathematical formula to convert this raw score into a scaled score. The test measures an intelligence range from 45 to 155. The mean score of the test is 100, which means that a person receiving a score of 100 is considered to have an average level of cognitive functioning. A. Kaufman & E. Lichtenberger, *Essentials of WAISIII Assessment* 60 (1999). It is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition. 2 B. Sadock & V. Sadock, *Comprehensive Textbook of Psychiatry* 2952 (7th ed.2000).

At the sentencing phase, Dr. Nelson testified: "[Atkins'] full scale IQ is 59. Compared to the population at large, that means less than one percentile Mental retardation is a relatively rare thing. It's about one percent of the population." App. 274. According to Dr. Nelson, Atkins' IQ score "would automatically qualify for Social Security disability income." *Id.*, at 280. Dr. Nelson also indicated that of the over 40 capital defendants that he had evaluated, Atkins was only the second individual who met the criteria for mental retardation. *Id.*, at 310. He testified that, in his opinion, Atkins' limited intellect had been a consistent feature throughout his life, and that his IQ score of 59 is not an "aberration, malingered result, or invalid test score." *Id.*, at 308.

ond sentencing hearing because the trial court had used a misleading verdict form. 257 Va. 160, 510 S.E.2d 445 (1999). At the resentencing, Dr. Nelson again testified. The State presented an expert rebuttal witness, Dr. Stanton Samenow, who expressed the opinion that Atkins was not mentally retarded, but rather was of "average intelligence, at least," and diagnosable as having antisocial personality disorder.⁶ App. 476. The jury again sentenced Atkins to death.

The Supreme Court of Virginia affirmed the imposition of the death penalty. 260 Va. 375, 385, 534 S.E.2d 312, 318 (2000). Atkins did not argue before the Virginia Supreme Court that his sentence was disproportionate to penalties imposed for similar crimes in Virginia, but he did contend "that he is mentally retarded and thus cannot be sentenced to death." *Id.*, at 386, 534 S.E.2d, at 318. The majority of the state court rejected this contention, relying on our holding in *Penry*. 260 Va., at 387, 534 S.E.2d, at 319. The Court was "not willing to commute Atkins' sentence of death to life imprisonment merely because of his IQ score." *Id.*, at 390, 534 S.E.2d, at 321.

Justice Hassell and Justice Koontz dissented. They rejected Dr. Samenow's opinion that Atkins possesses average intelligence as "incredulous as a matter of law," and concluded that "the imposition of the sentence of death upon a criminal defendant who has the mental age of a child between the ages of 9 and 12 is excessive." *Id.*, at 394, 395-396, 534 S.E.2d, at 323-324. In their opinion, "it is indefensible to conclude that individuals who are mentally retarded are not to

some degree less culpable for their criminal acts. By definition, such individuals have substantial limitations not shared by the general population. A moral and civilized society diminishes itself if its system of justice does not afford recognition and consideration of those limitations in a meaningful way." *Id.*, at 397, 534 S.E.2d, at 325.

Because of the gravity of the concern expressed by the dissenters, and in light of the dramatic shift in the state legislative landscape that has occurred in the past few years, we granted certiorari to revisit this issue that we first addressed in the *Penry* case. 533 U.S. 976, 122 S.Ct. 24, 119 L.Ed.2d 805 (2001).

II

[1] The Eighth Amendment succinctly prohibits "excessive" sanctions. It provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." In *Weems v. United States*, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910), we held that a punishment of 12 years jailed with irons at hard and painful labor for the crime of falsifying records was excessive. We explained "that it is a precept of justice that punishment for crime should be graduated and proportioned to the offense." *Id.*, at 367, 30 S.Ct. 544. We have repeatedly applied this proportionality precept in later cases interpreting the Eighth Amendment. See *Harmelin v. Michigan*, 501 U.S. 957, 997-998, 111 S.Ct. 2680, 117 L.Ed.2d 836 (1991) (KENNEDY, J., concurring in part and concurring in judgment); see also *id.*, at 1009-1011, 111 S.Ct. 2680 (White, J., dissenting).⁷ Thus, even

6. Dr. Samenow's testimony was based upon two interviews with Atkins, a review of his school records, and interviews with correctional staff. He did not administer an intelligence test, but did ask Atkins questions taken from the 1972 version of the Wechsler Memory Scale. *Id.*, at 524-525, 529. Dr. Samenow attributed Atkins' "academic performance [that was] by and large terrible" to the fact that he "is a person who chose to pay

attention sometimes, not to pay attention often, and did poorly because he did not want to do what he was required to do." *Id.*, at 480-481.

7. Thus, we have read the text of the amendment to prohibit all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive.

though "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual," it may not be imposed as a penalty for "the 'status' of narcotic addiction," *Robinson v. California*, 370 U.S. 660, 666-667, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962), because such a sanction would be excessive. As Justice Stewart explained in *Robinson*: "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Id.*, at 667, 82 S.Ct. 1417.

[2] A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the "Bloody Assizes" or when the Bill of Rights was adopted, but rather by those that currently prevail. As Chief Justice Warren explained in his opinion in *Trop v. Dulles*, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958): "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.*, at 100-101, 78 S.Ct. 590.

[3] Proportionality review under those evolving standards should be informed by "objective factors to the maximum possible extent," see *Harmelin*, 501 U.S., at 1000, 111 S.Ct. 2680 (quoting *Rummel v. Estelle*, 445 U.S. 263, 274-275, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980)). We have pinpointed that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Penry*, 492 U.S., at 331, 109 S.Ct. 2934. Relying in part on such legislative evidence, we have held that death is an impermissibly excessive punishment for the rape of an adult woman, *Coker v. Georgia*, 433 U.S. 584, 593-596, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), or for a defendant who neither took life, attempted to take life, nor intended to take life, *Enmund v. Florida*, 458 U.S. 782, 789-793, 102 S.Ct. 3368, 73 L.Ed.2d 1140

the then-recent legislation that had been enacted in response to our decision 10 years earlier in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (*per curiam*), to support the conclusion that the "current judgment," though "not wholly unanimous," weighed very heavily on the side of rejecting capital punishment as a "suitable penalty for raping an adult woman." *Coker*, 433 U.S., at 596, 97 S.Ct. 2861. The "current legislative judgment" relevant to our decision in *Enmund* was less clear than in *Coker* but "nevertheless weigh[ed] on the side of rejecting capital punishment for the crime at issue." *Enmund*, 458 U.S., at 793, 102 S.Ct. 3368.

[4] We also acknowledged in *Coker* that the objective evidence, though of great importance, did not "wholly determine" the controversy, "for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." 433 U.S., at 597, 97 S.Ct. 2861. For example, in *Enmund*, we concluded by expressing our own judgment about the issue:

"For purposes of imposing the death penalty, Enmund's criminal *culpability* must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt. Putting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts. This is the judgment of most of the legislatures that have recently addressed the matter, and we have no reason to disagree with that judgment for purposes of construing and applying the Eighth Amendment." 458 U.S., at 801, 102 S.Ct. 3368 (emphasis added).

Thus, in cases involving a consensus, our own judgment is "brought to bear," *Coker*, 433 U.S., at 597, 97 S.Ct. 2861, by asking

the judgment reached by the citizenry and its legislators.

Guided by our approach in these cases, we shall first review the judgment of legislatures that have addressed the suitability of imposing the death penalty on the mentally retarded and then consider reasons for agreeing or disagreeing with their judgment.

III

The parties have not called our attention to any state legislative consideration of the suitability of imposing the death penalty on mentally retarded offenders prior to 1986. In that year, the public reaction to the execution of a mentally retarded murderer in Georgia⁸ apparently led to the enactment of the first state statute prohibiting such executions.⁹ In 1988, when Congress enacted legislation reinstating the federal death penalty, it expressly provided that a "sentence of death shall not be carried out upon a person who is mentally retarded."¹⁰ In 1989, Maryland enacted a similar prohibition.¹¹ It was in that year that we decided *Penry*, and concluded that

those two state enactments, "even w added to the 14 States that have reje capital punishment completely, do not vide sufficient evidence at present c national consensus." 492 U.S., at 334, S.Ct. 2934.

Much has changed since then. sponding to the national attention rece by the Bowden execution and our deci in *Penry*, state legislatures across country began to address the issue. 1990 Kentucky and Tennessee enac statutes similar to those in Georgia Maryland, as did New Mexico in 1991, Arkansas, Colorado, Washington, Indi and Kansas in 1993 and 1994.¹² In 1 when New York reinstated its death p alty, it emulated the Federal Governr by expressly exempting the mentally tarded.¹³ Nebraska followed suit 1998.¹⁴ There appear to have been similar enactments during the next years, but in 2000 and 2001 six m States—South Dakota, Arizona, Conne cut, Florida, Missouri, and North C olina—joined the procession.¹⁵ The Te Legislature unanimously adopted a sim

8. Jerome Bowden, who was identified as having mental retardation when he was 14-years-old, was scheduled for imminent execution in Georgia in June of 1986. The Georgia Board of Pardons and Paroles granted a stay following public protests over his execution. A psychologist selected by the State evaluated Bowden and determined that he had an IQ of 65, which is consistent with mental retardation. Nevertheless, the board lifted the stay and Bowden was executed the following day. The board concluded that Bowden understood the nature of his crime and his punishment and therefore that execution, despite his mental deficiencies, was permissible. See Montgomery, *Bowden's Execution Stirs Protest*, Atlanta Journal, Oct. 13, 1986, p. A1.
9. Ga.Code Ann. § 17-7-131(j) (Supp.1988).
10. The Anti-Drug Abuse Act of 1988, Pub.L. 100-690, § 7001(l), 102 Stat. 4390, 21 U.S.C. § 848(l). Congress expanded the federal death penalty law in 1994. It again included a provision that prohibited any individual with mental retardation from being sentenced to death or executed. Federal Death Penalty Act of 1994, 18 U.S.C. § 3596(c).
11. Md. Ann.Code, Art. 27, § 412(f)(1) (1998).
12. Ky.Rev.Stat. Ann. §§ 532.130, 532.130, 532.140; Tenn.Code Ann. § 39-13-203; N.C. Stat. Ann. § 31-20A-2.1; Ark.Code Ann. § 4-6-18; Colo.Rev.Stat. Ann. § 16-9-2; Wash. Rev.Code § 10.95.030; Ind.C. Code §§ 35-36-9-2 through 35-36-9-6; Kan. Stat. Ann. § 21-4623.
13. N.Y.Crim. Proc. Law § 400.27. However, New York law provides that a sentence of death "may not be set aside . . . upon ground that the defendant is mentally retarded" if "the killing occurred while the defendant was confined or under custody in a state correctional facility or local correctional institution." N.Y.Crim. Proc. Law § 400.27.12 (McKinney 2001-2002 Interim Pocket Part).
14. Neb.Rev.Stat. § 28-105.01.
15. S.D. Codified Laws § 23A-27A-26.1; A.R. Stat. Ann. § 13-703.02; Conn. Gen.Stat. § 53a-46a; Fla. Stat. Ann. § 921.137; N.C. Rev.Stat. § 565.030; 2001-346 N.C. Sess. Laws p. 45.

bill,¹⁶ and bills have passed at least one house in other States, including Virginia and Nevada.¹⁷

It is not so much the number of these States that is significant, but the consistency of the direction of change.¹⁸ Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal. The evidence carries even greater force when it is noted that the legislatures that

have addressed the issue have voted overwhelmingly in favor of the prohibition.¹⁹ Moreover, even in those States that allow the execution of mentally retarded offenders, the practice is uncommon. Some States, for example New Hampshire and New Jersey, continue to authorize executions, but none have been carried out in decades. Thus there is little need to pursue legislation barring the execution of the mentally retarded in those States. And it appears that even among those States that regularly execute offenders and that have no prohibition with regard to the mentally retarded, only five have executed offenders possessing a known IQ less than 70 since we decided *Penry*.²⁰ The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it.²¹

16. House Bill No. 236 passed the Texas House on April 24, 2001, and the Senate version, S. 686, passed the Texas Senate on May 16, 2001. Governor Perry vetoed the legislation on June 17, 2001. In his veto statement, the Texas Governor did not express dissatisfaction with the principle of categorically excluding the mentally retarded from the death penalty. In fact, he stated: "We do not execute mentally retarded murderers today." See Veto Proclamation for H.B. No. 236. Instead, his motivation to veto the bill was based upon what he perceived as a procedural flaw: "My opposition to this legislation focuses on a serious legal flaw in the bill. House Bill No. 236 would create a system whereby the jury and judge are asked to make the same determination based on two different sets of facts . . . Also of grave concern is the fact that the provision that sets up this legally flawed process never received a public hearing during the legislative process." *Ibid*.

17. Virginia Senate Bill No. 497 (2002); House Bill No. 957 (2002); see also Nevada Assembly Bill 353 (2001). Furthermore, a commission on capital punishment in Illinois has recently recommended that Illinois adopt a statute prohibiting the execution of mentally retarded offenders. Report of the Governor's Commission on Capital Punishment 156 (April 2002).

18. A comparison to *Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989), in which we held that there was no national consensus prohibiting the execution of juvenile offenders over age 15, is telling. Although we decided *Stanford* on the same

day as *Penry*, apparently only two state legislatures have raised the threshold age for imposition of the death penalty. Mont.Code Ann. § 45-5-102 (1999); Ind.Code § 35-50-2-3 (1998).

19. App. D to Brief for AAMR et al. as *Amici Curiae*.

20. Those States are Alabama, Texas, Louisiana, South Carolina, and Virginia. D. Keyes, W. Edwards, & R. Perske, *People with Mental Retardation are Dying Legally*, 35 *Mental Retardation* (Feb.1997) (updated by Death Penalty Information Center; available at <http://www.advocacyone.org/deathpenalty.html>) (June 18, 2002).

21. Additional evidence makes it clear that this legislative judgment reflects a much broader social and professional consensus. For example, several organizations with germane expertise have adopted official positions opposing the imposition of the death penalty upon a mentally retarded offender. See Brief for American Psychological Association et al. as *Amici Curiae*; Brief for AAMR et al. as *Amici Curiae*. In addition, representatives of widely diverse religious communities in the United States, reflecting Christian, Jewish, Muslim, and Buddhist traditions, have filed an *amicus curiae* brief explaining that even though their views about the death penalty differ, they all "share a conviction that the execution of persons with mental retardation cannot be morally justified." See Brief for United States Catholic Conference et al. as *Amici Curiae* in

To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded. In this case, for instance, the Commonwealth of Virginia disputes that Atkins suffers from mental retardation. Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus. As was our approach in *Ford v. Wainwright*, with regard to insanity, "we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences." 477 U.S. 399, 405, 416-417, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986).²²

IV

This consensus unquestionably reflects widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty. Additionally, it suggests that some characteristics of mental

retardation undermine the strength of procedural protections that our capital jurisprudence steadfastly guards.

As discussed above, clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and social interaction that became manifest before age 18. Mentally retarded persons frequently do not know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, the clinical definition they have diminished capacity to understand and process information, to communicate, to abstract from that information, and to learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and in group settings they are followers rather than leaders.²⁴ Their deficiencies

McCarver v. North Carolina, O.T.2001, No. 00-8727, p. 2. Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved. Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T.2001, No. 00-8727, p. 4. Finally, polling data shows a widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong. R. Bonner & S. Rimer, *Executing the Mentally Retarded Even as Laws Begin to Shift*, N.Y. Times, Aug. 7, 2000, p. A1; App. B to Brief for AAMR as *Amicus Curiae* in *McCarver v. North Carolina*, O.T.2001, No. 00-8727 (appending approximately 20 state and national polls on the issue). Although these factors are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue. See *Thompson v. Oklahoma*, 487 U.S. 815, 830, 831, n. 31, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (considering the views of "respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community").

22. The statutory definitions of mental retardation are not identical, but generally conform to the clinical definitions set forth *supra*.

23. J. McGee & F. Menolascino, *Identification of Defendants with Mental Retardation in the Criminal Justice System*, in *The Criminal Justice System and Mental Retardation* 58-60 (R. Conley, R. Luckasson, & C. Appelbaum eds. 1992); Appelbaum & Conley, *Criminal-Justice Related Competencies of Defendants with Mental Retardation*, *Journal of Psychiatry & L.* 483, 487-489 (1992).

24. See, e.g., Ellis & Luckasson, *Mentally Retarded Criminal Defendants*, 53 *Journal of L. & Crim. Rev.* 414, 429 (1985); Levy, Shaffer, & Sevilla, *Ego Identity in Mentally Retarded Adolescents*, 94 *Ann. N.Y. Acad. Sci.* 541, 547 (1990); Whitman, *Self-Concept and Mental Retardation*, 94 *Ann. N.Y. Acad. Sci.* 347, 360 (1990); R. Fulero, *Competence to Contest Proceedings: Understanding and Suggestibility of Defendants with Mental Retardation*, 27 *Journal of Law & Crim. Rev.* 212, 212-213, 535 (1992) (hereinafter *Everington & Fulero*).

warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

In light of these deficiencies, our death penalty jurisprudence provides two reasons consistent with the legislative consensus that the mentally retarded should be categorically excluded from execution. First, there is a serious question as to whether either justification that we have recognized as a basis for the death penalty applies to mentally retarded offenders. *Gregg v. Georgia*, 428 U.S. 153, 183, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), identified "retribution and deterrence of capital crimes by prospective offenders" as the social purposes served by the death penalty. Unless the imposition of the death penalty on a mentally retarded person "measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." *Enmund*, 458 U.S., at 798, 102 S.Ct. 3368.

With respect to retribution—the interest in seeing that the offender gets his "just deserts"—the severity of the appropriate punishment necessarily depends on the culpability of the offender. Since *Gregg*, our jurisprudence has consistently confined the imposition of the death penalty to a narrow category of the most serious crimes. For example, in *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), we set aside a death sentence because the petitioner's crimes did not reflect "a consciousness materially more 'depraved' than that of any person guilty of murder." *Id.*, at 433, 100 S.Ct. 1759. If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution. Thus, pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of

execution are put to death, an exclusion for the mentally retarded is appropriate.

With respect to deterrence—the interest in preventing capital crimes by prospective offenders—"it seems likely that 'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation,'" *Enmund*, 458 U.S., at 799, 102 S.Ct. 3368. Exempting the mentally retarded from that punishment will not affect the "cold calculus that precedes the decision" of other potential murderers. *Gregg*, 428 U.S., at 186, 96 S.Ct. 2909. Indeed, that sort of calculus is at the opposite end of the spectrum from behavior of mentally retarded offenders. The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable—for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses—that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information. Nor will exempting the mentally retarded from execution lessen the deterrent effect of the death penalty with respect to offenders who are not mentally retarded. Such individuals are unprotected by the exemption and will continue to face the threat of execution. Thus, executing the mentally retarded will not measurably further the goal of deterrence.

The reduced capacity of mentally retarded offenders provides a second justification for a categorical rule making such offenders ineligible for the death penalty. The risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty," *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954, 57 L.Ed.2d 073 (1978) is enhanced not only by the

possibility of false confessions,²⁵ but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes. As *Penry* demonstrated, moreover, reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury. 492 U.S., at 323-325, 109 S.Ct. 2934. Mentally retarded defendants in the aggregate face a special risk of wrongful execution.

[5] Our independent evaluation of the issue reveals no reason to disagree with the judgment of "the legislatures that have recently addressed the matter" and concluded that death is not a suitable punishment for a mentally retarded criminal. We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty. Construing and applying the Eighth Amendment in the light of our "evolving standards of decency," we therefore conclude that such punishment is excessive and that the Constitution "places a substantive restriction on the State's power to take the life" of a mentally retarded offender. *Ford*, 477 U.S., at 405, 106 S.Ct. 2595.

The judgment of the Virginia Supreme Court is reversed and the case is remand-

25. See *Everington & Fulero* 212-213. Despite the heavy burden that the prosecution must shoulder in capital cases, we cannot ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated. As two recent high-profile cases demonstrate, these exonerations include mentally retarded persons who unwittingly

ed for further proceedings not inconsistent with this opinion.

It is so ordered.

Chief Justice REHNQUIST, with Justice SCALIA and Justice THOMAS join, dissenting.

The question presented by this case is whether a national consensus deprives Virginia of the constitutional power to impose the death penalty on capital murderers like petitioner, *i.e.*, those defendants who indisputably are competent to stand trial, aware of the punishment they are about to suffer and why, and whose mental retardation has been found an insubstantially compelling reason to lessen their individual responsibility for the crime. The Court pronounces the punishment excessive and unusual primarily because 12 States recently have passed laws limiting the death eligibility of certain defendants based on mental retardation alone. The fact that the laws of 19 other States besides Virginia continue to impose the question of proper punishment to the unaided consideration of state judges or juries familiar with the particular offender and his or her crime is *ante*, at 2248.

I agree with Justice SCALIA's dissent, 2259 (dissenting opinion), that the assessment of the current legislative movement regarding the execution of defendants like petitioner more resembles *ad hoc* rationalization for the majority's subjectively preferred result rather than an objective effort to ascertain the meaning of an evolving standard of decency. I dissent separately, however, to call attention to the defects in the Court's decision: the weight on foreign laws, the view of professional and religious organizations

confessed to crimes that they did not commit. See Baker, Death-Row Inmate Gets Pardon; Agreement Ends Days of Suspense, *Washington Post*, Jan. 15, 1994, p. A1; McRoberts, Porter Fully Savors Freedom; Judge Releases Man On Parole, *Chicago Tribune*, Feb. 1, 1994, p. N1.

opinion polls in reaching its conclusion. See *ante*, at 2249–2250, n. 21. The Court's suggestion that these sources are relevant to the constitutional question finds little support in our precedents and, in my view, is antithetical to considerations of federalism, which instruct that any "permanent prohibition upon all units of democratic government must [be apparent] in the operative acts (laws and the application of laws) that the people have approved." *Sanford v. Kentucky*, 492 U.S. 361, 377, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989) (plurality opinion). The Court's uncritical acceptance of the opinion poll data brought to our attention, moreover, warrants additional comment, because we lack sufficient information to conclude that the surveys were conducted in accordance with generally accepted scientific principles or are capable of supporting valid empirical inferences about the issue before us.

In making determinations about whether a punishment is "cruel and unusual" under the evolving standards of decency embraced by the Eighth Amendment, we have emphasized that legislation is the clearest and most reliable objective evidence of contemporary values." *Penry v. Trough*, 492 U.S. 302, 331, 109 S.Ct. 2969, 106 L.Ed.2d 256 (1989). See also *Cleskey v. Kemp*, 481 U.S. 279, 300, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). The reason we ascribe primacy to legislative judgments follows from the constitutional role legislatures play in expressing policy for a State. "[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." *Gregg v. Georgia*, 428 U.S. 153, 175–176, 96 S.Ct. 1398, 49 L.Ed.2d 859 (1976) (joint opinion by Stewart, Powell, and STEVENS, JJ.) (quoting *Furman v. Georgia*, 408 U.S. 238, 342 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Brennan, C. J., dissenting)). And because the specifications of punishments are "pe-
rsonal questions of legislative policy," *United States*, 357 U.S. 386, 393, 183 S.Ct. 1280, 2 L.Ed.2d 1405 (1958), our

cases have cautioned against using "the aegis of the Cruel and Unusual Punishment Clause" to cut off the normal democratic processes, *Gregg, supra*, at 176, 96 S.Ct. 2909 (quoting *Powell v. Texas*, 392 U.S. 514, 533, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968) (plurality opinion)).

Our opinions have also recognized that data concerning the actions of sentencing juries, though entitled to less weight than legislative judgments, "is a significant and reliable index of contemporary values," *Coker v. Georgia*, 433 U.S. 584, 596, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (plurality opinion) (quoting *Gregg, supra*, at 181, 96 S.Ct. 2909), because of the jury's intimate involvement in the case and its function of "maintain[ing] a link between contemporary community values and the penal system," *Gregg, supra*, at 181, 96 S.Ct. 2909 (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519, n. 15, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)). In *Coker, supra*, at 596–597, 97 S.Ct. 2861, for example, we credited data showing that "at least 9 out of 10" juries in Georgia did not impose the death sentence for rape convictions. And in *Enmund v. Florida*, 458 U.S. 782, 793–794, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), where evidence of the current legislative judgment was not as "compelling" as that in *Coker* (but more so than that here), we were persuaded by "overwhelming [evidence] that American juries . . . repudiated imposition of the death penalty" for a defendant who neither took life nor attempted or intended to take life.

In my view, these two sources—the work product of legislatures and sentencing jury determinations—ought to be the sole indicators by which courts ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment. They are the only objective indicia of contemporary values firmly supported by our precedents. More importantly, however, they can be reconciled with the undeniable precepts that the democratic branches of government and individual sentencing juries are, by design,

better suited than courts to evaluating and giving effect to the complex societal and moral considerations that inform the selection of publicly acceptable criminal punishments.

In reaching its conclusion today, the Court does not take notice of the fact that neither petitioner nor his *amici* have adduced any comprehensive statistics that would conclusively prove (or disprove) whether juries routinely consider death a disproportionate punishment for mentally retarded offenders like petitioner.* Instead, it adverts to the fact that other countries have disapproved imposition of the death penalty for crimes committed by mentally retarded offenders, see *ante*, at 2249–2250, n. 21 (citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T.2001, No. 00–8727, p. 2). I fail to see, however, how the views of other countries regarding the punishment of their citizens provide any support for the Court's ultimate determination. While it is true that some of our prior opinions have looked to "the climate of international opinion," *Coker, supra*, at 596, n. 10, 97 S.Ct. 2861, to reinforce a conclusion regarding evolving standards of decency, see *Thompson v. Oklahoma*, 487 U.S. 815, 830, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (plurality opinion); *Enmund, supra*, at 796–797, n. 22, 102 S.Ct. 3368 (1982); *Trop v. Dulles*, 356 U.S. 86, 102–103, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion); we have since explicitly rejected the idea that the sentencing practices of other countries could "serve to

establish the first Eighth Amendment prerequisite, that [a] practice is accepted among our people." *Stanford, supra*, at 369, n. 1, 109 S.Ct. 2969 (emphasizing that "American conceptions of decency . . . are dispositive") (emphasis in original).

Stanford's reasoning makes perfectly good sense, and the Court offers no basis to question it. For if it is evidence of a national consensus for which we are looking, then the viewpoints of other countries simply are not relevant. And nothing in *Thompson, Enmund, Coker*, or *Trop* suggests otherwise. *Thompson, Enmund*, and *Coker* rely only on the bare citation of international laws by the *Trop* plurality as authority to deem other countries' sentencing choices germane. But the *Trop* plurality—representing the view of only a minority of the Court—offered no explanation for its own citation, and there is no reason to resurrect this view given our sound rejection of the argument in *Stanford*.

To further buttress its appraisal of contemporary societal values, the Court marshals public opinion poll results and evidence that several professional organizations and religious groups have adopted official positions opposing the imposition of the death penalty upon mentally retarded offenders. See *ante*, at 2249–2250, n. 21 (citing Brief for American Psychological Association et al. as *Amici Curiae*; Brief for American Association on Mental Retardation et al. as *Amici Curiae*; noting that "representatives of widely diverse religious communities . . .

* Apparently no such statistics exist. See Brief for American Association on Mental Retardation et al. as *Amici Curiae* in *McCarver v. North Carolina*, O.T.2001, No. 00–8727, p. 19, n. 29 (noting that "actions by individual prosecutors and by juries are difficult to quantify with precision"). Petitioner's inability to muster studies in his favor ought to cut against him, for it is his "heavy burden," *Stanford v. Kentucky*, 492 U.S. 361, 373, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989) (internal quotation marks omitted), to establish a national consensus against a punishment deemed acceptable by the Virginia Legislature

and jury who sentenced him. Furthermore, it is worth noting that experts have estimated that as many as 10 percent of death row inmates are mentally retarded, see R. Bonner & S. Rimer, Executing the Mentally Retarded Even as Laws Begin to Shift, N.Y. Times, Aug. 7, 2000, p. A1, a number which suggests that sentencing juries are not as reluctant to impose the death penalty on defendants like petitioner as was the case in *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), and *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

reflecting Christian, Jewish, Muslim, and Buddhist traditions ... 'share a conviction that the execution of persons with mental retardation cannot be morally justified'; and stating that "polling data shows a widespread consensus among Americans ... that executing the mentally retarded is wrong"). In my view, none should be accorded any weight on the Eight Amendment scale when the elected representatives of a State's populace have not deemed them persuasive enough to prompt legislative action. In *Penry*, 492 U.S., at 334-335, 109 S.Ct. 2934, we were cited similar data and declined to take them into consideration where the "public sentiment expressed in [them]" had yet to find expression in state law. See also *Stanford*, 492 U.S., at 377, 109 S.Ct. 2969 (plurality opinion) (refusing "the invitation to rest constitutional law upon such uncertain foundations" as "public opinion polls, the views of interest groups, and the positions adopted by various professional organizations"). For the Court to rely on such data today serves only to illustrate its willingness to proscribe by judicial fiat—at the behest of private organizations speaking only for themselves—a punishment about which no across-the-board consensus has developed through the workings of normal democratic processes in the laboratories of the States.

Even if I were to accept the legitimacy of the Court's decision to reach beyond the product of legislatures and practices of sentencing juries to discern a national standard of decency, I would take issue with the blind-faith credence it accords the opinion polls brought to our attention. An extensive body of social science literature describes how methodological and other errors can affect the reliability and validity of estimates about the opinions and attitudes of a population derived from various sampling techniques. Everything from variations in the survey methodology, such as the choice of the target population, the sampling design used, the questions asked,

and the statistical analyses used to interpret the data can skew the results. See, e.g., R. Groves, *Survey Errors and Survey Costs* (1989); I. C. Turner & E. Martin, *Surveying Subjective Phenomena* (1984).

The Federal Judicial Center's Reference Manual on Scientific Evidence 221-271 (1994) and its Manual for Complex Litigation § 21.493 pp. 101-103 (3d ed.1995), offer helpful suggestions to judges called upon to assess the weight and admissibility of survey evidence on a factual issue before a court. Looking at the polling data (reproduced in the Appendix to this opinion) in light of these factors, one cannot help but observe how unlikely it is that the data could support a valid inference about the question presented by this case. For example, the questions reported to have been asked in the various polls do not appear designed to gauge whether the respondents might find the death penalty an acceptable punishment for mentally retarded offenders in rare cases. Most are categorical (e.g., "Do you think that persons convicted of murder who are mentally retarded should or should not receive the death penalty?"), and, as such, would not elicit whether the respondent might agree or disagree that all mentally retarded people by definition can never act with the level of culpability associated with the death penalty, regardless of the severity of their impairment or the individual circumstances of their crime. Second, none of the 27 polls cited disclose the targeted survey population or the sampling techniques used by those who conducted the research. Thus, even if one accepts that the survey instruments were adequately designed to address a relevant question, it is impossible to know whether the sample was representative enough or the methodology sufficiently sound to tell us anything about the opinions of the citizens of a particular State or the American public at large. Finally, the information provided to us does not indicate why a particular survey was conducted or, in a few cases, by whom, factors which also can bear on the

objectivity of the results. In order to be credited here, such surveys should be offered as evidence at trial, where their sponsors can be examined and cross-examined about these matters.

* * *

There are strong reasons for limiting our inquiry into what constitutes an evolving standard of decency under the Eighth Amendment to the laws passed by legislatures and the practices of sentencing juries

in America. Here, the Court goes beyond these well-established objective indicators of contemporary values. It finds "further support to [its] conclusion" that a national consensus has developed against imposing the death penalty on all mentally retarded defendants in international opinion, the views of professional and religious organizations, and opinion polls not demonstrated to be reliable. *Ante*, at 2249-2250, n. 21. Believing this view to be seriously mistaken, I dissent.

APPENDIX TO OPINION OF REHNQUIST, C. J.

Poll and survey results reported in Brief for American Association on Mental Retardation et al. as *Amici Curiae* in *McCarver v. North Carolina*, O.T.2001, No. 00-8727, p. 3a-7a, and cited by the Court, *ante*, at 2249-2250, n. 21:

STATE	POLL	DATE	RESPONSE	QUESTION
AR	Arkansans' Opinion on the Death Penalty, Opinion Research Associates, Inc., Q. 13 (July 1992) John DiPippa, <i>Will Fairchild's Death Violate the Constitution, or Simply Our Morality?</i> , Arkansas Forum, Sept. 1993	1992	61% never appropriate 17% is appropriate 5% opposed to all executions 17% undecided	"Some people say that there is nothing wrong with executing a person who is mentally retarded. Others say that the death penalty should never be imposed on a person who is mentally retarded. Which of these positions comes closest to your own?"
AZ	Behavior Research Center, Survey 2000, Q. 3 (July 2000)	2000	71% oppose 12% favor 11% depends 6% ref/unsure	"For persons convicted of murder, do you favor or oppose use of the death penalty when the defendant is mentally retarded?"
CA	Field Research Corp., California Death Penalty Survey, Q. 22 (Dec.1989) Frank Hill, <i>Death Penalty For The Retarded</i> , San Diego Union-Tribune, Mar. 28, 1993, at G3	1989	64.8% not all right 25.7% is all right 9.5% no opinion	"Some people feel there is nothing wrong with imposing the death penalty on persons who are mentally retarded depending on the circumstances. Others feel the death penalty should never be imposed on persons who are mentally retarded under any circumstance. The death penalty on a mentally retarded person is ... ?"
CA	Field Research Corp., California Death Penalty Survey, Q. 62D (Dec.1997) Paul Van Slambrouck, <i>Execution and a Convict's Mental State</i> , The Christian Science Monitor, Apr. 27, 1998, at 1	1997	74% disagree 17% agree 9% no opinion	"Mentally retarded defendants should be given the death penalty when they commit capital crimes."
CT	Quinnipac University Polling Institute, Death Penalty Survey Info., Q. 35 (April 23, 2001)	2001	77% no 12% yes 11% don't know	"Do you think that persons convicted of murder who are mentally retarded should or should not receive the death penalty?"
FL	Amnesty International Martin Dyckman, <i>Death Penalty's High Price</i> , St. Petersburg Times, Apr. 19, 1992, at 3D	1986	71% opposed	[not provided]

APPENDIX TO OPINION OF REHNQUIST, C. J.—Continued

STATE	POLL	DATE	RESPONSE	QUESTION
GA	Georgia State University Tracy Thompson, <i>Executions of Retarded Opposed</i> , Atlanta Journal, Jan. 6, 1987, at 1B	1987	66% opposed 17% favor 16% depends	[not provided]
LA	Marketing Research Inst., Loyola Death Penalty Survey, Q. 7 (Feb.1993)	1993	77.7% no 9.2% yes 13% uncertain	"Would you vote for the death penalty if the convicted person is mentally retarded?"
LA	Louisiana Poll, Poll 104, Q. 9 (Apr.2001)	2001	68% no 19% yes 11% no opinion 2% won't say	"Do you believe mentally retarded people, who are convicted of capital murder, should be executed?"
MD	Survey Research Center, University of Maryland, (Nov. 1988)	1988	82% opposed 8% favor 10% other	"Would you favor or oppose the death penalty for a person convicted of murder if he or she is mentally retarded?"
MO	Missouri Mental Retardation and Death Penalty Survey, Q. 5 (Oct.1993)	1993	61.3% not all right 23.7% is all right 15% don't know	"Some people feel there is nothing wrong with imposing the death penalty on persons who are mentally retarded depending on the circumstances. Others feel that the death penalty should never be imposed on persons who are mentally retarded under any circumstances. Do you think it IS or IS NOT all right to impose the death penalty on a mentally retarded person?"
NC/SC	Charlotte Observer-WMTV News Poll (Sept.2000) Diane Suchetka, <i>Carolinas Join Emotional Debate Over Executing Mentally Retarded</i> , Charlotte Observer, Sept. 13, 2000	2000	64% yes 21% no 14% not sure	"Should the Carolinas ban the execution of people with mental retardation?"
NM	Research & Polling Inc., Use of the Death Penalty Public Opinion Poll, Q. 2 (Dec.1990)	1990	57.1% oppose 10.5% support 26.2% depends 6.1% don't know	62% support the death penalty. Asked of those that support it, "for which of the following do you support use of the death penalty . . . when the convicted person is mentally retarded?"
NY	Patrick Caddell Enterprises, N.Y. Public Opinion Poll, The Death Penalty: An Executive Summary, Q. 27 (May 1989) Ronald Tabak & J. Mark Lane, <i>The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty</i> , 23 LOY. L.A.L.Rev. 59, 93 (1989)	1989	82% oppose 10% favor 9% don't know	"I'd like you to imagine you are a member of a jury. The jury has found the defendant guilty of murder beyond a reasonable doubt and now needs to decide about sentencing. You are the last juror to decide and your decision will determine whether or not the offender will receive the death penalty. Would you favor or oppose sentencing the offender to the death penalty if . . . the convicted person were mentally retarded?"
OK	Survey of Oklahoma Attitudes Regarding Capital Punishment: Survey Conducted for Oklahoma Indigent Defense System, Q. C (July 1999)	1999	83.5% should not be executed 10.8% should be executed 5.7% depends	"Some people think that persons convicted of murder who are mentally retarded (or have a mental age of between 5 and 10 years) should not be executed. Other people think that 'retarded' persons should be subject to the death penalty like anyone else. Which is closer to the way you feel, that 'retarded' persons should not be executed, or that 'retarded' persons should be subject to the death penalty like everyone else?"
TX	Austin American Statesman, November 15, 1988, at B3	1988	73% opposed	[not provided]
TX	Sam Houston State University, College of Criminal Justice,	1995	61% more likely to oppose	"For each of the following items that have been found to affect people's at-

APPENDIX TO OPINION OF REHNQUIST, C. J.—Continued

STATE	POLL	DATE	RESPONSE	QUESTION
	Texas Crime Poll On-line (1995) Domingo Ramirez Jr. <i>Murder Trial May Hinge on Defendant's IQ</i> , <i>The Fort Worth Star-Telegram</i> , Oct. 6, 1997, at 1			itude about the death penalty, please state if you would be more likely to favor or more likely to oppose the death penalty, or wouldn't it matter ... if the murderer is severely mentally retarded?"
TX	Scripps-Howard Texas Poll: Death Penalty (Mar.2001) Dan Parker, <i>Most Texans Support Death Penalty</i> , <i>Corpus Christi Caller-Times</i> , Mar. 2, 2001, at A1	2001	66% no 17% yes 17% don't know/no answer	"Should the state use the death penalty when the inmate is considered mentally retarded?"
TX	Houston Chronicle (Feb.2001) Stephen Brewer & Mike Tolson, <i>A Deadly Distinction: Part III, Debate Ferocious in Mental Cases</i> , <i>Johnny Paul Penry Illustrates a Lingering Capital Conundrum</i> , <i>The Houston Chronicle</i> , Feb. 6, 2001, at A6	2001	59.9% no support 19.3% support 20.7% not sure/no answer	"Would you support the death penalty if you were convinced the defendant were guilty, but the defendant is mentally impaired?"
US	Harris Poll, Unfinished Agenda on Race, Q. 32 (Sept.1988) Saundra Torry, <i>High Court to Hear Case on Retarded Slay-er</i> , <i>The Washington Post</i> , Jan. 11, 1989, at A6	1988	71% should not be executed 21% should be executed 4% depends 3% not sure/refused	"Some people think that persons convicted of murder who have an age of less than 18 (or the person should not be executed. Other people think that 'retarded' persons should be subject to the death penalty like everyone else. Which is closer to the way you feel, that 'retarded' persons should not be executed, or that 'retarded' persons should be subject to the death penalty like everyone else?"
US	Yankelovich Clancy Shulman, Time/CNN Poll, Q. 14 (July 7, 1998) Samuel R. Gross, <i>Second Thoughts: Americans' Views on the Death Penalty at the Turn of the Century</i> , <i>Capital Punishment and the American Future</i> (Feb.2001)	1998	61% oppose. 27% favor 12% not sure	"Do you favor or oppose the death penalty for mentally retarded persons convicted of serious crimes such as murder?"
US	The Tarrance Group, Death Penalty Poll, Q. 9 (Mar.1993) Samuel R. Gross, <i>Update: American Public Opinion on the Death Penalty—It's Getting Personal</i> , 83 <i>Cornell L.Rev.</i> 1448, 1467 (1998)	1993	56% not all right 32% is all right 11% unsure	"Some people feel that imposing the death penalty on persons who are mentally retarded, depending on the circumstances. Others feel that the death penalty should never be imposed on persons who are mentally retarded under any circumstances. Which of these views comes closest to your own?"
US	Public Policy Research, Crime in America, Q. 72 (July 1995)	1995	67% likely to oppose 7% likely to favor 26% wouldn't matter	"For each item please indicate how you would be more likely to favor or oppose the death penalty, more likely to favor the death penalty or it wouldn't matter ... if it is true that the person is severely mentally retarded?"
US	Princeton Research, Newsweek Poll, Q. 16 (Nov.1995) Samuel R. Gross, <i>Update: American Public Opinion on the Death Penalty—It's Getting Personal</i> , 83 <i>Cornell L.Rev.</i> 1448, 1468 (1998)	1995	83% oppose 9% favor 8% don't know refused	"If the convicted person was severely mentally retarded, would you favor or oppose the death penalty?"

APPENDIX TO OPINION OF REHNQUIST, C. J.—Continued

STATE	POLL	DATE	RESPONSE	QUESTION
US	Peter Hart Research Associates, Inc., Innocence Survey, Q. 12 (Dec.1999)	1999	58% strongly/somewhat favor 26% strongly/somewhat oppose 12% mixed/neutral 4% not sure	"... for each proposal I read, please tell me whether you strongly favor, somewhat favor, have mixed or neutral feelings, somewhat oppose, or strongly oppose that proposal ... prohibit the death penalty for defendants who are mentally retarded."
US	Peter Hart Research Associates, Inc., Innocence Survey, Q. 9 (Dec.1999)	1999	72% much/somewhat less likely* * 19% no difference 9% not sure 47% much less likely 25% somewhat less likely	"Suppose you were on a jury and a defendant was convicted of murder. Now it is time to determine the sentence. If you knew that the defendant was mentally retarded or otherwise mentally impaired in a serious way, would you be much less likely to support the use of the death penalty in this specific case, somewhat less likely, or would it make no difference to you?"
US	Houston Chronicle, (Feb.2001) Stephen Brewer & Mike Tolson, <i>A Deadly Distinction: Part III, Debate Fervent in Mental Cases, Johnny Paul Penry Illustrates a Lingering Capital Conundrum</i> , The Houston Chronicle, Feb. 6, 2001, at A6	2001	63.8% no support 16.4% support 19.8% not sure/no answer	"Would you support the death penalty if you were convinced the defendant were guilty, but the defendant is mentally impaired?"

Justice SCALIA, with whom THE CHIEF JUSTICE and Justice THOMAS join, dissenting.

Today's decision is the pinnacle of our Eighth Amendment death-is-different jurisprudence. Not only does it, like all of that jurisprudence, find no support in the text or history of the Eighth Amendment; it does not even have support in current social attitudes regarding the conditions that render an otherwise just death penalty inappropriate. Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members.

I

I begin with a brief restatement of facts that are abridged by the Court but important to understanding this case. After spending the day drinking alcohol and smoking marijuana, petitioner Daryl Renard Atkins and a partner in crime drove to a convenience store, intending to rob a customer. Their victim was Eric Nesbitt,

an airman from Langley Air Force Base, whom they abducted, drove to a nearby automated teller machine, and forced to withdraw \$200. They then drove him to a deserted area, ignoring his pleas to leave him unharmed. According to the co-conspirator, whose testimony the jury evidently credited, Atkins ordered Nesbitt out of the vehicle and, after he had taken only a few steps, shot him one, two, three, four, five, six, seven, eight times in the thorax, chest, abdomen, arms, and legs.

The jury convicted Atkins of capital murder. At resentencing (the Virginia Supreme Court affirmed his conviction but remanded for resentencing because the trial court had used an improper verdict form, 257 Va. 160, 179, 510 S.E.2d 445, 457 (1999)), the jury heard extensive evidence of petitioner's alleged mental retardation. A psychologist testified that petitioner was mildly mentally retarded with an IQ of 59, that he was a "slow learner," App. 444, who showed a "lack of success in pretty much every domain of his life," *id.*, at 442, and that he had an "impaired" capacity to

appreciate the criminality of his conduct and to conform his conduct to the law, *id.*, at 453. Petitioner's family members offered additional evidence in support of his mental retardation claim (*e.g.*, that petitioner is a "follower," *id.*, at 421). The State contested the evidence of retardation and presented testimony of a psychologist who found "absolutely no evidence other than the IQ score . . . indicating that [petitioner] was in the least bit mentally retarded" and concluded that petitioner was "of average intelligence, at least." *Id.*, at 476.

The jury also heard testimony about petitioner's 16 prior felony convictions for robbery, attempted robbery, abduction, use of a firearm, and maiming. *Id.*, at 491-522. The victims of these offenses provided graphic depictions of petitioner's violent tendencies: He hit one over the head with a beer bottle, *id.*, at 406; he slapped a gun across another victim's face, clubbed her in the head with it, knocked her to the ground, and then helped her up, only to shoot her in the stomach, *id.*, at 411-413. The jury sentenced petitioner to death. The Supreme Court of Virginia affirmed petitioner's sentence. 260 Va. 375, 534 S.E.2d 312 (2000).

II

As the foregoing history demonstrates, petitioner's mental retardation was a *central issue* at sentencing. The jury concluded, however, that his alleged retardation was not a compelling reason to exempt him from the death penalty in light of the brutality of his crime and his long demonstrated propensity for violence. "In upsetting this particularized judgment on the basis of a constitutional absolute," the Court concludes that no one who is even slightly mentally retarded can have sufficient "moral responsibility to be subjected to capital punishment for any crime. As a sociological and moral conclusion that is implausible; and it is doubly implausible as an interpretation of the United States Constitution." *Thompson v. Oklahoma*,

487 U.S. 815, 863-864, 108 S.Ct. 2687, L.Ed.2d 702 (1988) (SCALIA, J., dissenting).

Under our Eighth Amendment jurisprudence, a punishment is "cruel and unusual" if it falls within one of two categories: "those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted," *Ford v. Wainwright*, 477 U.S. 399, 405, 106 S.Ct. 2595, 91 L.Ed.2d 357 (1986), and modes of punishment that are "inconsistent with modern 'standards of decency,'" as evinced by objective indicia, the most important of which is "legislation enacted by the country's legislatures." *Penry v. Lynaugh*, 492 U.S. 302, 330-331, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

The Court makes no pretense that the execution of the mildly mentally retarded would have been considered "cruel and unusual" in 1791. Only the *severely* or *profoundly* mentally retarded, sometimes known as "idiots," enjoyed any special status under the law at that time. The "lunatics, suffered a 'deficiency in understanding' rendering them unable to tell right from wrong." 4 W. Blackstone, *Commentaries on the Laws of England* 24 (1763) (quoting after Blackstone); see also *Penry v. Lynaugh*, 492 U.S. at 331-332, 109 S.Ct. 2934. The term 'idiot' was generally used to describe persons who had a total lack of understanding, or an inability to distinguish between good and evil." *Thompson v. Oklahoma*, 487 U.S. at 819, 108 S.Ct. 2687 (citing sources that idiots generally had an IQ of 20 or below, which would place them in the "profound" or "severe" range of mental retardation under modern standards). *Fitz-Herbert, Natura Brevium*, 2 ed. 1794) (originally published 1791). An idiot is "such a person who cannot read, or number twenty pence, nor count, nor was his father or mother, nor his grandfather, is, etc., so as it may appear that he has no understanding of reason what he does for his profit, or what for his loss, or that by their incompetence, idiots were

from the guilt, and of course from the punishment, of any criminal action committed under such deprivation of the senses." 4 Blackstone 25; see also *Penry, supra*, at 331, 109 S.Ct. 2934. Instead, they were often committed to civil confinement or made wards of the State, thereby preventing them from "go[ing] loose, to the terror of the king's subjects." 4 Blackstone 25; see also S. Brakel, J. Parry, & B. Weiner, *The Mentally Disabled and the Law* 12-14 (3d ed.1985); 1 Blackstone 292-296; 1 M. Hale, *Pleas of the Crown* 33 (1st Am. ed. 1847). Mentally retarded offenders with less severe impairments—those who were not "idiots"—suffered criminal prosecution and punishment, including capital punishment. See, e.g., I. Ray, *Medical Jurisprudence of Insanity* 65, 87-92 (W. Overholser ed.1962) (recounting the 1834 trial and execution in Concord, New Hampshire, of an apparent "imbecile"—imbecility being a less severe form of retardation which "differs from idiocy in the circumstance that while in [the idiot] there is an utter destitution of every thing like reason, [imbeciles] possess some intellectual capacity, though infinitely less than is possessed by the great mass of mankind"); A. Highmore, *Law of Idiocy and Lunacy* 200 (1807) ("The great difficulty in all these cases, is to determine where a person shall be said to be so far deprived of his sense and memory as not to have any of his actions imputed to him: or where notwithstanding some defects of this kind he still appears to have so much reason and understanding as will make him accountable for his actions . . .").

The Court is left to argue, therefore, that execution of the mildly retarded is inconsistent with the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion) (Warren, C. J.). Before today, our opinions consistently emphasized that Eighth Amendment judg-

ments regarding the existence of social "standards" "should be informed by objective factors to the maximum possible extent" and "should not be, or appear to be, merely the subjective views of individual Justices." *Coker v. Georgia*, 433 U.S. 584, 592, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (plurality opinion); see also *Stanford, supra*, at 369, 109 S.Ct. 2969; *McCleskey v. Kemp*, 481 U.S. 279, 300, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987); *Enmund v. Florida*, 458 U.S. 782, 788, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). "First" among these objective factors are the "statutes passed by society's elected representatives," *Stanford v. Kentucky*, 492 U.S. 361, 370, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989); because it "will rarely if ever be the case that the Members of this Court will have a better sense of the evolution in views of the American people than do their elected representatives," *Thompson, supra*, at 865, 108 S.Ct. 2687 (SCALIA, J., dissenting).

The Court pays lipservice to these precedents as it miraculously extracts a "national consensus" forbidding execution of the mentally retarded, *ante*, at — 12, from the fact that 18 States—less than half (47%) of the 38 States that permit capital punishment (for whom the issue exists)—have very recently enacted legislation barring execution of the mentally retarded. Even that 47% figure is a distorted one. If one is to say, as the Court does today, that *all* executions of the mentally retarded are so morally repugnant as to violate our national "standards of decency," surely the "consensus" it points to must be one that has set its righteous face against *all* such executions. Not 18 States, but only seven—18% of death penalty jurisdictions—have legislation of that scope. Eleven of those that the Court counts enacted statutes prohibiting execution of mentally retarded defendants *convicted after, or convicted of crimes committed after, the effective date of the legislation*;¹ those already on

1. See *Ariz.Rev.Stat. Ann.* § 13-703.02(1)

(Supp.2001); *Ark.Code Ann.* § 5-4-618(d)(1)

death row, or consigned there before the statute's effective date, or even (in those States using the date of the crime as the criterion of retroactivity) tried in the future for murders committed many years ago, could be put to death. That is not a statement of absolute moral repugnance, but one of current preference between two tolerable approaches. Two of these States permit execution of the mentally retarded in other situations as well: Kansas apparently permits execution of all except the *severely* mentally retarded;² New York permits execution of the mentally retarded who commit murder in a correctional facility. N.Y.Crim. Proc. Law § 400.27.12(d) (McKinney 2001); N.Y. Penal Law § 125.27 (McKinney 2002).

But let us accept, for the sake of argument, the Court's faulty count. That bare number of States alone—18—should be enough to convince any reasonable person that no "national consensus" exists. How is it possible that agreement among 47% of the death penalty jurisdictions amounts to "consensus"? Our prior cases have generally required a much higher degree of agreement before finding a punishment cruel and unusual on "evolving standards" grounds. In *Coker, supra*, at 595–596, 97 S.Ct. 2861, we proscribed the death penalty for rape of an adult woman after finding that only one jurisdiction, Georgia, authorized such a punishment. In *Enmund, supra*, at 789, 102 S.Ct. 3368, we invalidated the death penalty for mere participation

in a robbery in which an accomplice took life, a punishment not permitted in the death penalty States (78%). In 477 U.S., at 408, 106 S.Ct. 2595, we reported the common-law prohibition of execution of the insane with the observation that "[t]his ancestral legacy has not lived its time," since not a single State authorizes such punishment. In *Solem v. Helm*, 463 U.S. 277, 300, 103 S.Ct. 3001, 79 L.Ed.2d 637 (1983), we invalidated a sentence without parole under a recidivist statute by which the criminal "was punished more severely than he would have been in any other State." What the Court found as evidence of "consensus" in the present case (a fudged 47%) more closely resembles evidence that we found *inadequate* to establish consensus in earlier cases: *Penry v. Arizona*, 481 U.S. 137, 154, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), in which state law authorizing capital punishment for major participation in a felony showed reckless indifference to life where 26 of the 37 death penalty States prohibited such punishment. *Stanford v. Kentucky*, at 372, 109 S.Ct. 2969, upheld a law permitting execution of defendants who committed a capital crime at age 16, although only 15 of the 36 death penalty States (42%) prohibited death for such a crime.

Moreover, a major factor that the Court entirely disregards is that the law in all 18 States it relies on is a juvenile law. The oldest of the statutes is for 14 years old;³ five were enacted

(1997); *Reams v. State*, 322 Ark. 336, 340, 909 S.W.2d 324, 326–327 (1995); Fla. Stat. § 921.137(8) (Supp.2002); Ga.Code Ann. § 17-7-131(j) (1997); Ind.Code § 35-36-9-6 (1998); *Rondon v. State*, 711 N.E.2d 506, 512 (Ind.1999); Kan. Stat. Ann. §§ 21-4623(d), 21-4631(c) (1995); Ky.Rev.Stat. Ann. § 532.140(3) (1999); Md. Ann.Code, Art. 27, § 412(g) (1996); *Booth v. State*, 327 Md. 142, 166–167, 608 A.2d 162, 174 (1992); Mo.Rev. Stat. § 565.030(7) (Supp.2001); N.Y.Crim. Proc. Law § 400.27.12(c) (McKinney Supp. 2002); 1995 Sess. N.Y. Laws, ch. 1, § 38; Tenn.Code Ann. § 39-13-203(b) (1997); *Van Tran v. State*, 66 S.W.3d 790, 798–799 (Tenn. 2001).

2. The Kansas statute defines "mentally retarded" as "having significantly subnormal general intellectual functioning which substantially impairs one's ability to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law." Kan. Stat. Ann. § 59-2601 (2001). This definition of retardation, the petitioner concedes, is analogous to the Penal Code's definition of a "mental or defect" excusing responsibility for criminal conduct, see ALLI, Model Penal Code § 2.02 (1985), which would not include mental retardation. Reply Brief for petitioner at 10.

3. Ga.Code Ann. § 17-7-131(j).

year;⁴over half were enacted within the past eight years.⁵ Few, if any, of the States have had sufficient experience with these laws to know whether they are sensible in the long term. It is "myopic to base sweeping constitutional principles upon the narrow experience of [a few] years." *Coker*, 493 U.S., at 614, 97 S.Ct. 2861 (Burger, C. J., dissenting); see also *Thompson*, 487 U.S., at 854-855, 108 S.Ct. 2687 (O'CONNOR, J., concurring in judgment).

The Court attempts to bolster its embarrassingly feeble evidence of "consensus" with the following: "It is not so much the number of these States that is significant, but the *consistency* of the direction of change." *Ante*, at 2249 (emphasis added). But in what *other* direction could we possibly see change? Given that 14 years ago *all* the death penalty statutes included the mentally retarded, *any* change (except precipitate undoing of what had just been done) was *bound to be* in the one direction the Court finds significant enough to overcome the lack of real consensus. That is to say, to be accurate the Court's "*consistency-of-the-direction-of-change*" point should be recast into the following unimpressive observation: "No State has yet undone its exemption of the mentally retarded, one for as long as 14 whole years." In any event, reliance upon "trends," even those of much longer duration than a mere 14 years, is a perilous basis for constitutional adjudication, as Justice O'CONNOR eloquently explained in *Thompson*:

"In 1846, Michigan became the first State to abolish the death penalty In succeeding decades, other American States continued the trend towards abolition Later, and particularly after World War II, there ensued a steady and dramatic decline in executions In the 1950's and 1960's, more States

abolished or radically restricted capital punishment, and executions ceased completely for several years beginning in 1968

"In 1972, when this Court heard arguments on the constitutionality of the death penalty, such statistics might have suggested that the practice had become a relic, implicitly rejected by a new societal consensus We now know that any inference of a societal consensus rejecting the death penalty would have been mistaken. But had this Court then declared the existence of such a consensus, and outlawed capital punishment, legislatures would very likely not have been able to revive it. The mistaken premise of the decision would have been frozen into constitutional law, making it difficult to refute and even more difficult to reject." 487 U.S., at 854-855, 108 S.Ct. 2687.

Her words demonstrate, of course, not merely the peril of riding a trend, but also the peril of discerning a consensus where there is none.

The Court's thrashing about for evidence of "consensus" includes reliance upon the *margins* by which state legislatures have enacted bans on execution of the retarded. *Ante*, at 2249. Presumably, in applying our Eighth Amendment "evolving-standards-of-decency" jurisprudence, we will henceforth weigh not only how many States have agreed, but how many States have agreed *by how much*. Of course if the percentage of legislators voting for the bill is significant, surely the number of people *represented* by the legislators voting for the bill is also significant: the fact that 49% of the legislators in a State with a population of 60 million voted *against* the bill should be more impressive than the fact that 90% of the legislators in

4. Ariz.Rev.Stat. Ann. § 13-703.02; Conn. Gen.Stat. § 53a-46a(h); Fla. Stat. Ann. § 921.137; Mo.Rev.Stat. §§ 565.030(4)-(7); N.C. Gen.Stat. § 15A-2005.

5. In addition to the statutes cited n. 3 *supra*, see S.D. Codified Laws § 23A-27A-26.1 (enacted 2000); Neb.Rev.Stat. §§ 28-105.01(2)-(5) (1998); N.Y.Crim. Proc. Law § 400.27(12) (1995); Ind.Code § 35-36-9-6 (1994); Kan. Stat. Ann. § 21-4623 (1994).

487 U.S., at 868–869, n. 4, 108 S.Ct. 2687 (SCALIA, J., dissenting).

III

Beyond the empty talk of a “national consensus,” the Court gives us a brief glimpse of what really underlies today’s decision: pretension to a power confined *neither* by the moral sentiments originally enshrined in the Eighth Amendment (its original meaning) *nor even* by the current moral sentiments of the American people. “[T]he Constitution,” the Court says, “contemplates that in the end *our own judgment* will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.” *Ante*, at 2247 (quoting *Coker*, 433 U.S., at 597, 97 S.Ct. 2861) (emphasis added). (The unexpressed reason for this unexpressed “contemplation” of the Constitution is presumably that really good lawyers have moral sentiments superior to those of the common herd, whether in 1791 or today.) The arrogance of this assumption of power takes one’s breath away. And it explains, of course, why the Court can be so cavalier about the evidence of consensus. It is just a game, after all. “[I]n the end,” it is the *feelings* and *intuition* of a majority of the Justices that count—“the perceptions of decency, or of penology, or of mercy, entertained . . . by a majority of the small and unrepresentative segment of our society that sits on this Court.” *Thompson, supra*, at 873, 108 S.Ct. 2687 (SCALIA, J., dissenting).

The genuinely operative portion of the opinion, then, is the Court’s statement of the reasons why it agrees with the contrived consensus it has found, that the “diminished capacities” of the mentally retarded render the death penalty excessive. *Ante*, at 2250–2252. The Court’s analysis rests on two fundamental assumptions: (1) that the Eighth Amendment prohibits excessive punishments, and (2) that sentencing juries or judges are unable to account properly for the “diminished capacities” of

the retarded. The first assumption is wrong, as I explained at length in *Harmelin v. Michigan*, 501 U.S. 957, 966–990, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (opinion of SCALIA, J.). The Eighth Amendment is addressed to always-and-everywhere “cruel” punishments, such as the rack and the thumbscrew. But where the punishment is in itself permissible, “[t]he Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions.” *Id.*, at 990, 111 S.Ct. 2680. The second assumption—inability of judges or juries to take proper account of mental retardation—is not only unsubstantiated, but contradicts the immemorial belief, here and in England, that they play an *indispensable* role in such matters:

“[I]t is very difficult to define the indivisible line that divides perfect and partial insanity; but it must rest upon circumstances duly to be weighed and considered both by the judge and jury, lest on the one side there be a kind of inhumanity towards the defects of human nature, or on the other side too great an indulgence given to great crimes . . .” 1 Hale, *Pleas of the Crown*, at 30.

Proceeding from these faulty assumptions, the Court gives two reasons why the death penalty is an excessive punishment for all mentally retarded offenders. First, the “diminished capacities” of the mentally retarded raise a “serious question” whether their execution contributes to the “social purposes” of the death penalty, viz., retribution and deterrence. *Ante*, at 2250. (The Court conveniently ignores a third “social purpose” of the death penalty—“incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future,” *Gregg v. Georgia*, 428 U.S. 153, 183, n. 28, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (joint

opinion of Stewart, Powell, and Stevens, JJ.). But never mind; its discussion of even the other two does not bear analysis.) Retribution is not advanced, the argument goes, because the mentally retarded are *no more culpable* than the average murderer, whom we have already held lacks sufficient culpability to warrant the death penalty, see *Godfrey v. Georgia*, 446 U.S. 420, 433, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (plurality opinion). *Ante*, at 2251. Who says so? Is there an established correlation between mental acuity and the ability to conform one's conduct to the law in such a rudimentary matter as murder? Are the mentally retarded really more disposed (and hence more likely) to commit willfully cruel and serious crime than others? In my experience, the opposite is true: being childlike generally suggests innocence rather than brutality.

Assuming, however, that there is a direct connection between diminished intelligence and the inability to refrain from murder, what scientific analysis can possibly show that a mildly retarded individual who commits an exquisite torture-killing is "no more culpable" than the "average" murderer in a holdup-gone-wrong or a domestic dispute? Or a moderately retarded individual who commits a series of 20 exquisite torture-killings? Surely culpability, and deservedness of the most severe retribution, depends not merely (if at all) upon the mental capacity of the criminal (above the level where he is able to distinguish right from wrong) but also upon the depravity of the crime—which is precisely why this sort of question has traditionally been thought answerable not by a categorical rule of the sort the Court today imposes upon all trials, but rather by the sentencer's weighing of the circumstances (both degree of retardation and depravity of crime) in the particular case. The fact that juries continue to sentence mentally retarded offenders to death for extreme crimes shows that society's moral outrage sometimes demands execution of retarded

offenders. By what principle of law, justice, or logic can the Court pronounce that this is wrong? There is none. Of course the Court admits (as it does) that mental retardation does not render the offender morally *blameless*, *ante*, at 2250; there is no basis for saying that the death penalty is *never* appropriate retribution, no matter how heinous the crime. As long as the mentally retarded offender knows "the difference between right and wrong," *ante*, at 2250, only the sentencer can assess whether his retardation reduces his culpability enough to exempt him from the death penalty for the particular murder in question.

As for the other social purposes of the death penalty that the Court discusses—deterrence: That is not advanced, the Court tells us, because the mentally retarded are "less likely" than their non-retarded counterparts to "process the information of the possibility of execution as a penalty and . . . control their conduct based upon that information" *ante*, at 2251. Of course this leads to the conclusion discussed earlier—that the mentally retarded (because they are not deterred) are more likely to kill. Neither I nor the society at large. In any event, even the Court does not say that *all* mentally retarded individuals do not "process the information of the possibility of execution as a penalty and control their conduct based upon that information"; it merely asserts that they are "less likely" to be able to do so. Surely the deterrent effect of a death penalty is adequately vindicated if it succeeds with many, but not all, of the targets. Virginia's death penalty, for example, does not fail of its deterrent effect because *some* criminals are unimpaired. Virginia *has* the death penalty. In other words, the supposed fact that retarded criminals cannot fully appreciate the death penalty has nothing to do with the deterrence rationale, but is simply one of the arguments denying a deterrence rationale, discussed and rejected

am not sure that a murderer is somehow less blameworthy if (though he knew his act was wrong) he did not fully appreciate that he could die for it; but if so, we should treat a mentally retarded murderer the way we treat an offender who may be "less likely" to respond to the death penalty because he was abused as a child. We do not hold him immune from capital punishment, but require his background to be considered by the sentencer as a mitigating factor. *Eddings v. Oklahoma*, 455 U.S. 104, 113-117, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

The Court throws one last factor into its grab bag of reasons why execution of the retarded is "excessive" in all cases: Mentally retarded offenders "face a special risk of wrongful execution" because they are less able "to make a persuasive showing of mitigation," "to give meaningful assistance to their counsel," and to be effective witnesses. *Ante*, at 2252. "Special risk" is pretty flabby language (even flabbier than "less likely")—and I suppose a similar "special risk" could be said to exist for just plain stupid people, inarticulate people, even ugly people. If this unsupported claim has any substance to it (which I doubt) it might support a due process claim in all criminal prosecutions of the mentally retarded; but it is hard to see how it has anything to do with an *Eighth Amendment* claim that execution of the mentally retarded is cruel and unusual. We have never before held it to be cruel and unusual punishment to impose a sentence in violation of some *other* constitutional imperative.

* * *

Today's opinion adds one more to the long list of substantive and procedural requirements impeding imposition of the death penalty imposed under this Court's assumed power to invent a death-is-different jurisprudence. None of those requirements existed when the Eighth Amendment was adopted, and some of them were not even supported by current moral consensus. They include prohibition of the

death penalty for "ordinary" murder, *Godfrey*, 446 U.S., at 433, 100 S.Ct. 1759, for rape of an adult woman, *Coker*, 433 U.S., at 592, 97 S.Ct. 2861, and for felony murder absent a showing that the defendant possessed a sufficiently culpable state of mind, *Enmund*, 458 U.S., at 801, 102 S.Ct. 3368; prohibition of the death penalty for any person under the age of 16 at the time of the crime, *Thompson*, 487 U.S., at 838, 108 S.Ct. 2687 (plurality opinion); prohibition of the death penalty as the mandatory punishment for any crime, *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality opinion), *Sumner v. Shuman*, 483 U.S. 66, 77-78, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987); a requirement that the sentencer not be given unguided discretion, *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (*per curiam*), a requirement that the sentencer be empowered to take into account all mitigating circumstances, *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion), *Eddings v. Oklahoma, supra*, at 110, 102 S.Ct. 869; and a requirement that the accused receive a judicial evaluation of his claim of insanity before the sentence can be executed, *Ford*, 477 U.S., at 410-411, 106 S.Ct. 2595 (plurality opinion). There is something to be said for popular abolition of the death penalty; there is nothing to be said for its incremental abolition by this Court.

This newest invention promises to be more effective than any of the others in turning the process of capital trial into a game. One need only read the definitions of mental retardation adopted by the American Association of Mental Retardation and the American Psychiatric Association (set forth in the Court's opinion, *ante*, at 2245, n. 3) to realize that the symptoms of this condition can readily be feigned. And whereas the capital defendant who feigns insanity risks commitment to a mental institution until he can be cured (and then tried and executed), *Jones v. United States*, 463 U.S. 354, 370, and n. 20, 103

S.Ct. 3043, 77 L.Ed.2d 694 (1983), the capital defendant who feigns mental retardation risks nothing at all. The mere pendency of the present case has brought us petitions by death row inmates claiming for the first time, after multiple habeas petitions, that they are retarded. See, e.g., *Moore v. Texas*, 535 U.S. —, 122 S.Ct. 1814, 152 L.Ed.2d 668 (2002) (SCALIA, J., dissenting from grant of applications for stay of execution).

Perhaps these practical difficulties will not be experienced by the minority of capital-punishment States that have very recently changed mental retardation from a mitigating factor (to be accepted or rejected by the sentencer) to an absolute immunity. Time will tell—and the brief time those States have had the new disposition in place (an average of 6.8 years) is surely not enough. But if the practical difficulties do not appear, and if the other States share the Court's perceived moral consensus that *all* mental retardation renders the death penalty inappropriate for *all* crimes, then that majority will presumably follow suit. But there is no justification for this Court's pushing them into the experiment—and turning the experiment into a permanent practice—on constitutional pretext. Nothing has changed the accuracy of Matthew Hale's endorsement of the common law's traditional method for taking account of guilt-reducing factors, written over three centuries ago:

"[Determination of a person's incapacity] is a matter of great difficulty, partly from the easiness of counterfeiting this disability . . . and partly from the variety of the degrees of this infirmity, whereof some are sufficient, and some are insufficient to excuse persons in capital offenses. . . .

"Yet the law of England hath afforded the best method of trial, that is possible, of this and all other matters of fact, namely, by a jury of twelve men all concurring in the same judgment, by the testimony of witnesses . . . , and by the

inspection and direction of the judge." 1 Hale, Pleas of the Crown, at 32-33. I respectfully dissent.



GONZAGA UNIVERSITY and Roberta S. League, Petitioners,

v.

John DOE.

No. 01-679.

Argued April 24, 2002.

Decided June 20, 2002.

Former university student sued university under § 1983, alleging violations of Family Educational Rights and Privacy Act (FERPA). The Spokane County Superior Court, Kenneth Kato, J., found for student, and university appealed. The Court of Appeals, 99 Wash.App. 338, 992 P.2d 545, reversed in relevant part, and student petitioned for review. The Washington Supreme Court, Ireland, J., 143 Wash.2d 687, 24 P.3d 390, reversed that decision, and university petitioned for certiorari. The United States Supreme Court, Chief Justice Rehnquist, held that FERPA's nondisclosure provisions created no personal rights to enforce under § 1983, abrogating *Falvo v. Owasso Independent School Dist. No. 1-011*, 233 F.3d 1203, *Brown v. Oneonta*, 106 F.3d 1125.

Reversed and remanded.

Justice Breyer, filed opinion concurring in the judgment in which Justice Souter joined.

Justice Stevens filed dissenting opinion in which Justice Ginsburg joined.

Appendix C

Report to the Crime Commission Subcommittee on the Implementation of the Adkins Decision

Martha E. Snell
Leigh Hagan
Clinical Advisory Group
Richard Bonnie, Chair

1

What is Mental Retardation? Three Required Criteria

Mental retardation is a disability,

1. Originating before the age of 18
2. Characterized by significant limitations in intellectual functioning, and
3. Significant limitations in adaptive behavior as expressed in conceptual, social, and practical adaptive skills.

2

Definition of Mental Retardation: Little controversy

- ◆ Definition based on the current AAMR 10th Edition
 - Luckasson, R., Borthwick-Duffy, S., Buntinx, W.H.E., Coulter, D.L., Craig, E.M., Reeve, A., Schalock, R.L., Snell, M.E., Spitalnik, D.M., Spreat, S., & Tasse, M.J. (2002). *Mental retardation: Definition, classification, and systems of supports (10th ed.)*. Washington, DC: American Association on Mental Retardation.
- ◆ And is consistent with other widely accepted definitions (DSM IV, ICD)

3

Assessment of Intellectual Functioning

- ◆ Must include administration of at least one standardized measure accepted by the field,
- ◆ The test must be appropriate for the particular person being assessed
 - taking into account cultural, linguistic, sensory, motor, behavioral and other individual factors.
- ◆ Testing should be carried out in conformity with accepted professional practice,
- ◆ Whenever indicated, the assessment should include information from multiple sources.

4

"Significant limitations in intellectual functioning" means

- ◆ Performance that is at least **two standard deviations** below the mean,
 - Considering the **standard error of measurement** for the specific instruments used (+/- 3 to 5 points),
 - As well as the pattern of strengths and limitations shown

5

Assessment of Adaptive Behavior

- ◆ Based on multiple sources of information,
 - Including clinical interview, psychological testing and educational, correctional, and vocational records,
- ◆ Includes administration of at least one standardized measure of adaptive behavior
 - Accepted by the field and appropriate for the person being assessed,
 - Taking into account the environments in which the person has lived as well as cultural, linguistic, sensory, motor, behavioral and other individual factors.

6

"Significant limitations in adaptive behavior" means

- ◆ Performance that is at least two standard deviations below the mean of either
 - One of the following three types of adaptive behavior: conceptual, social, or practical
 - Or an overall score on a standardized measure of conceptual, social, and practical adaptive skills
- ◆ Examiners use their clinical judgment to make this decision by
 - Giving performance on standardized measures whatever weight is clinically appropriate in light of the person's history and characteristics and the context of the assessment.

7

Assessment of Developmental Origin

- ◆ Should be based on
 - Multiple sources of information
 - Including, whenever available, educational, social service, and medical records and prior disability assessments.

8

Those with mild mental retardation

- ◆ Most often have the disability because of environmental causes
- ◆ Are the most abundant group
- ◆ Are more frequently born to parents in lower socio-economic groups
- ◆ Those who qualify for mild mental retardation labels during the school years may "lose" their label when they reach adulthood
- ◆ The school population of students with mild mental retardation is shrinking

9

Common Causes of Mental Retardation

- ◆ Genetic
 - *Less often the reason for mild mental retardation*
- ◆ Environmental
 - Prenatal
 - Perinatal
 - Postnatal
 - *Most often the reason for mild mental retardation*

10

Common Causes of Mental Retardation

- ◆ Genetic
 - Chromosomal disorders (Down syndrome, fragile X syndrome)
 - Inborn errors of metabolism (PKU)
 - Hereditary degenerative disorders (Tay-Sacks)
 - Hormonal deficiencies
 - Primary central nervous system disorders (microcephaly)
 - Malformation syndromes

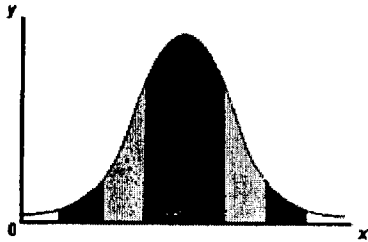
11

Common Causes of Mental Retardation

- Environmental (occurs before age 18)
- ◆ Prenatal: Infection (syphilis, rubella), fetal irradiation, toxins (fetal alcohol syndrome, lead), maternal metabolic problems
 - ◆ Perinatal: Prematurity, asphyxia, infection, trauma, hypoglycemia
 - ◆ Postnatal: Brain injury, poisoning, cerebrovascular accidents, infection (meningitis, encephalitis), early severe malnutrition, psychological deprivation, abuse, neglect

12

Prevalence: Bell curve



13

MR Prevalence per 1000 School-aged Children by IQ Level and SES

Socio-economic status: IQ Level:	High SES	Middle SES	Low SES
IQ < 20 Profound	1	1	1
IQ 20-50 Severe-moderate	4	4	4
IQ 50-75 Mild	10	25	50
IQ 75-90 Not MR	50	170	300

14

Prevalence

When we rely on IQ plus AB skills to diagnose mental retardation, many of those labeled with mild mental retardation "shed their diagnosis in adulthood as adaptive skills increase." (Hales, Yudofsky, & Talbott, 1994)

- ❖ Due to dislike of label
- ❖ Due to lack of emphasis on academic achievement
- ❖ Actual improvements for some in adaptive skills (getting along in everyday life)
- ❖ "Passing"

15

Shrinking School Population

- ◆ Between 1976 and 1981 the number of students with MR served in special education dropped 13%
- ◆ Between 1981 and 1995 it dropped about 20%
- ◆ Slightly increased since 1995
- ◆ But not in all states or in all school systems
- ◆ Why?

16

Reduction in Number of Students Classified as MR

- ◆ Professionals wary of misdiagnosis and misplacement
- ◆ Too many students from minority groups were being identified and IQ test was charged with being discriminatory
- ◆ Many formerly identified as mild MR now labeled as LD – less stigma
- ◆ Positive effects of early intervention

17

Ethnic disproportionality among students with mental retardation

- ◆ Overrepresentation has declined *some* from 1980-1994:
 - African Americans from 3.2 to 2.3 X more often
 - American Indians from 1.5 to 1.3 X more often
- ◆ But overrepresentation is *still is a national concern ... several reasons*
- ◆ **Reason 1: Environmental issues** (poverty 3 times higher)

18

Ethnic disproportionality among students with mental retardation

◆ Reason 2: Problems at all stages of special education process

- Pre-referral strategies, referral, testing for eligibility, placement, triennial evaluation
- Problems with IQ tests
- AB tests often not given, but should be

◆ Reason 3: Prejudice, lack of understanding by staff of cultural diversity

- Overrepresentation occurs far more often in primarily white districts than in primarily African American districts

(Oswald, Coutinho, Best, & Nguyen, 2001)

19

Persons with Mild MR (~89%)



- ◆ Are often hard to identify because
 - They have more skills
 - Often physically indistinguishable from the typical population
- ◆ Primarily have the label when in school
- ◆ More males than females identified, more from ethnically different groups, more from low SES

20

Persons with Mild MR (89%)

- ◆ Are capable of learning academic skills up to about 6th grade
- ◆ As adults, they can usually acquire the vocational and social skills needed for independent living



21

Development & Learning: Students with Mild MR

- ◆ Cognitive problems: Attention, memory, generalization
- ◆ Difficulty with social, practical, and/or conceptual skills as used in everyday life
- ◆ Limited ability to self-regulate
- ◆ Higher expectancy for failure
- ◆ More developmental delay
- ◆ More speech and language problems



22

Educational Characteristics



- ◆ Many tend to have a segregated education apart from typical peers: Limited inclusion in general education settings (13%)

23

Disability Setting	All	LD	S/L	MR	ED	OHI	MD
Regular class	46%	44%	88%	13%	25%	41%	10%
Resource class	29%	39%	7%	30%	23%	35%	17%
Separate class	20%	16%	4%	52%	34%	17%	45%
Separate other	5%	1%	.4%	6%	16%	7%	28%

US Department of Education,
1997-1998

24

Educational Characteristics



- ◆ Special education goals mainly academic
- ◆ Many qualify for related services (speech)
- ◆ About 30% earn diploma, 40% "IEP Diploma," 20% drop out (1990-91 VA data)
- ◆ Effect of the SOLs: Likely to increase drop out

25

Applying MR Assessment to Capital Sentencing

5 Considerations:

- ◆ Rate of MR at Capital Sentencing
- ◆ Intellectual Functioning Assessment
- ◆ Adaptive Behavior Assessment
- ◆ Developmental Origin Assessment
- ◆ Qualifications of Experts

26

Rate of MR at Capital Sentencing

- ◆ Not more than 2% of general population, by definition
- ◆ Dr. Hagan's experience
 - MR range: 0%
 - Borderline range: 19%
 - Low average range: 46%
 - Average range: 31%
- ◆ High average: 4%

27

Intellectual Functioning Assessment

- ◆ Malingering – not a new issue
- ◆ Acceptable choice of testing methods must be:
 1. Standardized
 - *Implication:* same administration, items, scoring, calculations, and percentile ranks for all defendants by all evaluators
 2. Generally accepted by the field
 - *Implication:* Meets Frye or Daubert

28

Intellectual Functioning Assessment

- ◆ Acceptable choice of testing methods must be:
 3. Appropriate for a particular defendant
 - *Implication:* Suitable norm group
 4. Conforming with accepted practice
 - *Implication:* No short cuts

29

Intellectual Functioning Assessment

- ◆ Testing outcome must indicate:
 - "Substantial limitation": at least 2 standard deviations below average with consideration for the test's standard error of measurement (3-5 pts.)
 - *Implication:* IQ 70 (+/- standard error of measurement) or lower in full context; less than 2% of the general population

30

Adaptive Behavior Assessment

- ◆ Multiple sources of information
 - Interview
 - Psychological testing and
 - Records: educational, correctional, vocational records, etc.
 - ◆ *Implication:* Look for duration, consistency, credibility, sufficiency

31

Adaptive Behavior Assessment

- ◆ A standardized measure for assessing adaptive behavior
 - Administered per instrument manual
 - ◆ *Implication:* No unacceptable variations
 - Appropriate for particular defendant
 - ◆ *Implication:* Relevant norm group accounting for cultural and other factors

32

Adaptive Behavior Assessment

- ◆ Typically, requires more judgment than IQ scores and age of onset issues
- ◆ Instrument should be administered, but evaluator is not entirely limited to scoring and interpretation parameters of administration manual
- ◆ Usually relies on review of archival information which is not uniformly available

33

Adaptive Behavior Assessment

- Example: 18 year old male defendant
- ◆ Verbal IQ of 67, Performance IQ of 93, stable IQ
 - ◆ 12th grade without special education
 - ◆ Driver's license without mishap
 - ◆ Completed job application: Casual labor
 - ◆ Able to operate small engines safely
 - ◆ Learning word processing software
 - ◆ Follows news effectively each day
- Implication:* Not MR in spite of IQ because of demonstrated adaptive behavior

34

Developmental Origin Assessment

- ◆ Younger defendants (15-18 years):
 - Records less likely to have been purged
 - Possibly fewer records (e.g., employment, Social Security disability, military, driver's license)
- ◆ Older defendants (> 18 years):
 - Greater likelihood of records being purged
 - Potentially a great pool of records

35

Clinical Judgment and Assessment of Mental Retardation

- ◆ Clinical judgment used in **mental health** prediction generally does not have as good an accuracy rate as many professionals believe
- ◆ Assessment of **mental retardation** is likely more accurate because it requires empirical data (i.e., IQ test)

36

Clinical Judgment and Assessment of Mental Retardation

- ◆ Judgment plays greater role in adaptive behavior assessment
- ◆ Safeguards against assessment error:
 - Consultation by CA's mental health expert
 - Rebuttal evaluation per § 19.2-264.3:1 (F)
 - Cross examination of mitigation expert

Appendix D

October 17, 2002

To: Subcommittee on the Death Penalty and Defendants with Mental Retardation

From: Clinical Advisory Group

In this report, the Clinical Advisory Group (CAG) sets forth its consensus opinion on three matters relating to the deliberations of the Subcommittee: (1) the definition of mental retardation; (2) standards for assessment and diagnosis of mental retardation, with special attention to the practical realities and legal context of these evaluations; and (3) qualifications that should be required of experts conducting these assessments. The CAG stands ready to address other issues of interest to the Subcommittee.

Definition. -- Mental retardation is a disability, originating before the age of 18, characterized concurrently by (1) substantial limitations in intellectual functioning, and (2) substantial limitations in adaptive behavior as expressed in conceptual, social, and practical adaptive skills.

Comment: The proposed language is drawn from the most recent edition of the manual of the American Association on Mental Retardation. It is similar to the formulation used in the American Psychiatric Association's DSM-IV and the International Classification of Diseases (ICD-10). All of these definitions have the same basic content, requiring concurrent deficits in intellectual and adaptive functioning, as well as developmental onset. The Clinical Advisory Group has modified the AAMR definition only by substituting the term "substantial" for "significant." This terminological change is not meant to reflect any substantive disagreement with the AAMR definition; rather it reflects the judgment that the word "substantial" best conveys the degree of limitation required by the condition, especially in legal settings.

[Additional Issue for subcommittee: Do you want to add conditions marked by equivalent limitations in intellectual and adaptive functioning that did not "originate before 18" but occurred during adulthood "as a direct consequence of a brain injury or disease"? Any definition of "subsequently acquired" neurological conditions would require that the injury or disease be clearly documented in medical records.]

Assessment. –

(1) **Assessment of intellectual functioning** must include administration of at least one standardized measure generally accepted by the field and appropriate for administration to the particular person being assessed, taking into account cultural, linguistic, sensory, motor, behavioral and other individual factors. Testing of intellectual functioning should be carried out in conformity with accepted professional practice, and, whenever indicated, the assessment should include information from multiple sources. "Substantial limitation in intellectual functioning" means performance that is at least two standard deviations below the mean, considering the standard error of measurement for the

specific instruments used, as well as their strengths and limitations in the context of the particular assessment.

(2) *Assessment of adaptive behavior* should be based on multiple sources of information, including clinical interview, psychological testing and educational, correctional, and vocational records, and should, whenever feasible, include at least one standardized measure for assessing adaptive behavior, administered in accordance with methods generally accepted by the field and appropriate for the particular person being assessed, taking into account the environments in which the person has lived as well as cultural, linguistic, sensory, motor, behavioral and other individual factors. In reaching a clinical judgment regarding whether the person exhibits “substantial limitations in adaptive behavior,” the examiner should give performance on standardized measures whatever weight is clinically appropriate in light of the person’s history and characteristics and the context of the assessment.

(3) *Assessment of developmental origin* should be based on multiple sources of information including, whenever available, educational, social service, medical records, prior disability assessments, parental or caregiver reports, and other collateral data. It is recognized that valid clinical assessments conducted during the person’s childhood may not have conformed to current practice standards.

[Note to subcommittee: If the statute includes impairments acquired during adulthood through traumatic brain injury or brain disease, something more will need to be added about the nature of the records and documentation required.]

Comment: The Clinical Advisory Group has agreed on the standards that should govern these assessments. These standards could be included in the statute or could be promulgated in other ways, either through professional training or through dissemination by the DMHMRSAS. Although inclusion of such specific practice requirements in a statute would be unusual, it might be sensible to do so in the present context in order to minimize the risk that examiners will deviate from these standards. Even if these basic standards are included in the statute, additional practice guidelines can also be developed and disseminated in the context of professional training.

Qualifications of Experts – Experts appointed by the courts to assess whether a capital defendant has mental retardation should be psychiatrists or clinical psychologists (a) skilled in the administration, scoring and interpretation of intelligence tests and measures of adaptive behavior; (b) qualified by training and experience to conduct forensic evaluations under XXX (cross-reference to the applicable statutes); and (c) who have received specialized training in the assessment of defendants charged with capital crimes.

Comment: It is anticipated that the necessary training concerning diagnosis of mental retardation can be provided in a 1-2 day intensive training program designed for psychiatrists and clinical psychologists already skilled in the administration, scoring and interpretation of psychological instruments who already have specialized training in forensic assessment and in the unique features of such assessments in capital cases.

Appendix E

Definitions of Mental Retardation Found in State Statutes Dealing with Capital Punishment

Arizona:

Mental Retardation - a condition based on a mental deficit that involves significantly subaverage general intellectual functioning, existing concurrently with significant impairment in adaptive behavior, where the onset of the foregoing conditions occurred before the defendant reached the age of eighteen. Az. Rev. Stat. § 13-703.2.

Arkansas:

(A) Significantly subaverage general intellectual functioning accompanied by significant deficits or impairments in adaptive functioning manifest in the developmental period, but no later than age eighteen (18); and
(B) Deficits in adaptive behavior. AK. Code Ann. 5-4-618.

Colorado:

Mental Retarded Defendant: Any defendant with significantly subaverage general intellectual function existing concurrently with substantial deficits in adaptive behavior and manifested and documented during the developmental period. The requirement for documentation may be excused by the court upon a finding that extraordinary circumstances exist. CO Rev. Stat. 16-9-401.

Connecticut

Mental retardation - a significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period. Conn. Gen. Stat. § 1-1g.

Delaware:

Serious mental retardation - a significantly subaverage general intellectual functioning that existing concurrently with substantial deficits in adaptive behavior and both the significant subaverage intellectual functioning and the deficits in adaptive behavior were manifested before the individual became 18 years of age. 11 Del. C. § 4209.

Florida:

Mental retardation - significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. Fl. Stat. Title XLVII 921.137.

Georgia:

Mentally retarded - having significantly subaverage general intellectual functioning resulting in or associated with impairments in adaptive behavior which manifested during the developmental period. Georgia Code 17-7-131 G.

Indiana:

Mentally retarded individual - an individual who, before becoming twenty-two (22) years of age, manifests:

- (1) Significantly subaverage intellectual functioning; and
- (2) Substantial impairment of adaptive behavior. IC 35-36-9-2.

Kansas:

Mental retardation - significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from birth to age 18. Kansas Statute No. 21-4623.

Kentucky:

A defendant with significant subaverage intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested during the developmental period is referred to in KRS 532.135 and 532.140 as a seriously mentally retarded defendant. KY Stat. 532.130.

Maryland:

Mentally retarded if:

(i) the defendant had significantly below average intellectual functioning, as shown by an intelligence quotient of 70 or below on an individually administered intelligence quotient test and an impairment in adaptive behavior; and

(ii) the mental retardation was manifested before the age of 22 years.

Md. Crim. Law Code Ann. § 2-202.

Missouri:

mentally retarded refer to a condition involving substantial limitations in general functioning characterized by significantly subaverage intellectual functioning with continual extensive related deficits and limitations in two or more adaptive behaviors such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work, which conditions are manifested and documented before eighteen years of age. Miss. Rev Stat. § 565.030.

Nebraska:

Mental retardation - significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior. Neb. Stat. 28-105.01.

New Mexico:

Mental retardation - significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior. N. M. Stat. 31.20A-2.1.

New York:

Mental retardation - significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior which were manifested before the age of eighteen. N.Y. Crim Proc. § 400.27(12).

North Carolina:

Mental retardation - significantly subaverage general intellectual functioning, existing concurrently with significant limitations in adaptive functioning, both of which were manifested before the age of 18. N.C. Gen. Stat. § 15A-2005.

South Dakota:

Mental retardation - significant subaverage general intellectual functioning existing concurrently with substantial related deficits in applicable adaptive skill areas. S.D. Cod. Law 23A-27A-26.2.

Tennessee:

Mental retardation:

- (1) Significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below;
- (2) Deficits in adaptive behavior; and
- (3) The mental retardation must have been manifested during the developmental period, or by eighteen (18) years of age. Tenn. Code Ann. 39-13-203.

ARIZONA
HOUSE OF REPRESENTATIVES

SB 1551

~~capital defendants; mental retardation~~
(now: mental retardation; capital defendants)

Sponsors: Senators Solomon, Richardson, Cirillo, et al.

DPA		
S/E	Committee on Judiciary	
DPA		
S/E	Committee on Counties & Municipalities	
DPA	Caucus and COW	

X	As Transmitted to the Governor
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SB 1551 adds a new section of law to the Arizona Revised Statutes (ARS) that prohibits consideration of the death penalty for individuals with *mental retardation*

History

In deciding *Penry v. Lynaugh* (492 U.S. 302, 1989), a plurality of the United States Supreme Court held that an execution of a individual with *mental retardation* is not fundamentally prohibited by the Eighth Amendment, which prohibits cruel and unusual punishment. However, the Court also held that juries must be given the opportunity to consider *mental retardation* as a mitigating circumstance if presented by the defense when determining whether or not to impose the death penalty. In the plurality decision, Justice O'Connor explained that the Eighth Amendment prohibits practices that were condemned at the time the Bill of Rights was adopted, as well as actions that may be considered cruel and unusual by the "evolving standards of decency that mark the progress of a maturing society" (*Trop v. Dulles* 356 U.S. 86 (1958)). Justice O'Connor further explained that "[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."

Thirteen of the thirty-seven death penalty states and the federal government prohibit the execution of mentally retarded individuals. Current Arizona sentencing law provides that a jury may consider as a mitigating circumstance whether or not a "defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense of prosecution" (ARS section 13-703).

The U.S. Supreme Court agreed on March 26, 2001 to again consider the issue of whether the Constitution bars the execution of mentally retarded people as cruel and unusual punishment.

Provisions

- Prohibits the court from sentencing a person with *mental retardation* to the death penalty. Requires the court to impose a life sentence if the person is convicted of a death-eligible offense.
- Requires the trial court in a capital case to appoint a licensed psychologist to conduct a prescreening evaluation to determine the defendant's intelligence quotient (I.Q.)
- Allows the court to appoint separate experts to conduct each of these evaluations.
- Provides that if the prescreening results show that the defendant's I.Q. is higher than 75, the notice of intent to seek the death penalty shall not be dismissed on ground that the defendant has *mental retardation*. Stipulates that such a determination does not prevent the defendant from introducing evidence as to the defendant's *mental retardation* or diminished mental capacity as a mitigating factor during sentencing.
- Provides that if the prescreening psychological finds that the defendant's I.Q. is higher than 75, the report shall be sealed by the court and be available only to the defendant. The report may only be released if the defendant in the present case introduces it or if the defendant is convicted in the present case and the sentence is final.
- Stipulates that if the prescreening expert determines that the defendant has an I.Q. of 75 or less, the trial court shall order the State and the defendant to each nominate three psychological experts or jointly nominate a single expert. The trial court shall appoint one expert nominated by the State and one by the defendant, or one expert agreed to by both the State and the defendant.
- Allows the court to make one additional appointment of an expert who was neither nominated by the State or defendant and did not make the prescreening determination.
- Requires the State and defendant to provide the psychological experts with any available records

- that may be relevant to the defendant's *mental retardation* status.
- Requires each expert to submit a written report to the trial court within 15 days of examining the defendant that includes the expert's opinion as to whether or not the defendant has *mental retardation*.
- Stipulates that if the scores on all of tests administered show the defendant has an I.Q. above 70, the intent to seek the death penalty shall not be dismissed on the ground that the defendant has *mental retardation*. This does not preclude the defendant from introducing evidence of *mental retardation* or diminished mental capacity as a mitigating factor.
- Requires the trial court to hold a hearing no less than 30 days after the psychological experts' reports are submitted to determine if the defendant has *mental retardation*. At the hearing the defendant has the burden to prove *mental retardation* by clear and convincing evidence.
- States that a determination by the trial court that the defendant's I.Q. is 65 or lower establishes a rebuttable presumption that the defendant has *mental retardation*. This does not prevent a defendant with an I.Q. higher than 65 from proving *mental retardation* by clear and convincing evidence.
- Stipulates that if the trial court finds that the defendant has *mental retardation*, then the trial court shall dismiss the intent to seek the death penalty and shall not impose a sentence of death on the defendant if convicted of first degree murder. Provides that the trial upon a finding of *mental retardation*, the trial court may dismiss one of the appointed defense attorneys, unless the court finds good cause to retain both attorneys.
- Provides that if the court finds that the defendant does not have *mental retardation* the defendant may introduce evidence of the defendant's *mental retardation* or diminished mental capacity as a mitigating factor during sentencing.
- Provides for appeal of the trial court's finding on the issue of *mental retardation*.
- Defines *mental retardation* as a condition based on a mental deficit that has resulted in *significantly subaverage general intellectual functioning* existing concurrently with significant limitations in *adaptive functioning*, where the onset of the forgoing conditions occurred before the defendant reached the age of eighteen.
- Defines *significantly subaverage general intellectual functioning* as a full scale intelligence quotient of 70 or lower (taking into account the margin of error for the test administered).
- Defines *adaptive functioning* as the effectiveness with which the defendant copes with common life demands and the defendant's level of personal independence relative to others in the defendant's age group, socioeconomic background and community setting.
- Defines *prescreening psychological expert* or *psychological expert* as a licensed psychologist with at least two years experience in testing, evaluation and diagnosis of *mental retardation*.
- Stipulates that this section applies prospectively only to cases in which the state files a notice of intent to seek the death penalty after the effective date of this act.
- States that it is the intent of the legislature that no defendant with *mental retardation* shall be executed in this state after the effective date of the act.
- Makes other technical and conforming changes.

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State of Arizona
Senate
Forty-fifth Legislature
First Regular Session
2001

SENATE BILL 1551

AN ACT

AMENDING SECTION 13-703, ARIZONA REVISED STATUTES; AMENDING TITLE 13, CHAPTER 7, ARIZONA REVISED STATUTES, BY ADDING SECTION 13-703.02; RELATING TO CAPITAL PUNISHMENT.

(TEXT OF BILL BEGINS ON NEXT PAGE)

ARIZONA

S.B. 1551

1 Be it enacted by the Legislature of the State of Arizona:

2 Section 1. Section 13-703, Arizona Revised Statutes, is amended to
3 read:

4 13-703. Sentence of death or life imprisonment; aggravating and
5 mitigating circumstances; definitions

6 A. A person guilty of first degree murder as defined in section
7 13-1105 shall suffer death or imprisonment in the custody of the state
8 department of corrections for life as determined and in accordance with the
9 procedures provided in subsections B through ~~G~~ H of this section. If the
10 court imposes a life sentence, the court may order that the defendant not be
11 released on any basis for the remainder of the defendant's natural life. An
12 order sentencing the defendant to natural life is not subject to commutation
13 or parole, work furlough or work release. If the court does not sentence the
14 defendant to natural life, the defendant shall not be released on any basis
15 until the completion of the service of twenty-five calendar years if the
16 victim was fifteen or more years of age and thirty-five years if the victim
17 was under fifteen years of age.

18 B. IN ANY CASE IN WHICH THE STATE FILES A NOTICE OF INTENT TO SEEK THE
19 DEATH PENALTY AFTER THE EFFECTIVE DATE OF THIS SUBSECTION, THE COURT SHALL
20 NOT IMPOSE THE DEATH PENALTY ON A PERSON WHO IS FOUND TO HAVE MENTAL
21 RETARDATION PURSUANT TO SECTION 13-703.02, BUT INSTEAD SHALL SENTENCE THE
22 PERSON TO LIFE IMPRISONMENT PURSUANT TO SUBSECTION A OF THIS SECTION.

23 ~~B~~ C. When a defendant is found guilty of or pleads guilty to first
24 degree murder as defined in section 13-1105, the judge who presided at the
25 trial or before whom the guilty plea was entered, or any other judge in the
26 event of the death, resignation, incapacity or disqualification of the judge
27 who presided at the trial or before whom the guilty plea was entered, shall
28 conduct a separate sentencing hearing to determine the existence or
29 nonexistence of the circumstances included in subsections ~~F~~ G and ~~G~~ H of
30 this section, for the purpose of determining the sentence to be imposed. The
31 hearing shall be conducted before the court alone. The court alone shall
32 make all factual determinations required by this section or the constitution
33 of the United States or this state.

34 ~~G~~ D. In the sentencing hearing the court shall disclose to the
35 defendant or defendant's counsel all material contained in any presentence
36 report, if one has been prepared, except such material as the court
37 determines is required to be withheld for the protection of human life. A
38 victim may submit a written victim impact statement, an audio or video tape
39 statement or make an oral impact statement to the probation officer preparing
40 the presentence report for the probation officer's use in preparing the
41 presentence report. The probation officer shall consider and include in the
42 presentence report the victim impact information regarding the murdered
43 person and the economical, physical and psychological impact of the murder on
44 the victim and other family members. Any presentence information withheld
45 from the defendant shall not be considered in determining the existence or
46 nonexistence of the circumstances included in subsection ~~F~~ G or ~~G~~ H of this

1 section. Any information relevant to any mitigating circumstances included
2 in subsection ~~G~~- H of this section may be presented by either the prosecution
3 or the defendant, regardless of its admissibility under the rules governing
4 admission of evidence at criminal trials, but the admissibility of
5 information relevant to any of the aggravating circumstances set forth in
6 subsection ~~F~~- G of this section shall be governed by the rules of evidence at
7 criminal trials. Evidence admitted at the trial, relating to such
8 aggravating or mitigating circumstances, shall be considered without
9 reintroducing it at the sentencing proceeding. The victim has the right to
10 be present and to testify at the hearing. The victim may present information
11 about the murdered person and the impact of the murder on the victim and
12 other family members. The prosecution and the defendant shall be permitted
13 to rebut any information received at the hearing and shall be given fair
14 opportunity to present argument as to the adequacy of the information to
15 establish the existence of any of the circumstances included in subsections
16 ~~F~~- G and ~~G~~- H of this section. The burden of establishing the existence of
17 any of the circumstances set forth in subsection ~~F~~- G of this section is on
18 the prosecution. The burden of establishing the existence of the
19 circumstances included in subsection ~~G~~- H of this section is on the
20 defendant.

21 ~~D~~- E. The court shall return a special verdict setting forth its
22 findings as to the existence or nonexistence of each of the circumstances set
23 forth in subsection ~~F~~- G of this section and as to the existence of any of
24 the circumstances included in subsection ~~G~~- H of this section. In evaluating
25 the mitigating circumstances, the court shall consider any information
26 presented by the victim regarding the murdered person and the impact of the
27 murder on the victim and other family members. The court shall not consider
28 any recommendation made by the victim regarding the sentence to be imposed.

29 ~~E~~- F. In determining whether to impose a sentence of death or life
30 imprisonment, the court shall take into account the aggravating and
31 mitigating circumstances included in subsections ~~F~~- G and ~~G~~- H of this
32 section and shall impose a sentence of death if the court finds one or more
33 of the aggravating circumstances enumerated in subsection ~~F~~- G of this
34 section and that there are no mitigating circumstances sufficiently
35 substantial to call for leniency.

36 ~~F~~- G. The court shall consider the following aggravating
37 circumstances:

38 1. The defendant has been convicted of another offense in the United
39 States for which under Arizona law a sentence of life imprisonment or death
40 was imposable.

41 2. The defendant was previously convicted of a serious offense,
42 whether preparatory or completed.

43 3. In the commission of the offense the defendant knowingly created a
44 grave risk of death to another person or persons in addition to the person
45 murdered during the commission of the offense.

1 4. The defendant procured the commission of the offense by payment, or
2 promise of payment, of anything of pecuniary value.

3 5. The defendant committed the offense as consideration for the
4 receipt, or in expectation of the receipt, of anything of pecuniary value.

5 6. The defendant committed the offense in an especially heinous, cruel
6 or depraved manner.

7 7. The defendant committed the offense while in the custody of or on
8 authorized or unauthorized release from the state department of corrections,
9 a law enforcement agency or a county or city jail.

10 8. The defendant has been convicted of one or more other homicides, as
11 defined in section 13-1101, which were committed during the commission of the
12 offense.

13 9. The defendant was an adult at the time the offense was committed or
14 was tried as an adult and the murdered person was under fifteen years of age
15 or was seventy years of age or older.

16 10. The murdered person was an on duty peace officer who was killed in
17 the course of performing his official duties and the defendant knew, or
18 should have known, that the murdered person was a peace officer.

19 G. H. The court shall consider as mitigating circumstances any
20 factors proffered by the defendant or the state which are relevant in
21 determining whether to impose a sentence less than death, including any
22 aspect of the defendant's character, propensities or record and any of the
23 circumstances of the offense, including but not limited to the following:

24 1. The defendant's capacity to appreciate the wrongfulness of his
25 conduct or to conform his conduct to the requirements of law was
26 significantly impaired, but not so impaired as to constitute a defense to
27 prosecution.

28 2. The defendant was under unusual and substantial duress, although
29 not such as to constitute a defense to prosecution.

30 3. The defendant was legally accountable for the conduct of another
31 under the provisions of section 13-303, but his participation was relatively
32 minor, although not so minor as to constitute a defense to prosecution.

33 4. The defendant could not reasonably have foreseen that his conduct
34 in the course of the commission of the offense for which the defendant was
35 convicted would cause, or would create a grave risk of causing, death to
36 another person.

37 5. The defendant's age.

38 H. I. As used in this section:

39 1. "MENTAL RETARDATION" HAS THE SAME MEANING AS IN SECTION 13-703.02.

40 2. "Serious offense" means any of the following offenses if
41 committed in this state or any offense committed outside this state that if
42 committed in this state would constitute one of the following offenses:

43 (a) First degree murder.

44 (b) Second degree murder.

45 (c) Manslaughter.

1 (d) Aggravated assault resulting in serious physical injury or
2 committed by the use, threatened use or exhibition of a deadly weapon or
3 dangerous instrument.

4 (e) Sexual assault.

5 (f) Any dangerous crime against children.

6 (g) Arson of an occupied structure.

7 (h) Robbery.

8 (i) Burglary in the first degree.

9 (j) Kidnapping.

10 (k) Sexual conduct with a minor under fifteen years of age.

11 ~~2-~~ 3. "Victim" means the murdered person's spouse, parent, child or
12 other lawful representative, except if the spouse, parent, child or other
13 lawful representative is in custody for an offense or is the accused.

14 Sec. 2. Title 13, chapter 7, Arizona Revised Statutes, is amended by
15 adding section 13-703.02, to read:

16 13-703.02. Evaluations of capital defendants; prescreening
17 evaluation; hearing; mental retardation; appeal;
18 definitions; prospective application

19 A. IF THE STATE FILES A NOTICE OF INTENT TO SEEK THE DEATH PENALTY,
20 THE COURT SHALL APPOINT A PRESCREENING PSYCHOLOGICAL EXPERT IN ORDER TO
21 DETERMINE THE DEFENDANT'S INTELLIGENCE QUOTIENT USING CURRENT COMMUNITY,
22 NATIONALLY AND CULTURALLY ACCEPTED INTELLIGENCE TESTING PROCEDURES. THE
23 PRESCREENING PSYCHOLOGICAL EXPERT SHALL SUBMIT A WRITTEN REPORT OF THE
24 INTELLIGENCE QUOTIENT DETERMINATION TO THE COURT WITHIN TEN DAYS OF THE
25 TESTING OF THE DEFENDANT.

26 B. IF THE PRESCREENING PSYCHOLOGICAL EXPERT DETERMINES THAT THE
27 DEFENDANT'S INTELLIGENCE QUOTIENT IS HIGHER THAN SEVENTY-FIVE, THE NOTICE OF
28 INTENT TO SEEK THE DEATH PENALTY SHALL NOT BE DISMISSED ON THE GROUND THAT
29 THE DEFENDANT HAS MENTAL RETARDATION. IF THE PRESCREENING PSYCHOLOGICAL
30 EXPERT DETERMINES THAT THE DEFENDANT'S INTELLIGENCE QUOTIENT IS HIGHER THAN
31 SEVENTY-FIVE, THE REPORT SHALL BE SEALED BY THE COURT AND BE AVAILABLE ONLY
32 TO THE DEFENDANT. THE REPORT SHALL BE RELEASED UPON MOTION OF ANY PARTY IF
33 THE DEFENDANT INTRODUCES THE REPORT IN THE PRESENT CASE OR IS CONVICTED OF AN
34 OFFENSE IN THE PRESENT CASE AND THE SENTENCE IS FINAL. A PRESCREENING
35 DETERMINATION THAT THE DEFENDANT'S INTELLIGENCE QUOTIENT IS HIGHER THAN
36 SEVENTY-FIVE DOES NOT PREVENT THE DEFENDANT FROM INTRODUCING EVIDENCE OF THE
37 DEFENDANT'S MENTAL RETARDATION OR DIMINISHED MENTAL CAPACITY AS A MITIGATING
38 FACTOR AT ANY SENTENCING PROCEEDING PURSUANT TO SECTION 13-703.

39 C. IF THE PRESCREENING PSYCHOLOGICAL EXPERT DETERMINES THAT THE
40 DEFENDANT'S INTELLIGENCE QUOTIENT IS SEVENTY-FIVE OR LESS, THE TRIAL COURT
41 SHALL APPOINT ONE OR MORE ADDITIONAL PSYCHOLOGICAL EXPERTS TO INDEPENDENTLY
42 DETERMINE WHETHER THE DEFENDANT HAS MENTAL RETARDATION. IF THE PRESCREENING
43 PSYCHOLOGICAL EXPERT DETERMINES THAT THE DEFENDANT'S INTELLIGENCE QUOTIENT IS
44 SEVENTY-FIVE OR LESS, THE TRIAL COURT SHALL, WITHIN TEN DAYS OF RECEIVING THE
45 WRITTEN REPORT, ORDER THE STATE AND THE DEFENDANT TO EACH NOMINATE THREE
46 PSYCHOLOGICAL EXPERTS, OR JOINTLY NOMINATE A SINGLE PSYCHOLOGICAL

1 EXPERT. THE TRIAL COURT SHALL APPOINT ONE PSYCHOLOGICAL EXPERT NOMINATED BY
2 THE STATE AND ONE PSYCHOLOGICAL EXPERT NOMINATED BY THE DEFENDANT, OR A
3 SINGLE PSYCHOLOGICAL EXPERT JOINTLY NOMINATED BY THE STATE AND THE DEFENDANT,
4 NONE OF WHOM MADE THE PRESCREENING DETERMINATION OF THE DEFENDANT'S
5 INTELLIGENCE QUOTIENT. THE TRIAL COURT MAY, IN ITS DISCRETION, APPOINT AN
6 ADDITIONAL PSYCHOLOGICAL EXPERT WHO WAS NEITHER NOMINATED BY THE STATE NOR
7 THE DEFENDANT, AND WHO DID NOT MAKE THE PRESCREENING DETERMINATION OF THE
8 DEFENDANT'S INTELLIGENCE QUOTIENT. WITHIN FORTY-FIVE DAYS AFTER THE TRIAL
9 COURT ORDERS THE STATE AND THE DEFENDANT TO NOMINATE PSYCHOLOGICAL EXPERTS,
10 OR UPON THE APPOINTMENT OF SUCH EXPERTS, WHICHEVER IS LATER, THE STATE AND
11 THE DEFENDANT SHALL PROVIDE TO THE PSYCHOLOGICAL EXPERTS AND THE COURT ANY
12 AVAILABLE RECORDS THAT MAY BE RELEVANT TO THE DEFENDANT'S MENTAL RETARDATION
13 STATUS. THE COURT MAY EXTEND THE DEADLINE FOR PROVIDING RECORDS UPON GOOD
14 CAUSE SHOWN BY THE STATE OR DEFENDANT.

15 D. NOT LESS THAN TWENTY DAYS AFTER RECEIPT OF THE RECORDS PROVIDED
16 PURSUANT TO SUBSECTION E OF THIS SECTION, OR TWENTY DAYS AFTER THE EXPIRATION
17 OF THE DEADLINE FOR PROVIDING SUCH RECORDS, WHICHEVER IS LATER, EACH
18 PSYCHOLOGICAL EXPERT SHALL EXAMINE THE DEFENDANT USING CURRENT COMMUNITY,
19 NATIONALLY AND CULTURALLY ACCEPTED PHYSICAL, DEVELOPMENTAL, PSYCHOLOGICAL AND
20 INTELLIGENCE TESTING PROCEDURES, FOR THE PURPOSE OF DETERMINING WHETHER THE
21 DEFENDANT HAS MENTAL RETARDATION. WITHIN FIFTEEN DAYS OF EXAMINING THE
22 DEFENDANT, EACH PSYCHOLOGICAL EXPERT SHALL SUBMIT A WRITTEN REPORT TO THE
23 TRIAL COURT THAT INCLUDES THE EXPERT'S OPINION AS TO WHETHER THE DEFENDANT
24 HAS MENTAL RETARDATION.

25 E. IF THE SCORES ON ALL THE TESTS FOR INTELLIGENCE QUOTIENT
26 ADMINISTERED TO THE DEFENDANT ARE ABOVE SEVENTY, THE NOTICE OF INTENT TO SEEK
27 THE DEATH PENALTY SHALL NOT BE DISMISSED ON THE GROUND THAT THE DEFENDANT HAS
28 MENTAL RETARDATION. THIS DOES NOT PRECLUDE THE DEFENDANT FROM INTRODUCING
29 EVIDENCE OF THE DEFENDANT'S MENTAL RETARDATION OR DIMINISHED MENTAL CAPACITY
30 AS A MITIGATING FACTOR AT ANY SENTENCING PROCEEDING PURSUANT TO SECTION
31 13-703.

32 F. NO LESS THAN THIRTY DAYS AFTER THE PSYCHOLOGICAL EXPERTS' REPORTS
33 ARE SUBMITTED TO THE COURT AND BEFORE TRIAL, THE TRIAL COURT SHALL HOLD A
34 HEARING TO DETERMINE IF THE DEFENDANT HAS MENTAL RETARDATION. AT THE
35 HEARING, THE DEFENDANT HAS THE BURDEN OF PROVING MENTAL RETARDATION BY CLEAR
36 AND CONVINCING EVIDENCE. A DETERMINATION BY THE TRIAL COURT THAT THE
37 DEFENDANT'S INTELLIGENCE QUOTIENT IS SIXTY-FIVE OR LOWER ESTABLISHES A
38 REBUTTABLE PRESUMPTION THAT THE DEFENDANT HAS MENTAL RETARDATION. NOTHING IN
39 THIS SUBSECTION SHALL PRECLUDE A DEFENDANT WITH AN INTELLIGENCE QUOTIENT OF
40 SEVENTY OR BELOW FROM PROVING MENTAL RETARDATION BY CLEAR AND CONVINCING
41 EVIDENCE.

42 G. IF THE TRIAL COURT FINDS THAT THE DEFENDANT HAS MENTAL RETARDATION,
43 THE TRIAL COURT SHALL DISMISS THE INTENT TO SEEK THE DEATH PENALTY, SHALL NOT
44 IMPOSE A SENTENCE OF DEATH ON THE DEFENDANT IF THE DEFENDANT IS CONVICTED OF
45 FIRST DEGREE MURDER AND SHALL DISMISS ONE OF THE ATTORNEYS APPOINTED UNDER
46 RULE 6.2. ARIZONA RULES OF CRIMINAL PROCEDURE UNLESS THE COURT FINDS THAT

1 THERE IS GOOD CAUSE TO RETAIN BOTH ATTORNEYS. IF THE TRIAL COURT FINDS THAT
2 THE DEFENDANT DOES NOT HAVE MENTAL RETARDATION, THE COURT'S FINDING DOES NOT
3 PREVENT THE DEFENDANT FROM INTRODUCING EVIDENCE OF THE DEFENDANT'S MENTAL
4 RETARDATION OR DIMINISHED MENTAL CAPACITY AS A MITIGATING FACTOR AT ANY
5 SENTENCING PROCEEDING PURSUANT TO SECTION 13-703.

6 H. WITHIN TEN DAYS AFTER THE TRIAL COURT MAKES A FINDING ON MENTAL
7 RETARDATION, THE STATE OR THE DEFENDANT MAY FILE A PETITION FOR SPECIAL
8 ACTION WITH THE ARIZONA COURT OF APPEALS PURSUANT TO THE RULES OF PROCEDURE
9 FOR SPECIAL ACTIONS. THE FILING OF THE PETITION FOR SPECIAL ACTION IS
10 GOVERNED BY THE RULES OF PROCEDURE FOR SPECIAL ACTIONS, EXCEPT THAT THE COURT
11 OF APPEALS SHALL EXERCISE JURISDICTION AND DECIDE THE MERITS OF THE CLAIMS
12 RAISED.

13 I. FOR PURPOSES OF THIS SECTION, UNLESS THE CONTEXT OTHERWISE
14 REQUIRES:

15 1. "ADAPTIVE BEHAVIOR" MEANS THE EFFECTIVENESS OR DEGREE TO WHICH THE
16 DEFENDANT MEETS THE STANDARDS OF PERSONAL INDEPENDENCE AND SOCIAL
17 RESPONSIBILITY EXPECTED OF THE DEFENDANT'S AGE AND CULTURAL GROUP.

18 2. "MENTAL RETARDATION" MEANS A CONDITION BASED ON A MENTAL DEFICIT
19 THAT INVOLVES SIGNIFICANTLY SUBAVERAGE GENERAL INTELLECTUAL FUNCTIONING,
20 EXISTING CONCURRENTLY WITH SIGNIFICANT IMPAIRMENT IN ADAPTIVE BEHAVIOR, WHERE
21 THE ONSET OF THE FOREGOING CONDITIONS OCCURRED BEFORE THE DEFENDANT REACHED
22 THE AGE OF EIGHTEEN.

23 3. "PRESCREENING PSYCHOLOGICAL EXPERT" OR "PSYCHOLOGICAL EXPERT" MEANS
24 A PSYCHOLOGIST LICENSED PURSUANT TO TITLE 32, CHAPTER 19.1 WITH AT LEAST TWO
25 YEARS EXPERIENCE IN THE TESTING, EVALUATION AND DIAGNOSIS OF MENTAL
26 RETARDATION.

27 4. "SIGNIFICANTLY SUBAVERAGE GENERAL INTELLECTUAL FUNCTIONING" MEANS A
28 FULL SCALE INTELLIGENCE QUOTIENT OF SEVENTY OR LOWER. THE COURT IN
29 DETERMINING THE INTELLIGENCE QUOTIENT SHALL TAKE INTO ACCOUNT THE MARGIN OF
30 ERROR FOR THE TEST ADMINISTERED.

31 J. THIS SECTION APPLIES PROSPECTIVELY ONLY TO CASES IN WHICH THE STATE
32 FILES A NOTICE OF INTENT TO SEEK THE DEATH PENALTY AFTER THE EFFECTIVE DATE
33 OF THIS ACT.

34 Sec. 3. Legislative intent

35 It is the intent of the legislature that in any case in which this state
36 files a notice of intent to seek the death penalty after the effective date
37 of this act, a defendant with mental retardation shall not be executed in
38 this state.

5-4-618. Mental retardation.

(a)(1) As used in this section, "mental retardation" means:

(A) Significantly subaverage general intellectual functioning accompanied by significant deficits or impairments in adaptive functioning manifest in the developmental period, but no later than age eighteen (18); and

(B) Deficits in adaptive behavior.

(2) There is a rebuttable presumption of mental retardation when a defendant has an intelligence quotient of sixty-five (65) or below.

(b) No defendant with mental retardation at the time of committing capital murder shall be sentenced to death.

(c) The defendant has the burden of proving mental retardation at the time of committing the offense by a preponderance of the evidence.

(d)(1) A defendant on trial for capital murder shall raise the special sentencing provision of mental retardation by motion prior to trial.

(2) Prior to trial, the court shall determine if the defendant is mentally retarded.

(A) If the court determines that the defendant is not mentally retarded, the defendant may raise the question of mental retardation to the jury for determination de novo during the sentencing phase of the trial.

(i) At the time the jury retires to decide mitigating and aggravating circumstances, the jury shall be given a special verdict form on mental retardation.

(ii) If the jury unanimously determines that the defendant was mentally retarded at the time of the commission of capital murder, then the defendant will automatically be sentenced to life imprisonment without possibility of parole.

(B) If the court determines that the defendant is mentally retarded, then the jury shall not be "death qualified", but the jury shall sentence the defendant to life imprisonment without possibility of parole upon conviction.

(e) However, this section shall not be deemed to require unanimity for consideration of any mitigating circumstance, nor shall this section be deemed to supersede any suggested mitigating circumstance regarding mental defect or disease currently found in § 5-4-605.

History. Acts 1993, No. 420, § 1.

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16-9-401 - Definitions.



As used in this part 4:

- (1) "Defendant" means any person charged with a class 1 felony.
- (2) "Mentally retarded defendant" means any defendant with significantly subaverage general intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested and documented during the developmental period. The requirement for documentation may be excused by the court upon a finding that extraordinary circumstances exist.

Source: L. 93: Entire part added, p. 543, § 1, effective April 29.

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**16-9-402 - Pretrial motion by defendant in class 1 felony case -
determination whether defendant is mentally retarded -
procedure.**



(1) Any defendant may file a motion with the trial court in which the defendant may allege that such defendant is a mentally retarded defendant. Such motion shall be filed at least ninety days prior to trial.

(2) The court shall hold a hearing upon any motion filed pursuant to subsection (1) of this section and shall make a determination regarding such motion no later than ten days prior to trial. At such hearing, the defendant shall be permitted to present evidence with regard to such motion and the prosecution shall be permitted to offer evidence in rebuttal. The defendant shall have the burden of proof to show by clear and convincing evidence that such defendant is mentally retarded.

(3) The court shall enter specific findings of fact and conclusions of law regarding whether or not the defendant is a mentally retarded defendant as defined in section 16-9-401.

Source: L. 93: Entire part added, p. 543, § 1, effective April 29.

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16-9-403 - Mentally retarded defendant - death penalty not imposed thereon.



A sentence of death shall not be imposed upon any defendant who is determined to be a mentally retarded defendant pursuant to section 16-9-402. If any person who is determined to be a mentally retarded defendant is found guilty of a class 1 felony, such defendant shall be sentenced to life imprisonment.

Source: L. 93: Entire part added, p. 544, § 1, effective April 29.

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Connecticut Definition

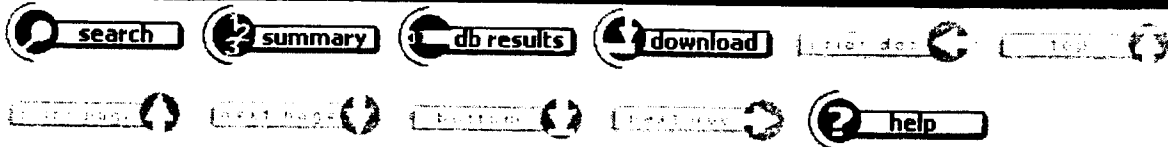
Sec. 1-1g. "Mental retardation", defined. (a) For the purposes of sections 4a-60, 17a-274, 17a-281, 38a-816, 45a-668 to 45a-684, inclusive, 46a-51, 53a-59a, 53a-60b, 53a-60c and 53a-61a, mental retardation means a significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

(b) As used in subsection (a), "general intellectual functioning" means the results obtained by assessment with one or more of the individually administered general intelligence tests developed for that purpose and standardized on a significantly adequate population and administered by a person or persons formally trained in test administration; "significantly subaverage" means an intelligence quotient more than two standard deviations below the mean for the test; "adaptive behavior" means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected for the individual's age and cultural group; and "developmental period" means the period of time between birth and the eighteenth birthday.

(P.A. 78-148, S. 1; P.A. 80-259, S. 3; P.A. 82-51, S. 1; P.A. 83-587, S. 1. 96; P.A. 99-122, S. 5.)
History: P.A. 80-259 added reference to Subdiv. (12) of Sec. 38-61; P.A. 82-51 clarified terms used in the statutory definition in new Subsec. (b) and updated list of applicable sections in prior provisions, now Subsec. (a); P.A. 83-587 made a technical amendment; P.A. 99-122 amended Subsec. (a) to make definition applicable to Secs. 53a-59a, 53a-60b, 53a-60c and 53a-61a.

53 a-46a

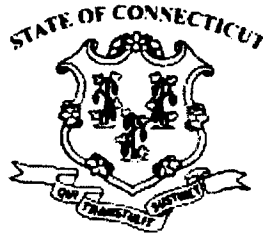
5b 116. Jan 2001



Year: 2001
Number: 151
Name: 2001PA-00151-R00SB-01161-PA.HTM
Title: AN ACT CONCERNING THE DEATH PENALTY

Connecticut

Go to first hit:



Substitute Senate Bill No. 1161

Public Act No. 01-151

AN ACT CONCERNING THE DEATH PENALTY.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. Subsection (i) of section 53a-46a of the general statutes is repealed and the following is substituted in lieu thereof:

(i) The aggravating factors to be considered shall be limited to the following: (1) The defendant committed the offense during the commission or attempted commission of, or during the immediate flight from the commission or attempted commission of, a felony and [he] the defendant had previously been convicted of the same felony; or (2) the defendant committed the offense after having been convicted of two or more state offenses or two or more federal offenses or of one or more state offenses and one or more federal offenses for each of which a penalty of more than one year imprisonment may be imposed, which offenses were committed on different occasions and which involved the infliction of serious bodily injury upon another person; or (3) the defendant committed the offense and in such commission knowingly created a grave risk of death to another person in addition to the victim of the offense; or (4) the defendant committed the offense in an especially heinous, cruel or depraved manner; or (5) the defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value; or (6) the defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value; or (7) the defendant committed the offense with an assault weapon, as defined in section 53-202a; or (8) the defendant committed the offense set forth in subdivision (1) of section 53a-54b, as amended by

this act, to avoid arrest for a criminal act or prevent detection of a criminal act or to hamper or prevent the victim from carrying out any act within the scope of the victim's official duties or to retaliate against the victim for the performance of the victim's official duties.

Sec. 2. Subsection (h) of section 53a-46a of the general statutes is repealed and the following is substituted in lieu thereof:

(h) The court shall not impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by a special verdict, as provided in subsection (e), that at the time of the offense (1) [he] the defendant was under the age of eighteen years, or (2) the defendant was a person with mental retardation, as defined in section 1-1g, or [(2) his] (3) the defendant's mental capacity was significantly impaired or [his] the defendant's ability to conform [his] the defendant's conduct to the requirements of law was significantly impaired but not so impaired in either case as to constitute a defense to prosecution, or [(3) he] (4) the defendant was criminally liable under sections 53a-8, 53a-9 and 53a-10 for the offense, which was committed by another, but [his] the defendant's participation in such offense was relatively minor, although not so minor as to constitute a defense to prosecution, or [(4) he] (5) the defendant could not reasonably have foreseen that [his] the defendant's conduct in the course of commission of the offense of which [he] the defendant was convicted would cause, or would create a grave risk of causing, death to another person.

Sec. 3. Section 53a-54b of the general statutes is repealed and the following is substituted in lieu thereof:

A person is guilty of a capital felony who is convicted of any of the following: (1) Murder of a member of the Division of State Police within the Department of Public Safety or of any local police department, a chief inspector or inspector in the Division of Criminal Justice, a state marshal who is exercising authority granted under any provision of the general statutes, a judicial marshal in performance of the duties of a judicial marshal, a constable who performs criminal law enforcement duties, a special policeman appointed under section 29-18, a conservation officer or special conservation officer appointed by the Commissioner of Environmental Protection under the provisions of section 26-5, an employee of the Department of Correction or a person providing services on behalf of said department when such employee or person is acting within the scope of [his] such employee's or person's employment or duties in a correctional institution or facility and the actor is confined in such institution or facility, or any fireman, while such victim was acting within the scope of [his] such victim's duties; (2) murder committed by a defendant who is hired to commit the same for pecuniary gain or murder committed by one who is hired by the defendant to commit the same for pecuniary gain; (3) murder committed by one who has previously been convicted of intentional murder or of murder committed in the course of commission of a felony; (4) murder committed by one who was, at the time of commission of the murder, under sentence of life imprisonment; (5) murder by a kidnapper of a kidnapped person during the course of the kidnapping or before such person is able to return or be returned to safety; [(6) the illegal sale, for economic gain, of cocaine, heroin or methadone to a person who dies as a direct result of the use by him of such cocaine, heroin or methadone; (7)] (6) murder committed in the course of the commission of sexual assault in the first degree; [(8)] (7) murder of two or more

persons at the same time or in the course of a single transaction; or [(9)] (8) murder of a person under sixteen years of age.

Sec. 4. (a) There is established a Commission on the Death Penalty to study the imposition of the death penalty in this state.

(b) The commission shall be comprised of nine members appointed as follows: The Governor shall appoint two members, the Chief Justice shall appoint one member and the president pro tempore of the Senate, the speaker of the House of Representatives, the majority leader of the Senate, the majority leader of the House of Representatives, the minority leader of the Senate and the minority leader of the House of Representatives shall each appoint one member. Any vacancy on the commission shall be filled by the appointing authority having the power to make the original appointment. The Governor shall appoint a chairperson from among the membership.

(c) The study shall include, but not be limited to:

- (1) An examination of whether the administration of the death penalty in this state comports with constitutional principles and requirements of fairness, justice, equality and due process;
- (2) An examination and comparison of the financial costs to the state of imposing a death sentence and of imposing a sentence to life imprisonment without the possibility of release;
- (3) An examination of whether there is any disparity in the decision to charge, prosecute and sentence a person for a capital felony based on the race, ethnicity, gender, religion, sexual orientation, age or socioeconomic status of the defendant or the victim;
- (4) An examination of whether there is any disparity in the decision to charge, prosecute and sentence a person for a capital felony based on the judicial district in which the offense occurred;
- (5) An examination of the training and experience of prosecuting officials and defense counsel involved in capital cases at the trial and appellate and post-conviction levels;
- (6) An examination of the process for appellate and post-conviction review of death sentences;
- (7) An examination of the delay in attaining appellate and post-conviction review of death sentences, the delay between imposition of the death sentence and the actual execution of such sentence, and the reasons for such delays;
- (8) An examination of procedures for the granting of a reprieve, stay of execution or commutation from the death penalty;
- (9) An examination of the extent to which the Governor is authorized to grant a reprieve or stay of execution from the death penalty and whether the Governor should be granted that authority;

(10) An examination of safeguards that are currently in place or that should be put in place to ensure that innocent persons are not executed;

(11) An examination of the extent to which the victim impact statement authorized by section 53a-46d of the general statutes affects the sentence imposed upon a defendant convicted of a capital felony;

(12) A recommendation regarding the financial resources required by the Judicial Branch, Division of Criminal Justice, Division of Public Defender Services, Department of Correction and Board of Pardons to ensure that there is no unnecessary delay in the prosecution, defense and appeal of capital cases;

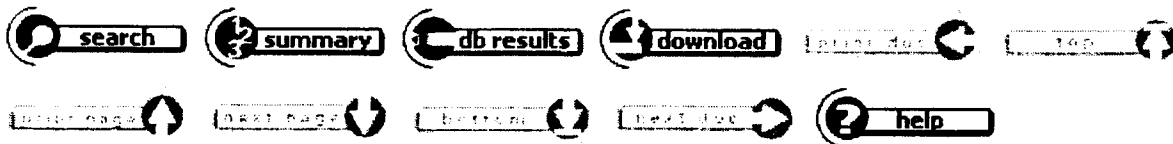
(13) An examination and review of any studies by other states and the federal government on the administration of the death penalty; and

(14) An examination of the emotional and financial effects that the delay between the imposition of the death sentence and the actual execution of such sentence has on the family of a murder victim.

(d) Not later than January 8, 2003, the commission shall report its findings and recommendations, including any recommendations for legislation and appropriations, to the General Assembly in accordance with the provisions of section 11-4a of the general statutes.

Sec. 5. This act shall take effect July 1, 2001.

Approved July 6, 2001



2001 Bill Tracking DE S.B. 450

DELAWARE BILL TRACKING
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2001 DE S.B. 450

SECOND YEAR OF THE 141ST GENERAL ASSEMBLY

SENATE BILL 450

2001 Bill Tracking DE S.B. 450

DATE-INTRO: JUNE 26, 2002

LAST-ACTION: JULY 22, 2002; Chapter Number

SYNOPSIS: Bars the imposition of a death penalty sentence upon any defendant who is found by the sentencing court to be seriously mentally retarded at the time of his or her crime; sets forth definitions based upon standards of the American Psychiatric Association and the American Association of **Mental Retardation**.

STATUS:

06/26/2002 INTRODUCED.
06/26/2002 Laid on table.
06/27/2002 Removed from table.
06/27/2002 Rules suspended.
06/27/2002 Passed SENATE. *****To HOUSE.
06/30/2002 To HOUSE Committee on JUDICIARY.
06/30/2002 From HOUSE Committee on JUDICIARY: Reported without recommendation.
06/30/2002 Rules suspended.
06/30/2002 Passed HOUSE.
06/30/2002 Eligible for GOVERNOR'S desk.
07/22/2002 Signed by GOVERNOR.
07/22/2002 Chapter Number

SUBJECT: LAW AND JUSTICE, CRIMINAL LAW, HEALTH AND SOCIAL SERVICES, SOCIAL SERVICES- OTHER, Developmentally Disabled- Services and Rights, Criminal Procedure and Investigations, Criminal Sentencing and Penalties

SPONSOR: Blevins

SUBJECT: MENTAL RETARDATION (91%); DEVELOPMENTAL DISABILITIES (90%); INVESTIGATIONS (90%); SENTENCING (90%);
2001 Bill Text DE S.B. 450

THE STATE OF DELAWARE
BILL TEXT
STATENET
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2001 DE S.B. **450**

DELAWARE SECOND YEAR OF THE 141ST GENERAL ASSEMBLY

SENATE BILL **450**

DELAWARE STATE SENATE
141ST GENERAL ASSEMBLY
SENATE BILL NO. **450**

BILL TRACKING REPORT: ♦ 2001 Bill Tracking DE S.B. 450

2001 Bill Text DE S.B. **450**

VERSION: Enacted - Final

VERSION-DATE: July 22, 2002

SYNOPSIS: AN ACT TO AMEND TITLE 11 OF THE DELAWARE CODE RELATING TO THE DEATH PENALTY.

DIGEST:

SYNOPSIS

This Act will bar the imposition of a death sentence upon any defendant who is found by the sentencing court to be "seriously mentally retarded" at the time of his or her crime, thereby ensuring that Delaware's death penalty statute complies with the recent United States Supreme Court decision in *Atkins v. Virginia*, U.S (2002 WL 1338045) (June 20, 2002). The Act is patterned after the statutes of several other states with similar provisions. The definitions set forth in the Act are based upon standards promulgated by the American Psychiatric Association and the American Association of **Mental Retardation**.

Author: Senator Blevins

TEXT: BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend Section 4209, Title 11, Delaware Code by redesignating paragraph (d)(3) thereof as paragraph '(d)(4)', and by inserting a new paragraph '(d)(3)' to read as follows:

'(d)(3)a. Not later than ninety days before trial the defendant may file a motion with

the Court alleging that he was seriously mentally retarded at the time the crime was committed.

Upon the filing of the motion, the Court shall order an evaluation of the defendant for the purpose of providing evidence of the following:

1. Whether the defendant has a significantly subaverage level of intellectual functioning;
2. Whether the defendant's adaptive behavior is substantially impaired; and,
3. Whether the conditions described in subparagraphs (1) and (2) of this paragraph existed before the defendant became 18 years of age.

b. During the hearing authorized by subsections (b) and (c) of this section, the defendant and the State may present relevant and admissible evidence on the issue of the defendant's alleged **mental retardation**, or in rebuttal thereof. The defendant shall have the burden of proof to demonstrate by clear and convincing evidence that the defendant was seriously mentally retarded at the time of the offense. Evidence presented during the hearing shall be considered by the jury in making its recommendation to the Court pursuant to subsection (c)(3) of this section as to whether the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist. The jury shall not make any recommendation to the Court on the question of whether the defendant was seriously mentally retarded at the time the crime was committed.

c. If the defendant files a motion pursuant to this paragraph claiming serious **mental retardation** at the time the crime was committed, the Court, in determining the sentence to be imposed, shall make specific findings as to the existence of serious **mental retardation** at the time the crime was committed. If the Court finds that the defendant has established by clear and convincing evidence that he was seriously mentally retarded at the time the crime was committed, notwithstanding any other provision of this section to the contrary the Court shall impose a sentence of imprisonment for the remainder of the defendant's natural life without benefit of probation or parole or any other reduction. If the Court determines that the defendant has failed to establish by clear and convincing evidence that he was seriously mentally retarded at the time the crime was committed, the Court shall proceed to determine the sentence to be imposed pursuant to the provisions of this subsection. Evidence on the question of the defendant's **mental retardation** presented during the hearing shall be considered by the Court in its determination pursuant to this section as to whether the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist.

d. When used in this paragraph:

1. 'Seriously mentally retarded' or 'serious **mental retardation**' means that an individual has significantly subaverage intellectual functioning that exists concurrently with substantial deficits in adaptive behavior and both the significantly subaverage intellectual functioning and the deficits in adaptive behavior were manifested before the individual became 18 years of age;
2. 'Significantly subaverage intellectual functioning' means an intelligent quotient of 70 or below obtained by assessment with one or more of the standardized,

individually administered general intelligence tests developed for the purpose of assessing intellectual functioning;

3. 'Adaptive behavior' means the effectiveness or degree to which the individual meets the standards of personal independence expected of the individual's age group, sociocultural background, and community setting, as evidenced by significant limitations in not less than two of the following adaptive skill areas: communication, self-care, home living, social skills, use of community resources, self-direction, functional academic skills, work, leisure, health or safety.

Section 2. This Act shall apply to all defendants tried, re-tried, sentenced or re-sentenced after its effective date.

Section 3. The prohibition against the imposition of or execution of a death sentence upon a seriously mentally retarded person, the standards of proof, and the definitions of 'seriously mentally retarded,' 'significantly subaverage intellectual functioning,' and 'adaptive behavior' as set forth in this Act shall be applicable in all judicial or executive proceedings relating to any persons currently under a sentence of death that was imposed prior to the effective date of this Act.

Section 4. If any provision of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to that end the provisions of this Act are declared to severable.

SPONSOR:

Blevins

SUBJECT: MENTAL

RETARDATION (96%); LITIGATION (93%); EVIDENCE (93%); APPEALS (92%); INTELLIGENCE & COGNITION (92%); SENTENCING (92%); BURDEN OF PROOF (90%); SETTLEMENTS & DECISIONS (90%); CAPITAL PUNISHMENT (90%); COMPETENCE (78%); INSANITY DEFENSE (78%); PAROLE (78%); JURY TRIAL (75%);

COUNTRY: NORTH AMERICA (94%);

STATE: DELAWARE, USA (94%);

LOAD-DATE: August 9, 2002

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*** CURRENT THROUGH DECEMBER 2002 ***
*** (2002 REGULAR SESSION OF THE 141ST GENERAL ASSEMBLY) ***
*** ANNOTATIONS CURRENT THROUGH SEPTEMBER 2002 ***

TITLE 11. CRIMES AND CRIMINAL PROCEDURE

PART II. CRIMINAL PROCEDURE GENERALLY

CHAPTER 42. CLASSIFICATION OF OFFENSES; SENTENCES

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

11 Del. C. § 4209 (2002)

§ 4209. Punishment, procedure for determining punishment, review of punishment and method of punishment for first-degree murder

(a) *Punishment for first-degree murder.* -- Any person who is convicted of first-degree murder shall be punished by death or by imprisonment for the remainder of the person's natural life without benefit of probation or parole or any other reduction, said penalty to be determined in accordance with this section.

(b) *Separate hearing on issue of punishment for first-degree murder.*

(1) Upon a conviction of guilt of a defendant of first-degree murder, the Superior Court shall conduct a separate hearing to determine whether the defendant should be sentenced to death or to life imprisonment without benefit of probation or parole as authorized by subsection (a) of this section. If the defendant was convicted of first-degree murder by a jury, this hearing shall be conducted by the trial judge before that jury as soon as practicable after the return of the verdict of guilty. Alternate jurors shall not be excused from the case prior to submission of the issue of guilt to the trial jury and shall remain separately sequestered until a verdict on guilt is entered. If the verdict of the trial jury is guilty of first-degree murder said alternates shall sit as alternate jurors on the issue of punishment. If, for any reason satisfactory to the Court, any member of the trial jury is excused from participation in the hearing on punishment, the trial judge shall replace such juror or jurors with ...

...for the hearing in accordance with the applicable rules of the Superior Court and laws of Delaware, unless the defendant(s) and the State stipulate to the use of a lesser number of jurors.

(2) If the defendant was convicted of first-degree murder by the Court, after a trial and waiver of a jury trial or after a plea of guilty or nolo contendere, the hearing shall be conducted by the trial judge before a jury, plus ...

...contendere.

(c) *Procedure at punishment hearing.*

(1) The sole determination for the jury or judge at the hearing provided for by this section shall be the penalty to be imposed upon the defendant for the conviction of first-degree murder. At the hearing, evidence may be presented as to any matter that the Court deems relevant and admissible to the penalty to be imposed. The evidence shall include matters relating to any mitigating circumstance and to any aggravating circumstance, including, but not limited to, those aggravating ...

...before the defendant became 18 years of age.

b. During the hearing authorized by subsections (b) and (c) of this section, the defendant and the State may present relevant and admissible evidence on the issue of the defendant's alleged mental retardation, or in rebuttal thereof. The defendant shall have the burden of proof to demonstrate by clear and convincing evidence that the defendant was seriously mentally retarded at the time of the offense. Evidence presented during the hearing shall be considered by the jury ...

...found to exist. The jury shall not make any recommendation to the Court on the question of whether the defendant was seriously mentally retarded at the time the crime was committed.

c. If the defendant files a motion pursuant to this paragraph claiming serious mental retardation at the time the crime was committed, the Court, in determining the sentence to be imposed, shall make specific findings as to the existence of serious mental retardation at the time the crime was committed. If the Court finds that the defendant has established by clear and convincing evidence that the defendant was seriously mentally retarded at the time the crime was committed, notwithstanding any other provision of this section to the contrary, the Court shall ...

...failed to establish by clear and convincing evidence that the defendant was seriously mentally retarded at the time the crime was committed, the Court shall proceed to determine the sentence to be imposed pursuant to the provisions of this subsection. Evidence on the question of the defendant's mental retardation presented during the hearing shall be considered by the Court in its determination pursuant to this section as to whether the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist.

d. When used in this paragraph:

1. "Seriously mentally retarded" or "serious mental retardation" means that an individual has significantly subaverage intellectual functioning that exists concurrently with substantial deficits in adaptive behavior and both the significantly subaverage intellectual functioning and the deficits in adaptive behavior were manifested before the individual ...

...imposed, the jury, unanimously, or the judge where applicable, must find that the evidence established beyond a reasonable doubt the existence of at least 1 of the following aggravating circumstances which shall apply with equal force to accomplices convicted of such murder:

a. The murder was committed by a person in, or who has escaped from, the custody of a law-enforcement officer or place of confinement.

b. The murder was committed for the purpose of avoiding or preventing an arrest or for the purpose of effecting an escape from custody.

c. The murder was committed against any law-enforcement officer, corrections employee or firefighter, while such victim was engaged in the performance of official duties.

d. The murder was committed against a judicial officer, a former judicial officer, Attorney General, former Attorney General, Assistant or Deputy Attorney General or former Assistant or Deputy Attorney General, State Detective or former State Detective, Special Investigator or former Special Investigator, during, or because of, the exercise of an official duty.

e. The murder was committed against a person who was held or otherwise detained as a shield or hostage.

f. The murder was committed against a person who was held or detained by the defendant for ransom or reward.

g. The murder was committed against a person who was a witness to a crime and who was killed for the purpose of preventing the witness's appearance or testimony in any grand jury, criminal or civil proceeding involving such crime, or in retaliation ...

...paid or was paid by another person or had agreed to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim.

i. The defendant was previously convicted of another murder or manslaughter or of a felony involving the use of, or threat of, force or violence upon another person.

j. The murder was committed while the defendant was engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit any degree of rape, unlawful sexual intercourse, arson, kidnapping, robbery, sodomy or burglary.

k. The defendant's course of conduct resulted in the deaths of 2 or more persons where the deaths are a probable consequence of the defendant's conduct.

l. The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, use of an explosive device or poison or the defendant used such means on the victim prior to murdering the victim.

m. The defendant caused or directed another to commit murder or committed murder as an agent or employee of another person.

n. The defendant was under a sentence of life imprisonment, whether for natural life or otherwise, at the time of the commission of the murder.

o. The murder was committed for pecuniary gain.

p. The victim was pregnant.

q. The victim was severely handicapped or severely disabled.

r. The victim was 62 years of age or older.

s. The victim was a child 14 years of age or younger, and the murder was committed by an individual who is at least 4 years older than the victim.

t. At the time of the killing, the victim was or had been a nongovernmental informant or had otherwise provided any investigative, law enforcement or police agency with information concerning criminal activity, and the killing was in retaliation for the victim's activities as a nongovernmental

informant or in providing information concerning criminal activity to an investigative, law enforcement or police agency.

u. The murder was premeditated and the result of substantial planning. Such planning must be as to the commission of the murder itself and not simply as to the commission or attempted commission of any underlying felony.

v. The murder was committed for the purpose of interfering with the victim's free exercise or enjoyment of any right, privilege or immunity protected by the First Amendment to the United States Constitution, or because the victim has exercised or enjoyed said rights, or because of the victim's race, religion, color, disability, national origin or ancestry.

(2) In any case where the defendant has been convicted of murder in the first degree in violation of any provision of § 636(a)(2)-(7) of this title, that conviction shall establish the existence of a statutory aggravating circumstance and the jury, or judge where appropriate, shall be so instructed. This ...

NOTES:

CROSS REFERENCES. --As to murder in the first degree, see § 636 of this title.

REVISOR'S NOTE. --Although § 2 of 73 Del. Laws, c. 423 only indicated that "Section 4209(c)(3)b." be amended, ...

NOTES:

...people of this State, speaking through their chosen representatives in the General Assembly. State v. Dickerson, Del. Supr., 298 A.2d 761 (1972).

DELAWARE RETAINS THE DEATH PENALTY ONLY FOR MURDER IN THE FIRST DEGREE. State v. White, Del. Supr., 395 A.2d 1082 (1978).

DEATH PENALTY FOR FELONY MURDER PROPER. --Use of felony-murder to establish both a defendant's eligibility for death, and the aggravating circumstance warranting its imposition, is an approved procedure. Deputy v. Taylor, 19 F.3d 1485 (3d Cir.), cert. denied, 512 ...

...d) of this section is not violative of the Fifth and Fourteenth Amendments of the United States Constitution and Del. Const., art. I, § 7, in that it fails to provide punishment for persons convicted of first-degree murder when the jury (or judge where appropriate) can find a statutory aggravating circumstance beyond a reasonable doubt but fails to recommend death or vice versa. State v. White, Del. Supr., 395 ...

...SENTENCE OF ALLEGEDLY RETARDED DEFENDANT UPHeld. --The defendant's death sentence did not constitute cruel and unusual punishment although the Superior Court failed to give a specific jury instruction concerning the defendant's alleged mental retardation as a mitigating circumstance, when the defendant had presented evidence sufficient to support such an instruction. Sullivan v. State, Del. Supr., 636 A.2d 931, cert. denied, 513 U.S. 833, 115 S. ...
...Ct., 708 A.2d 994 (1996).

USE OF TERM "DEFENSELESS" HELD DESCRIPTIVE, NOT INVALID AGGRAVATING CIRCUMSTANCE. --In a reference by the prosecutor in closing argument in a murder trial that the shopkeeper-victim was "defenseless" when the second fatal shot was fired, the term "defenseless" was held used as a descriptive term and not as an unconstitutionally vague statutory aggravating circumstance. Riley v. State, Del. ...

...MEANING OF "LIFE IMPRISONMENT WITHOUT BENEFIT OF PAROLE." --"Life imprisonment without benefit of parole" under former subsection (a) of this section meant confinement for the balance of the life of the person convicted of first-degree murder. State v. Spence, Del. Supr., 367 A.2d 983 (1976).

SAME JURY FOR GUILT AND PUNISHMENT PHASES IS CONSTITUTIONAL. --Delaware practice permitting the same jury to determine guilt in ...
...F.3d 736 (3d Cir. 1995), cert. denied, 516 U.S. 1088, 116 S. Ct. 807, 133 L. Ed. 2d 754 (1996).

TELLING PROSPECTIVE JURORS THAT PARTICULAR MURDER CASE WAS NONCAPITAL NOT REVERSIBLE ERROR. --Generally, a jury should not be permitted to speculate as to the postconviction consequences of a verdict, but it was not reversible error to tell prospective jurors that a particular first-degree murder case was noncapital. Dutton v. State, Del. Supr., 452 A.2d 127 (1982).

SUPPLEMENTAL INSTRUCTION TO DEADLOCKED JURY IS REVERSIBLE ERROR. --It is reversible error for a trial judge to give ...
...Del. Super. Ct., 708 A.2d 994 (1996).

STATUTORY AGGRAVATING CIRCUMSTANCES SHOWN. --Where the court found a factual basis for a plea of guilty but mentally ill to two murders committed by the defendant, the murder of two persons was an enumerated statutory aggravating circumstance and the defendant's plea established this statutory aggravating circumstance as a matter of law. State v. Cohen, Del. Super. Ct., 634 A.2d 380 (...
...15th birthday when murdered. State v. Demby, Del. Supr., 672 A.2d 59 (1996).

STATUTORY AGGRAVATING CIRCUMSTANCES SHOWN. --Death penalty was imposed on two defendants convicted of a double murder where: both victims were shot in the back of the head; both defendants had murdered before; the jury recommended death; and the trial court found, after weighing both the aggravating and mitigating circumstances as to each defendant, that the aggravating ...
...denied, 513 U.S. 1048, 115 S. Ct. 646, 130 L. Ed. 2d 551 (1994).

Although there was no evidence that the defendant had any intention of hurting any of the children whose deaths were the very basis of the first degree murder convictions, the reckless indifference to human life evidenced by the defendant's actions were sufficient to impose the death penalty. Lawrie v. State, Del. Supr., 643 A.2d 1336, cert. denied, 513 ...

...ESTABLISH AGGRAVATING CIRCUMSTANCES. --Evidence supported Superior Court judge's finding that the State had established beyond a reasonable doubt, the existence of at least one statutory aggravating circumstance with respect to each of defendant's convictions of murder in the first degree. Pennell v. State, Del. Supr., 604 A.2d 1368 (1992).

Where defendant was convicted of murder in the course of committing the felony of robbery, the statutory aggravating circumstance in subdivision (e)(1)j of this section was established by the jury's finding in the guilt phase. Wright v. State, Del. Supr., 633 A.2d 329 (1993).

NONSTATUTORY AGGRAVATING CIRCUMSTANCES. --An unprovoked, cold-blooded murder of a person who was defenseless, solely for pecuniary gain, was a nonstatutory aggravating circumstance. Wright v. State, Del. Supr., 633 A.2d 329 (1993).

The admitted shooting of a young ...
...672 A.2d 1004 (1996).

Where defendant's case reflected the existence of four statutory aggravating circumstances and significant non-statutory aggravating circumstances, and

defendant committed an unprovoked cold-blooded, execution-style murder of a defenseless person, his death sentence was not comparatively disproportionate. *Stevenson v. State*, Del. Supr., 709 A.2d 619 (1998), cert. denied, 525 U.S. 967, 119 S. Ct. 414, 142 L. Ed. 2d 337 (1998).

Defendant's death sentence held proportional to sentences imposed in other first degree murder cases that resulted in the death penalty. *Steckel v. State*, Del. Supr., 711 A.2d 5 (1998).

The court did not impose a death sentence either arbitrarily or capriciously where both ...

...A.2d 1025 (2001).

DEATH SENTENCE CONVERTED TO LIFE IN PRISON. --Upon remand for a new penalty hearing for two of three defendants convicted of felony first degree murder, the exclusion of a certain previously-considered statement resulted in the trial court no longer being able to say beyond a reasonable doubt what degree of culpability to assign to each of three defendants ...

...stay defendant's execution in derogation of the defendant's express directions to the contrary. *Red Dog v. State*, Del. Supr., 620 A.2d 848 (1993).

PROSECUTOR'S PASSING COMMENT TO JURY IN MURDER TRIAL THAT ITS DECISION WOULD BE "AUTOMATICALLY REVIEWED" was fairly made in the context of the prosecutor's preceding reference to the "specific statute [controlling] a penalty hearing on a capital case"; the remark in no way suggested that ...

...imprisonment. *State v. Wright*, Del. Super. Ct., 653 A.2d 288 (1994).

DUAL USE OF FELONY TO ELEVATE OFFENSE AND AS AGGRAVATING CIRCUMSTANCE. --Reliance on an underlying felony in a felony murder conviction to establish a statutory aggravating circumstance does not render Delaware's system of sentencing so unprincipled and arbitrary that it violates the U.S.

Constitution's Eighth Amendment. *Riley v. Snyder*, 840 F. Supp. 1012 (...
...*Riley v. Taylor*, 62 F.3d 86 (3d Cir. 1995).

Dual use of the underlying felony of robbery in the first degree both (1) to "elevate" an offense from a reckless killing (murder in the second degree under § 635 of this title) to a first-degree felony-murder offense in violation of § 636(a)(2) of this title, and (2) as an "aggravating circumstance" (murder committed in the course of robbery) to permit imposition of the death penalty under subsection (e)(1)j. of this section is not constitutionally prohibited as placing the defendant in double jeopardy and subjecting the defendant to cruel and ...

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*** CURRENT THROUGH DECEMBER 2001 ***
*** (2001 REGULAR SESSION OF THE 141ST GENERAL ASSEMBLY) ***
*** ANNOTATIONS CURRENT THROUGH SEPTEMBER 2002 ***

TITLE 11. CRIMES AND CRIMINAL PROCEDURE
PART I. DELAWARE CRIMINAL CODE
CHAPTER 4. DEFENSES TO CRIMINAL LIABILITY

◆ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

11 Del. C. § 401 (2001)

§ 401. Mental illness or psychiatric disorder

(a) In any prosecution for an offense, it is an affirmative defense that, at the time of the conduct charged, as a result of mental illness or mental defect, the accused lacked substantial capacity to appreciate the wrongfulness of the accused's conduct. If the defendant prevails in establishing the affirmative defense provided in this subsection, the trier of fact shall return a verdict of "not guilty by reason of insanity."

(b) Where the trier of fact determines that, at the time of the conduct charged, a defendant suffered from a psychiatric disorder which substantially disturbed such person's thinking, feeling or behavior and/or that such psychiatric disorder left such person with insufficient willpower to choose whether the person would do the act or refrain from doing it, although physically capable, the trier of fact shall return a verdict of "guilty, but mentally ill."

(c) It shall not be a defense under this section if the alleged insanity or mental illness was proximately caused by the voluntary ingestion, inhalation or injection of intoxicating liquor, any drug or other mentally debilitating substance, or any combination thereof, unless such substance was prescribed for the defendant by a licensed health care practitioner and was used in accordance with the directions of such prescription. As used in this chapter, the terms "insanity" or "mental illness" do not include an abnormality manifested only by repeated criminal or other nonsocial conduct.

HISTORY: 11 Del. C. 1953, § 401; 58 Del. Laws, c. 497, § 1; 63 Del. Laws, c. 328, § 1; 70 Del. Laws, c. 186, § 1.

NOTES:

CROSS REFERENCES. --As to criminally mentally ill persons, see §§ 5151 to 5154 of Title 16. As to Interstate Compact on the Mentally Disordered Offender, see Chapter 52 of Title 16.

REVISOR'S NOTE. --Section 4 of 63 Del. Laws, c. 328, provides: "In the event the provisions of this act conflict with any other act or statute relating to admissions to

the Delaware State Hospital or to the institutional treatment of mental illness, this act shall take precedence."

CONSTRUCTION. --The issue of how to reconcile a discrepancy between the language of subsection (b) of this section and prior interpretations of that language posed a legal question that was subject to de novo review. Aizupitis v. State, Del. Supr., 699 A.2d 1092 (1997).

DUE PROCESS. --This section is not in conflict with the due process clause. Rivera v. State, Del. Supr., 351 A.2d 561, appeal dismissed, 429 U.S. 877, 97 S. Ct. 226, 50 L. Ed. 2d 160 (1976).

TREATMENT AND PUNISHMENT OF MENTALLY ILL ENVISIONED. --This section and § 408 of this title reflect a legislative judgment that an individual whose willpower was undermined by disease should receive both treatment and punishment -- treatment because the person is ill and punishment because the person might, in theory at least, have resisted the urge to commit the crime of which the person has been convicted. Sanders v. State, Del. Supr., 585 A.2d 117 (1990).

THE DISTINCTION BETWEEN "NOT GUILTY BY REASON OF INSANITY" AND "GUILTY, BUT MENTALLY ILL" lies in the degree of mental impairment. "Not guilty by reason of insanity" requires the mental impairment be so severe as to render the defendant unable to distinguish right from wrong. Collingwood v. State, Del. Supr., 594 A.2d 502 (1991).

PURPOSE OF "GUILTY BUT MENTALLY ILL" VERDICT. --Delaware established the plea and verdict of "guilty but mentally ill" to govern defendants who are not legally insane but who nevertheless suffer from mental illness. Aizupitis v. State, Del. Supr., 699 A.2d 1092 (1997).

THE VOLITIONAL TEST HAS BEEN ELIMINATED AS AN ABSOLUTE DEFENSE and defendants who would have been acquitted under the prior statute must now be found "guilty, but mentally ill." Sanders v. State, Del. Supr., 585 A.2d 117 (1990).

THE VOLUNTARY ACT REQUIREMENT IS CONCEPTUALLY DISTINCT FROM THE INSANITY DEFENSE. --Broadly speaking, § 242 of this title goes to actus reus, while this section goes to mens rea. Sanders v. State, Del. Supr., 585 A.2d 117 (1990).

Since it was clear that defendant found guilty but mentally ill could not have been acquitted under § 242 of this title, there was no error in the trial court's decision not to instruct the jury on the definition of a voluntary act. Sanders v. State, Del. Supr., 585 A.2d 117 (1990).

ANY SIGNIFICANT VOLITIONAL IMPAIRMENT IS INCLUDED WITHIN THE SCOPE OF SUBSECTION (B), which thus eliminates the need for expert witnesses to make implausible distinctions between an absolute and partial impairment. Sanders v. State, Del. Supr., 585 A.2d 117 (1990).

THE DEFENSE MUST SERVE NOTICE OF THE INSANITY DEFENSE AND TENDER EVIDENCE of insanity at trial. United States ex rel. Parson v. Anderson, 481 F.2d 94 (3d Cir.), cert. denied, 414 U.S. 1072, 94 S. Ct. 586, 38 L. Ed. 2d 479 (1973).

ABSENT SUCH NOTICE AND EVIDENCE THE DEFENDANT IS PRESUMED SANE. United States ex rel. Parson v. Anderson, 481 F.2d 94 (3d Cir.), cert. denied, 414 U.S.

1072, 94 S. Ct. 586, 38 L. Ed. 2d 479 (1973).

VERDICT OF GUILTY, BUT MENTALLY ILL NOT LIMITED TO SITUATIONS WHERE DEFENDANT FILES MOTION FOR SUCH A DETERMINATION. --General Assembly considered and rejected the concept of limiting the verdict of guilty but mentally ill to only those situations where the defendant filed a motion for determination of "guilty, but mentally ill." Daniels v. State, Del. Supr., 538 A.2d 1104 (1988).

BASES FOR "GUILTY BUT MENTALLY ILL" VERDICT. --There are three bases for a "guilty but mentally ill" verdict that follow from the "and/or" language of subsection (b) of this section: (1) where a defendant suffered from a psychiatric disorder that substantially disturbed such person's thinking, feeling or behavior; (2) where a defendant suffered from an ongoing psychiatric disorder that substantially disturbed such person's thinking, feeling or behavior and such psychiatric disorder left such person with insufficient willpower to choose whether to do the act or refrain from doing it; and (3) where a psychiatric disorder left such person with insufficient willpower to choose whether the person would do the act or refrain from doing it. Aizupitis v. State, Del. Supr., 699 A.2d 1092 (1997).

TRIAL COURT'S FAILURE TO INSTRUCT JURY ON THE VERDICT OF GUILTY BUT MENTALLY ILL. --The trial court's failure, sua sponte, to instruct the jury on the verdict of guilty but mentally ill did not affect substantial rights of the defendant where the evidence presented in the case did not support such an instruction. Stansbury v. State, Del. Supr., 591 A.2d 188 (1991), cert. denied, 513 U.S. 882, 115 S. Ct. 217, 130 L. Ed. 2d 145 (1994).

WHEN "GUILTY BUT MENTALLY ILL" VERDICT APPROPRIATE. --Separate from the irresistible impulse test, the "guilty but mentally ill" verdict is also appropriate where a defendant has any psychiatric disorder that substantially disturbs such person's thinking, feeling or behavior yet does not rise to the level of insanity. Aizupitis v. State, Del. Supr., 699 A.2d 1092 (1997).

Subsection (b) of this section allows for a finding of "guilty but mentally ill" in any one of three scenarios: (1) that the defendant suffered from a psychiatric disorder that substantially disturbed the thinking, feeling or behavior; (2) that the defendant suffered from a psychiatric disorder that left defendant with insufficient willpower to choose whether to do the act or refrain from doing the act although physically capable of refraining from doing it; and (3) that the defendant suffered from a psychiatric disorder that substantially disturbed defendant's thinking, feeling or behavior and that left defendant with insufficient willpower to choose whether to do the act or refrain from doing it although physically capable of refraining from doing the act. State v. Aizupitis, Del. Super. Ct., 699 A.2d 1098 (1996), aff'd, Del. Supr., 699 A.2d 1092 (1996).

PROOF OF INSANITY WILL RELIEVE THE PRISONER FROM CRIMINAL RESPONSIBILITY. In every case where insanity is set up as a defense, it must be proved affirmatively, to the satisfaction of the jury, and not be left to conjecture and surmise. State v. Harrigan, 14 Del. 369, 31 A. 1052 (1881).

If the prisoner was insane at the time of the commission of the homicide, that will be sufficient to acquit the defendant of the crime, without considering any other matter of defense which has been presented in the defendant's behalf. If the existence of insanity has been proved, the prisoner will be entitled to an acquittal on that ground. State v. Harrigan, 14 Del. 369, 31 A. 1052 (1881).

EMOTIONAL FRENZY DOES NOT, OF ITSELF, CONSTITUTE INSANITY. --A frenzy introduced by mere passion or other overwhelming emotion not growing out of a mental disease does not, of itself, constitute insanity. Ruffin v. State, 50 Del. 83, 123 A.2d 461 (1956).

BURDEN OF PROOF. --Insanity being a matter of defense, the burden of showing it is upon the defendant. State v. Jack, 20 Del. 470, 58 A. 833 (1903).

There is a presumption that the defendant knew the consequences of the act and was sane at the time of its commission, and the burden is upon the defendant to prove the contrary. Longoria v. State, 53 Del. 311, 168 A.2d 695, cert. denied, 368 U.S. 10, 82 S. Ct. 18, 7 L. Ed. 2d 18 (1961).

Upon the plea of mental illness as a defense in a criminal case, the defendant has the burden of proving mental illness to the satisfaction of the jury by a preponderance of the evidence; acquittal on the ground of mental illness may not result from reasonable doubt of mental condition, as in some jurisdictions, but only from a specific adjudication by the jury of mental illness at the time of the offense. Mills v. State, Del. Supr., 256 A.2d 752 (1969).

A state statute forcing the defendant to carry the burden of proof in asserting an insanity defense does not run afoul of the federal Constitution. United States ex rel. Hand v. Redman, 416 F. Supp. 1109 (D. Del. 1976).

Requiring defendant to prove insanity does not constitute a veiled effort to shift the State's traditional burden of proof of the essential elements of an offense. United States ex rel. Hand v. Redman, 416 F. Supp. 1109 (D. Del. 1976).

COLLATERAL ESTOPPEL --A finding by a jury that a criminal defendant had the requisite intent to commit a criminal act forecloses parties attempting to recover civilly from arguing that defendant was insane while committing the acts under the principle of collateral estoppel. Nationwide Mut. Ins. Co. v. Flagg, Del. Super. Ct., 789 A.2d 586 (2001).

IN A CASE WHERE THE INSANITY DEFENSE WAS ADVERTENTLY NOT ASSERTED OR ATTEMPTED, the State is not obligated to prove the defendant's sanity in the first instance. United States ex rel. Parson v. Anderson, 481 F.2d 94 (3d Cir.), cert. denied, 414 U.S. 1072, 94 S. Ct. 586, 38 L. Ed. 2d 479 (1973).

SANITY AT TIME OF OFFENSES CHARGED IS RELEVANT. --Under this section, a jury has for decision the issue of a defendant's sanity at the time of the offenses charged in the indictment and not the defendant's sanity at the time of prior offenses. Taylor v. State, Del. Supr., 402 A.2d 373 (1979).

DIMINISHED RESPONSIBILITY MAY NOT BE INVOKED. --Until established by the General Assembly as a provision collateral to the statutes governing insanity and extreme emotional distress, the doctrine of diminished responsibility may not be invoked in this State. Bates v. State, Del. Supr., 386 A.2d 1139 (1978).

ACQUITTAL COLLATERALLY ESTOPPED STATE FROM RELITIGATION. --Where a rational jury could not have reached a verdict of not guilty by reason of mental illness without determining that the petitioner was mentally ill during the entire series of actions comprising the crimes charged in the 2 proceedings, acquittal in the first trial collaterally estopped the State from relitigating the issue of the defendant's sanity. United States ex rel. Taylor v. Redman, 500 F. Supp. 453 (D. Del. 1980).

GUILTY BUT MENTALLY ILL INSTRUCTION REQUIRED WHERE WARRANTED BY THE EVIDENCE. --Where warranted by the evidence, guilty but mentally ill instruction is required regardless of a defendant's desire to avoid it. Daniels v. State, Del. Supr., 538 A.2d 1104 (1988).

SCOPE OF COURT'S DUTY IN INSTRUCTING JURY. --In the absence of any manifestation of mental impairment, the court is not required to probe to determine if the jury understands the differences between the verdicts of "not guilty by reason of insanity" and "guilty, but mentally ill." Such a function is served by the full instruction on the law given the jury prior to deliberations. Collingwood v. State, Del. Supr., 594 A.2d 502 (1991).

INSTRUCTIONS PROPERLY DISTINGUISHED EMOTIONAL DISTRESS FROM MENTAL ILLNESS OR DEFECT. --Jury instructions properly demonstrated that the defense of extreme emotional distress was separate and apart from the defense of mental illness or mental defect. Ross v. State, Del. Supr., 482 A.2d 727 (1984), cert. denied, 469 U.S. 1194, 105 S. Ct. 973, 83 L. Ed. 2d 976 (1985).

INSTRUCTIONS IN CAPITAL CASE CONCERNING MITIGATING EFFECT OF VERDICT. -
-In order for the constitutionality of the guilty but mentally ill statute to be upheld, it is essential that the judge instructing the jury in the punishment phase of a capital case advise the jury concerning the mitigating effect of a finding of guilty but mentally ill, as contrasted with the findings implicit in an ordinary guilty verdict. Sanders v. State, Del. Supr., 585 A.2d 117 (1990).

In the punishment phase in a capital case, the jury must be instructed that this section and § 402 of this title reflect a legislative judgment that an individual found guilty but mentally ill should receive both treatment and punishment, although such consideration would not preclude the imposition of the death penalty if the aggravating circumstance(s) already determined to exist outweighed the mitigating effect of the defendant's mental illness; to assure that the jury has focused specifically on the effect of its guilty but mentally ill verdict in the penalty determination, it should be required to answer a specific interrogatory as to whether it finds the impairment of volitional capacity to be a mitigating circumstance. Sanders v. State, Del. Supr., 585 A.2d 117 (1990).

Where defendant was sentenced to death, the jury's verdict of "guilty, but mentally ill" established a mitigating factor as a matter of law and the failure of the trial court to instruct the jury to that effect was plain error. Sanders v. State, Del. Supr., 585 A.2d 117 (1990).

ATTEMPTED COMBINATION OF ALCOHOL AND LOW INTELLECT TO CONSTITUTE AN EFFECTIVE DEFENSE is more closely akin to diminished responsibility than it is to mental illness. Gray v. State, Del. Supr., 441 A.2d 209 (1981).

PROSECUTOR'S USE OF WORD "INSANITY" IN CROSS-EXAMINATION OF PSYCHIATRIST HELD NOT PREJUDICIAL. --While it would have been preferable for the prosecution not to frame its cross-examination of a psychiatrist testifying for defendant in terms of sanity or insanity, no reversible error resulted from the court's declining to order the prosecution to rephrase its questions to delete the use of the word "insanity" where the focus of the cross-examination was clearly on defendant's mental status and where the jury was properly instructed that insanity only had a meaning within the statutory terms of this section and § 402 of this title. Ross v. State, Del. Supr., 482 A.2d 727 (1984), cert. denied, 469 U.S. 1194, 105 S. Ct. 973, 83 L. Ed. 2d 976 (1985).

DENIAL OF BIFURCATED TRIAL OF ISSUE OF MENTAL ILLNESS NOT ABUSE OF DISCRETION. --See Garrett v. State, Del. Supr., 320 A.2d 745 (1974).

Where jury instructions properly explicated the basis for an acquittal on the ground of mental illness or defect, which was the defense in issue, the additional instructions on general criminal liability, based on §§ 242 and 243 of this title and requested by defendant, would have been cumulative, adding nothing to the jury's deliberative process, and, therefore, the trial court's refusal to so instruct was not a denial of defendant's rights of due process and fair trial. Wright v. State, Del. Supr., 374 A.2d 824 (1977).

JURY WITHOUT JURISDICTION TO DETERMINE SANITY. --Since a jury is without jurisdiction, under Super. Ct. Crim. R. 18, to determine a defendant's sanity under this section in relation to events in another county when the indictment pertains only to offenses committed in the county where the jury sits, any incidental determination in such a matter is not conclusive in a subsequent action brought to determine the matter directly. Taylor v. State, Del. Supr., 402 A.2d 373 (1979).

EVIDENCE WAS SUFFICIENT TO WARRANT AN INSTRUCTION TO THE JURY ABOUT THE POSSIBILITY OF RENDERING A VERDICT OF GUILTY BUT MENTALLY ILL. Daniels v. State, Del. Supr., 538 A.2d 1104 (1988).

VERDICT. --A jury's verdict of "guilty but mentally ill" need not be unanimous as to a specific subtype as set forth in subsection (b) of this section, so long as the jury was in general agreement that the defendant was guilty but mentally ill. State v. Aizupitis, Del. Super. Ct., 699 A.2d 1098 (1996), aff'd, Del. Supr., 699 A.2d 1092 (1996).

"GUILTY BUT MENTALLY ILL" ESTABLISHED. --The elements for a finding of "guilty but mentally ill" were established through expert testimony that (1) the defendant suffered from a psychiatric disorder, and (2) the psychiatric disorder substantially disturbed the defendant's behavior. State v. Aizupitis, Del. Super. Ct., 699 A.2d 1098 (1996), aff'd, Del. Supr., 699 A.2d 1092 (1996).

NOTES APPLICABLE TO ENTIRE TITLE

CROSS REFERENCES. --As to Department of Public Safety, see Chapter 82 of Title 29. As to Council on Police Training, see § 8205 of Title 29.

TITLE 11

Crimes and Criminal Procedure

PART I

Delaware Criminal Code

CHAPTER 4. DEFENSES TO CRIMINAL LIABILITY

§ 401. Mental illness or psychiatric disorder.

(a) In any prosecution for an offense, it is an affirmative defense that, at the time of the conduct charged, as a result of mental illness or mental defect, the accused lacked substantial capacity to appreciate the wrongfulness of the accused's conduct. If the defendant prevails in establishing the affirmative defense provided in this subsection, the trier of fact shall return a verdict of "not guilty by reason of insanity."

(b) Where the trier of fact determines that, at the time of the conduct charged, a defendant suffered from a psychiatric disorder which substantially disturbed such person's thinking, feeling or behavior and/or that such psychiatric disorder left such person with insufficient willpower to choose whether the person would do the act or refrain from doing it, although physically capable, the trier of fact shall return a verdict of "guilty, but mentally ill."

(c) It shall not be a defense under this section if the alleged insanity or mental illness was proximately caused by the voluntary ingestion, inhalation or injection of intoxicating liquor, any drug or other mentally debilitating substance, or any combination thereof, unless such substance was prescribed for the defendant by a licensed health care practitioner and was used in accordance with the directions of such prescription. As used in this chapter, the terms "insanity" or "mental illness" do not include an abnormality manifested only by repeated criminal or other nonsocial conduct. (*11 Del. C. 1953, § 401; 58 Del. Laws, c. 497, § 1; 63 Del. Laws, c. 328, § 1; 70 Del. Laws, c. 186, § 1.*)

§ 402. Rules to prescribe procedures for psychiatric examination; testimony of psychiatrist or other expert.

(a) The procedures for examination of the accused by the accused's own psychiatrist or by a psychiatrist employed by the State and the circumstances under which such an examination will be permitted may be prescribed by rules of the court having jurisdiction over the offense.

(b) A psychiatrist or other expert testifying at trial concerning the mental condition of the accused shall be permitted to make a statement as to the nature of the examination, the psychiatrist's or expert's diagnosis of the mental condition of the accused at the time of the commission of the offense charged and the psychiatrist's or expert's opinion as to the extent, if any, to which the capacity of the accused to appreciate the wrongfulness of the accused's conduct or to choose whether the accused would do the act or refrain from doing it or to have a particular state of mind which is an element of the offense charged was impaired as a result of mental illness or mental defect at that time. The psychiatrist or expert shall be permitted to make any explanation reasonably serving to clarify the diagnosis and opinion and may be cross-examined as to any matter bearing on the psychiatrist's or expert's competence or credibility or the validity of the diagnosis or opinion. (*11 Del. C. 1953, § 402; 58 Del. Laws, c. 497, § 1; 70 Del. Laws, c. 186, § 1.*)

§ 403. Verdict of "not guilty by reason of insanity"; commitment to Delaware Psychiatric Center of persons no longer endangering the public safety; periodic review of commitments to Delaware Psychiatric Center; participation of patient in treatment program.

(a) Upon the rendition of a verdict of "not guilty by reason of insanity," the court shall, upon motion of the Attorney General, order that the person so acquitted shall forthwith be committed to the Delaware Psychiatric Center.

(b) Except as provided in subsection (c) below, a person committed, confined or transferred to the Delaware Psychiatric Center in accordance with subsection (a) of this section, § 404, § 405, § 406 or § 408 of this title (referred to herein as "the patient") shall be kept there at all times in a secured building until the Superior Court of the county wherein the case would be tried or was tried is satisfied that the public safety will not be endangered by the patient's release. The Superior Court shall

without special motion reconsider the necessity of continued detention of a patient thus committed after the patient has been detained for 1 year. The Court shall thereafter reconsider the patient's detention upon petition on the patient's behalf or whenever advised by the Psychiatric Center that the public safety will not be endangered by the patient's release.

(c)(1) Upon petition by a patient confined pursuant to this section, § 404, § 405, § 406 or § 408 of this title, or upon petition by the Center Director of the Delaware Psychiatric Center, the Court may permit housing in an unsecured building or participation by the patient in any treatment program that is offered by the Center, which requires or provides that the patient be placed outside a secured building. Such participation shall include, but not be limited to, employment off hospital grounds, job interviews, family visits and other activities inside and outside the Center, as may be prescribed by the Medical Director in the interest of rehabilitation.

(2) The petition shall include an affidavit from the Medical Director which states that the patient has not exhibited dangerous behavior during the last year of confinement and that in the opinion of the Medical Director, the patient will benefit from such participation.

(3) The petition shall set forth any specific treatment program being sought; the specific goals and course of treatment involved; and a schedule for periodic judicial reevaluation of the patient's treatment status, all of which shall be subject to the Court's approval and modification.

(4) Copies of the petition shall be served on the Attorney General, the Medical Director and the patient or the patient's counsel or guardian.

(5) There shall be a judicial hearing on the petition, and any person or agency served with a copy of the petition, or a representative of such person or agency, shall have the right to testify, present evidence and/or cross-examine witnesses. The patient shall have the right to be represented by counsel at any proceeding held in accordance with this section. The Court shall appoint counsel for the patient if the patient cannot afford to retain counsel.

(6) Upon conclusion of a hearing on a petition pursuant to this section, the Court may approve, modify or disapprove any request or matter within the petition. If the patient's participation in any treatment program is approved, such approval or participation shall be effective for not longer than 6 months from the date of the judge's signature on the petition or order permitting such participation. Immediately prior to the conclusion of the 6-month period, the Center Director shall report to the Court on the patient's status, and make recommendations. Any authorization by the Court for continued participation by the patient in any authorized treatment programs may be extended, modified or discontinued at the end of the effective period with or without further hearings, as the Court may determine.

(d) Any treatment program approved by the Court under this section may be terminated by the Medical Director of the Delaware Psychiatric Center. When a treatment program is terminated earlier than its court-approved expiration date, the Medical Director shall immediately notify the Superior Court. The Superior Court shall, after giving appropriate notice, hear the matter and review the decision of the Medical Director. At such termination hearing, the patient shall have such rights as are provided for other hearings under this section, including the right to counsel, the right to present evidence and the right to cross-examine witnesses. Where the Medical Director's decision to terminate is based upon the patient's mental or psychological condition, the patient may be examined by an independent psychiatrist or other qualified expert; provided, however, that the termination hearing shall not be held until such examination has been finally concluded. (*11 Del. C. 1953, § 403; 58 Del. Laws, c. 497, § 1; 63 Del. Laws, c. 428, §§ 1-3; 65 Del. Laws, c. 90, §§ 1, 2; 70 Del. Laws, c. 186, § 1; 70 Del. Laws, c. 550, § 1.*)

§ 404. Confinement in Delaware Psychiatric Center of persons too mentally ill to stand trial; requiring State to prove prima facie case in such circumstances; adjustment of sentences.

(a) Whenever the court is satisfied, after hearing, that an accused person, because of mental illness or mental defect, is unable to understand the nature of the proceedings against the accused, or to give evidence in the accused's own defense or to

instruct counsel on the accused's own behalf, the court may order the accused person to be confined and treated in the Delaware Psychiatric Center until the accused person is capable of standing trial. However, upon motion of the defendant, the court may conduct a hearing to determine whether the State can make out a prima facie case against the defendant, and if the State fails to present sufficient evidence to constitute a prima facie case, the court shall dismiss the charge. This dismissal shall have the same effect as a judgment of acquittal.

(b) When the court finds that the defendant is capable of standing trial, the defendant may be tried in the ordinary way, but the court may make any adjustment in the sentence which is required in the interest of justice, including a remission of all or any part of the time spent in the Psychiatric Center. (*11 Del. C. 1953, § 404; 58 Del. Laws, c. 497, § 1; 59 Del. Laws, c. 203, § 3; 70 Del. Laws, c. 186, § 1; 70 Del. Laws, c. 550, § 1.*)

§ 405. Confinement in Delaware Psychiatric Center of persons becoming mentally disabled after conviction but before sentencing; adjustment of sentences.

(a) Whenever the court is satisfied that a prisoner has become mentally ill after conviction but before sentencing so that the prisoner is unable understandingly to participate in the sentencing proceedings, and if the court is satisfied that a sentence of imprisonment may be appropriate, the court may order the prisoner to be confined and treated in the Delaware Psychiatric Center until the prisoner is capable of participating in the sentencing proceedings.

(b) When the court finds that the prisoner is capable of participating in the sentencing proceedings, the prisoner may be sentenced in the ordinary way, but the court may make any adjustment in the sentence which is required in the interest of justice, including a remission of all or any part of the time spent in the Psychiatric Center. (*11 Del. C. 1953, § 405; 58 Del. Laws, c. 497, § 1; 70 Del. Laws, c. 186, § 1; 70 Del. Laws, c. 550, § 1.*)

§ 406. Transfer of convicted persons becoming mentally disabled from prison to Delaware Psychiatric Center; appointment of physicians to conduct inquiry; expenses of transfer.

(a) Whenever in any case it appears to the Superior Court, upon information received from the Department of Health and Social Services, that a prisoner confined with the Department has become mentally ill after conviction and sentence, the Court may appoint 2 reputable practicing physicians to inquire of the mental condition of the prisoner and make report of their finding to the Court within 2 days from the date of their appointment, by writing under their hands and seals. Should the report of the physicians be that the prisoner is mentally ill, the prisoner shall at once be ordered by the Court transferred from the prison facility where the prisoner is confined to the Delaware Psychiatric Center.

(b) The expenses of the removal of such mentally ill person and of admission into such Psychiatric Center and maintenance therein up and until the time the person is discharged by the Court shall be borne by the State. If any such mentally ill person has any real or personal estate, the Department of Health and Social Services shall have for the expenses and charges so incurred the same remedy as is provided in § 5127 of Title 16. (*11 Del. C. 1953, § 406; 58 Del. Laws, c. 497, § 1; 70 Del. Laws, c. 186, § 1; 70 Del. Laws, c. 550, § 1.*)

§ 407. >Reserved. |.

§ 408. Verdict of "guilty, but mentally ill" -- Sentence; confinement; discharge from treating facility.

(a) Where a defendant's defense is based upon allegations which, if true, would be grounds for a verdict of "guilty, but mentally ill" or the defendant desires to enter a plea to that effect, no finding of "guilty, but mentally ill" shall be rendered until the trier of fact has examined all appropriate reports (including the presentence investigation); has held a hearing on the sole issue of the defendant's mental illness, at which either party may present evidence; and is satisfied that the defendant was in fact mentally ill at the time of the offense to which the plea is entered. Where the trier of fact, after such hearing, is not satisfied that the defendant was mentally ill at the time of the offense, or determines that the facts do not support a "guilty, but mentally ill" plea, the trier of fact shall strike such plea, or permit such plea to be withdrawn by the defendant. A defendant whose plea is not accepted by the trier of fact shall be entitled to a jury trial, except that if a defendant

subsequently waives the right to a jury trial, the judge who presided at the hearing on mental illness shall not preside at the trial.

(b) In a trial under this section a defendant found guilty but mentally ill, or whose plea to that effect is accepted, may have any sentence imposed which may lawfully be imposed upon any defendant for the same offense. Such defendant shall be committed into the custody of the Department of Correction, and shall undergo such further evaluation and be given such immediate and temporary treatment as is psychiatrically indicated. The Commissioner shall retain exclusive jurisdiction over such person in all matters relating to security. The Commissioner shall thereupon confine such person in the Delaware Psychiatric Center. Although such person shall remain under the jurisdiction of the Department of Correction, decisions directly related to treatment for the mental illness shall be the joint responsibility of the Director of the Division of Substance Abuse and Mental Health and those persons at the Delaware Psychiatric Center who are directly responsible for such treatment. The Delaware Psychiatric Center, or any other residential treatment facility to which the defendant is committed by the Commissioner, shall have the authority to discharge the defendant from the facility and return the defendant to the physical custody of the Commissioner whenever the facility believes that such a discharge is in the best interests of the defendant. The offender may, by written statement, refuse to take any drugs which are prescribed for treatment of the offender's mental illness; except when such a refusal will endanger the life of the offender, or the lives or property of other persons with whom the offender has contact.

(c) When the Psychiatric Center or other treating facility designated by the Commissioner discharges an offender prior to the expiration of such person's sentence, the treating facility shall transmit to the Commissioner and to the Parole Board a report on the condition of the offender which contains the clinical facts; the diagnosis; the course of treatment, and prognosis for the remission of symptoms; the potential for the recidivism, and for danger to the offender's own person or the public; and recommendations for future treatment. Where an offender under this section is sentenced to the Psychiatric Center or other facility, the offender shall not be eligible for any privileges not permitted in writing by the Commissioner

(including escorted or unescorted on-grounds or off-grounds privileges) until the offender has become eligible for parole. Where the court finds that the offender, before completing the sentence, no longer needs nor could benefit from treatment for the offender's mental illness, the offender shall be remanded to the Department of Correction. The offender shall have credited toward the sentence the time served at the Psychiatric Center or other facility. (63 Del. Laws, c. 328, § 2; 64 Del. Laws, c. 467, § 8; 70 Del. Laws, c. 186, § 1; 70 Del. Laws, c. 550, § 1; 73 Del. Laws, c. 41, § 1.)

§ 409. Same -- Parole; probation.

(a) A person who has been adjudged "guilty, but mentally ill" and who during incarceration is discharged from treatment may be placed on prerelease or parole status under the same terms and laws applicable to any other offender. Psychological or psychiatric counseling and treatment may be required as a condition for such status. Failure to continue treatment, except by agreement of the Department of Correction, shall be a basis for terminating prerelease status or instituting parole violation hearings.

(b) If the report of the Delaware Psychiatric Center or other facility recommends parole, the paroling authority shall within 45 days or at the expiration of the offender's minimum sentence, whichever is later, meet to consider the offender's request for parole. If the report does not recommend parole, but other laws or administrative rules of the Department permit parole, the paroling authority may meet to consider a parole request. When the paroling authority considers the offender for parole, it shall consult with the State Hospital or other facility at which the offender had been treated, or from which the offender has been discharged.

(c) If an offender who has been found "guilty, but mentally ill" is placed on probation, the court, upon recommendation by the Attorney General, shall make treatment a condition of probation. Reports as specified by the trial judge shall be filed with the probation officer, and the sentencing court. Treatment shall be provided by an agency of the State or, with the approval of the sentencing court and at individual expense, private agencies, private physicians or other mental health

personnel. (63 Del. Laws, c. 328, § 2; 70 Del. Laws, c. 186, § 1; 70 Del. Laws, c. 550, § 1.)

§ 222. General definitions.

When used in this Criminal Code:

(1) "Building," in addition to its ordinary meaning, includes any structure, vehicle or watercraft. Where a building consists of 2 or more units separately secured or occupied, each unit shall be deemed a separate building.

(2) "Controlled substance" or "counterfeit substance" shall have the same meaning as used in Chapter 47 of Title 16.

(3) "Conviction" means a verdict of guilty by the trier of fact, whether judge or jury, or a plea of guilty or a plea of nolo contendere accepted by the court.

(4) "Dangerous instrument" means any instrument, article or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or serious physical injury, or any disabling chemical spray, as defined in subdivision (7) of this section.

(5) "Deadly weapon" includes a firearm, as defined in subdivision (10) of this section, a bomb, a knife of any sort (other than an ordinary pocketknife carried in a closed position), switchblade knife, billy, blackjack, bludgeon, metal knuckles, slingshot, razor, bicycle chain or ice pick or any dangerous instrument, as defined in subdivision (4) of this section, which is used, or attempted to be used, to cause death or serious physical injury. For the purpose of this definition, an ordinary pocketknife shall be a folding knife having a blade not more than 3 inches in length.

(6) "Disabling chemical spray" includes mace, tear gas, pepper spray or any other mixture containing quantities thereof, or any other aerosol spray or any liquid, gaseous or solid substance capable of producing temporary physical discomfort, disability or injury through being vaporized or otherwise dispersed in the air, or any cannister, container or device designed or intended to carry, store or disperse such aerosol spray or such gas or solid.

(7) "Defraud" means to acquire a gain or advantage by fraud.

(8) "Drug" means any substance or preparation capable of producing any alteration of the physical, mental or emotional condition of a person.

(9) "Elderly person" means any person who is 62 years of age or older. Thus, the terms "elderly person" and "person who is 62 years of age or older" shall have the same meaning as used in this Code or in any action brought pursuant to this Code.

(10) "Female" means a person of the female sex.

(11) "Firearm" includes any weapon from which a shot, projectile or other object may be discharged by force of combustion, explosive, gas and/or mechanical means, whether operable or inoperable, loaded or unloaded. It does not include a BB gun.

(12) "Fraud" means an intentional perversion, misrepresentation or concealment of truth.

(13) "Law" includes statutes and ordinances. Unless the context otherwise clearly requires, "law" also includes settled principles of the common law of Delaware governing areas other than substantive criminal law.

(14) "Law-enforcement officer" includes police officers, the Attorney General and the Attorney General's deputies, sheriffs and their regular deputies agents of the State Division of Alcoholic Beverage Control, correctional officers, state fire marshals, municipal fire marshals, that are graduates of a Delaware Police Academy which is accredited/authorized by the Council on Police Training, sworn members of the City of Wilmington Fire Department who have graduated from a Delaware Police Academy which is authorized/accredited by the Council on Police Training, environmental protection officers, enforcement agents of the Department of Natural Resources and Environmental Control, and constables.

(15) "Lawful" means in accordance with law or, where the context so requires, not prohibited by law.

(16) "Male" means a person of the male sex.

(17) "Mental defect" means any condition of the brain or nervous system recognized as defective, as compared with an average or normal condition, by a substantial part of the medical profession.

(18) "Mental illness" means any condition of the brain or nervous system recognized as a mental disease by a substantial part of the medical profession.

(19) "Narcotic drug" shall have the same definition as contained in § 4701(24) of Title 16.

(20) 'Oath or affirmation' for the purpose of warrants can be made via videophone, telephone, secure electronic means or in person.

(21) "Person" means a human being who has been born and is alive, and, where appropriate, a public or private corporation, an unincorporated association, a partnership, a government or a governmental instrumentality.

(22) "Physical force" means any application of force upon or toward the body of another person.

(23) "Physical injury" means impairment of physical condition or substantial pain.

(24) "Serious physical injury" means physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health or prolonged loss or impairment of the function of any bodily organ, or which causes the unlawful termination of a pregnancy without the consent of the pregnant female.

(25) "Telephone," in addition to its ordinary meaning, includes any computer (as defined in § 931 of this title) or any other electronic device which is actually used to engage in a wire communication (as defined in § 2701(20) of this title) with any other telephone, computer or electronic device.

(26) "Therapeutic abortion" means an abortion performed pursuant to subchapter IX of Chapter 17 of Title 24.

(27) "Unlawful" means contrary to law or, where the context so requires, not permitted by law. It does not mean wrongful or immoral.

(28) "Vehicle" includes any means in or by which someone travels or something is carried or conveyed or a means of conveyance or transport, whether or not propelled by its own power. (*11 Del. C. 1953, § 222; 58 Del. Laws, c. 497, § 1; 59 Del. Laws, c. 203, § 1; 63 Del. Laws, c. 92, § 1; 64 Del. Laws, c. 17, § 1; 68 Del. Laws, c. 378, §§ 1-3; 69 Del. Laws, c. 24, § 1; 70 Del. Laws, c. 186, § 1; 70 Del. Laws, c. 383, § 1; 71 Del. Laws, c. 374, §§ 1-3; 72 Del. Laws, c. 34, § 8; 72 Del. Laws, c. 43, § 2; 72 Del. Laws, c. 50, § 1; 72 Del. Laws, c. 371, § 1; 72 Del. Laws, c. 379, § 1; 73 Del. Laws, c. 126, § 1, 73 Del. Laws, c. 249, § 1; 73 Del. Laws, c. 413, § 1.*)

11 Del. C. § 404

DELAWARE CODE ANNOTATED
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*** CURRENT THROUGH DECEMBER 2001 ***
*** (2001 REGULAR SESSION OF THE 141ST GENERAL ASSEMBLY) ***
*** ANNOTATIONS CURRENT THROUGH SEPTEMBER 2002 ***

TITLE 11. CRIMES AND CRIMINAL PROCEDURE
PART I. DELAWARE CRIMINAL CODE
CHAPTER 4. DEFENSES TO CRIMINAL LIABILITY

♦ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

11 Del. C. § 404 (2001)

§ 404. Confinement in Delaware Psychiatric Center of persons too mentally ill to stand trial; requiring State to prove prima facie case in such circumstances; adjustment of sentences

(a) Whenever the court is satisfied, after hearing, that an accused person, because of mental illness or mental defect, is unable to understand the nature of the proceedings against the accused, or to give evidence in the accused's own defense or to instruct counsel on the accused's own behalf, the court may order the accused person to be confined and treated in the Delaware Psychiatric Center until the accused person is capable of standing trial. However, upon motion of the defendant, the court may conduct a hearing to determine whether the State can make out a prima facie case against the defendant, and if the State fails to present sufficient evidence to constitute a prima facie case, the court shall dismiss the charge. This dismissal shall have the same effect as a judgment of acquittal.

(b) When the court finds that the defendant is capable of standing trial, the defendant may be tried in the ordinary way, but the court may make any adjustment in the sentence which is required in the interest of justice, including a remission of all or any part of the time spent in the Psychiatric Center.

HISTORY: 11 Del. C. 1953, § 404; 58 Del. Laws, c. 497, § 1; 59 Del. Laws, c. 203, § 3; 70 Del. Laws, c. 186, § 1; 70 Del. Laws, c. 550, § 1.

STANDARD OF THIS SECTION IS SUBSTANTIALLY THE SAME AS FEDERAL STANDARD. McCollum v. Sullivan, 507 F. Supp. 865 (D. Del. 1981).

PROSECUTION MUST PROVE DEFENDANT'S COMPETENCE BY PREPONDERANCE OF EVIDENCE. Diaz v. State, Del. Supr., 508 A.2d 861 (1986).

COMPETENCY TO STAND TRIAL IS A LEGAL, NOT A MEDICAL ISSUE. State v. Shields, Del. Super. Ct., 593 A.2d 986 (1990).

STANDARD FOR LEGAL COMPETENCY. --This section is another way of stating the

test of legal competency, which is: Whether the defendant has sufficient present ability to consult with a lawyer with a reasonable degree of rational understanding, and whether the defendant has a rational as well as factual understanding of the proceedings. State v. Shields, Del. Super. Ct., 593 A.2d 986 (1990).

From a legal standpoint, the competency threshold is quite low. It is neither very demanding nor exacting. The standard by which a defendant's competency is measured is not that of the reasonable person but rather of the average criminal defendant. State v. Shields, Del. Super. Ct., 593 A.2d 986 (1990).

DEFENDANT, THOUGH DISTRACTED, HELD NOT INCOMPETENT AT TIME OF TRIAL. -- See Diaz v. State, Del. Supr., 508 A.2d 861 (1986).

MENTAL DISTURBANCE IS NOT AUTOMATIC INCOMPETENCE. --The fact that defendant may suffer from mental disturbance does not mean that the defendant is incompetent to stand trial. State v. Wynn, Del. Super. Ct., 490 A.2d 605 (1985).

COMBINATION OF DISORDERS INSUFFICIENT FOR AUTOMATIC FINDING OF INCOMPETENCE. --Assuming arguendo that a diagnosis of defendant as suffering from conduct disorder was correct, even in combination with attention-deficit hyperactivity disorder, mild or borderline **mental retardation** and intellectual developmental deficits, it would not be so disabling as to automatically trigger a finding of incompetency to stand trial. State v. Shields, Del. Super. Ct., 593 A.2d 986 (1990).

AMNESIA DOES NOT, OF ITSELF, RENDER DEFENDANT INCOMPETENT. --The fact that defendant suffered amnesia as to the commission of a crime does not, in and of itself, render defendant incompetent to stand trial. United States ex rel. Parson v. Anderson, 481 F.2d 94 (3d Cir.), cert. denied, 414 U.S. 1072, 94 S. Ct. 586, 38 L. Ed. 2d 479 (1973).

AMNESIA MAY AT TIMES MAKE DIFFICULT THE EMPLOYMENT OF AN INSANITY DEFENSE. United States ex rel. Parson v. Anderson, 481 F.2d 94 (3d Cir.), cert. denied, 414 U.S. 1072, 94 S. Ct. 586, 38 L. Ed. 2d 479 (1973).

WHERE THE DEFENSE'S TRIAL STRATEGY DELIBERATELY OMITTED A DEFENSE BASED ON INSANITY, defendant cannot later contend that the defense was unavailable because of the defendant's amnesia. United States ex rel. Parson v. Anderson, 481 F.2d 94 (3d Cir.), cert. denied, 414 U.S. 1072, 94 S. Ct. 586, 38 L. Ed. 2d 479 (1973).

AMNESIA DID NOT MEANINGFULLY AFFECT AVAILABILITY OF REBUTTAL DEFENSE. -- See United States ex rel. Parson v. Anderson, 481 F.2d 94 (3d Cir.), cert. denied, 414 U.S. 1072, 94 S. Ct. 586, 38 L. Ed. 2d 479 (1973).

WHEN RECORD DISCLOSES THAT BONA FIDE DOUBT OF COMPETENCY OF DEFENDANT IS RAISED DURING TRIAL, due process requires the trial court to hold a hearing and make a determination as to the legal competency of the defendant to stand trial. Williams v. State, Del. Supr., 378 A.2d 117 (1977), cert. denied, 436 U.S. 908, 98 S. Ct. 2241, 56 L. Ed. 2d 406 (1978).

USER NOTE: For more generally applicable notes, see notes under the first section of this heading, subchapter, chapter, part or title.

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[.../ TITLE 11. CRIMES AND CRIMINAL PROCEDURE](#) > [PART I. DELAWARE CRIMINAL CODE](#) / ...

[CHAPTER 4. DEFENSES TO CRIMINAL LIABILITY](#) > **§ 404. Confinement in Delaware Psychiatric Center of persons too mentally ill to stand trial; requiring State to prove prima facie case in such circumstances; adjustment of sentences**

Terms: **mental retardation** ([Edit Search](#))

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Date/Time: Wednesday, October 16, 2002 - 4:54 PM EDT

Delaware – Mental Retardation Capital Law

Prior to sentencing but after trial, Court determines “Serious Mental Retardation” in separate hearing. (Separate hearing for punishment is current law in Delaware)

If “Serious Mental Retardation” found – life sentence no parole

If not found, evidence used in weighing of mitigating and aggravating factors by jury to determine sentence

Standard of Proof – Clear and Convincing

Determiner – Court

Definitions based upon -

American Psychological Association and American Association of Mental Retardation


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The 2001 Florida Statutes

Title XLVII

Criminal Procedure And Corrections

Chapter 921

Sentence

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921.137 Imposition of the death sentence upon a mentally retarded defendant prohibited.--

- (1) As used in this section, the term "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Department of Children and Family Services. The term "adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community. The Department of Children and Family Services shall adopt rules to specify the standardized intelligence tests as provided in this subsection.
- (2) A sentence of death may not be imposed upon a defendant convicted of a capital felony if it is determined in accordance with this section that the defendant has mental retardation.
- (3) A defendant charged with a capital felony who intends to raise mental retardation as a bar to the death sentence must give notice of such intention in accordance with the rules of court governing notices of intent to offer expert testimony regarding mental health mitigation during the penalty phase of a capital trial.
- (4) After a defendant who has given notice of his or her intention to raise mental retardation as a bar to the death sentence is convicted of a capital felony and an advisory jury has returned a recommended sentence of death, the defendant may file a motion to determine whether the defendant has mental retardation. Upon receipt of the motion, the court shall appoint two experts in the field of mental retardation who shall evaluate the defendant and report their findings to the court and all interested parties prior to the final sentencing hearing. Notwithstanding s. 921.141 or s. 921.142, the final sentencing hearing shall be held without a jury. At the final sentencing hearing, the court shall consider the findings of the court-appointed experts and consider the findings of any other expert which is offered by the state or the defense on the issue of whether the defendant has mental retardation. If the court finds, by clear and convincing evidence, that the defendant has mental retardation as defined in subsection (1), the court may not impose a sentence of death and shall enter a written order that sets forth with specificity the findings in support of the determination.
- (5) If a defendant waives his or her right to a recommended sentence by an advisory jury following a plea of guilt or nolo contendere to a capital felony and adjudication of guilt by the court, or following a jury finding of guilt of a capital felony, upon acceptance of the waiver by the court, a defendant who has given notice as required in subsection (3) may file a motion for a determination of mental retardation. Upon granting the motion, the court shall proceed as provided in subsection (4).
- (6) If, following a recommendation by an advisory jury that the defendant be sentenced to life imprisonment, the state intends to request the court to order that the defendant be sentenced to

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17-7-131 G

*** CODE SECTION *** 12/03/01

17-7-131.

(a) For purposes of this Code section, the term:

(1) "Insane at the time of the crime" means meeting the criteria of Code Section 16-3-2 or Code Section 16-3-3. However, the term shall not include a mental state manifested only by repeated unlawful or antisocial conduct.

(2) "Mentally ill" means having a disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life. However, the term "mental illness" shall not include a mental state manifested only by repeated unlawful or antisocial conduct.

(3) "Mentally retarded" means having significantly subaverage general intellectual functioning resulting in or associated with impairments in adaptive behavior which manifested during the developmental period.

(b) (1) In all cases in which the defense of insanity is interposed, the jury, or the court if tried by it, shall find whether the defendant is:

(A) Guilty;

(B) Not guilty;

(C) Not guilty by reason of insanity at the time of the crime;

(D) Guilty but mentally ill at the time of the crime, but the finding of guilty but mentally ill shall be made only in felony cases; or

(E) Guilty but mentally retarded, but the finding of mental retardation shall be made only in felony cases.

(2) A plea of guilty but mentally ill at the time of the crime or a plea of guilty but mentally retarded shall not be accepted until the defendant has undergone examination by a licensed psychologist or psychiatrist and the court has examined the psychological or psychiatric reports, held a hearing on the issue of the defendant's mental condition, and is satisfied that there is a factual basis that the defendant was mentally ill at the time of the offense or mentally retarded to which the plea is entered.

(2.1) A plea of not guilty by reason of insanity at the time of the crime shall not be accepted and the defendant adjudicated not guilty by reason of insanity by the court without a jury until the

defendant has undergone examination by a licensed psychologist or psychiatrist and the court has examined the psychological or psychiatric reports, has held a hearing on the issue of the defendant's mental condition, and the court is satisfied that the defendant was insane at the time of the crime according to the criteria of Code Section 16-3-2 or 16-3-3.

(3) In all cases in which the defense of insanity is interposed, the trial judge shall charge the jury, in addition to other appropriate charges, the following:

(A) I charge you that should you find the defendant not guilty by reason of insanity at the time of the crime, the defendant will be committed to a state mental health facility until such time, if ever, that the court is satisfied that he or she should be released pursuant to law.

(B) I charge you that should you find the defendant guilty but mentally ill at the time of the crime, the defendant will be given over to the Department of Corrections or the Department of Human Resources, as the mental condition of the defendant may warrant.

(C) I charge you that should you find the defendant guilty but mentally retarded, the defendant will be given over to the Department of Corrections or the Department of Human Resources, as the mental condition of the defendant may warrant.

(c) In all criminal trials in any of the courts of this state wherein an accused shall contend that he was insane or otherwise mentally incompetent under the law at the time the act or acts charged against him were committed, the trial judge shall instruct the jury that they may consider, in addition to verdicts of "guilty" and "not guilty," the additional verdicts of "not guilty by reason of insanity at the time of the crime," "guilty but mentally ill at the time of the crime," and "guilty but mentally retarded."

(1) The defendant may be found "not guilty by reason of insanity at the time of the crime" if he meets the criteria of Code Section 16-3-2 or 16-3-3 at the time of the commission of the crime. If the court or jury should make such finding, it shall so specify in its verdict.

(2) The defendant may be found "guilty but mentally ill at the time of the crime" if the jury, or court acting as trier of facts, finds beyond a reasonable doubt that the defendant is guilty of the crime charged and was mentally ill at the time of the commission of the crime. If the court or jury should make such finding, it shall so specify in its verdict.

(3) The defendant may be found "guilty but mentally retarded" if the jury, or court acting as trier of facts, finds beyond a reasonable doubt that the defendant is guilty of the crime charged and is mentally retarded. If the court or jury should make such finding, it shall so specify in its verdict.

(d) Whenever a defendant is found not guilty by reason of insanity at the time of the crime, the court shall retain jurisdiction over the person so acquitted and shall order such person to be detained in a state mental health facility, to be selected by the Department of Human Resources, for a period not to exceed 30 days from the date of the acquittal order, for evaluation of the defendant's present mental condition. Upon completion of the evaluation, the proper officials of the mental health facility shall send a report of the defendant's present mental condition to the trial judge, the prosecuting attorney, and the defendant's attorney, if any.

(e) (1) After the expiration of the 30 days' evaluation period in the state mental health facility, if the evaluation report from the Department of Human Resources indicates that the defendant does not meet the inpatient commitment criteria of Chapter 3 of Title 37 or Chapter 4 of Title 37, the trial judge may issue an order discharging the defendant from custody without a hearing.

(2) If the defendant is not so discharged, the trial judge shall order a hearing to determine if the defendant meets the inpatient commitment criteria of Chapter 3 of Title 37 or Chapter 4 of Title 37. If such criteria are not met, the defendant must be discharged.

(3) The defendant shall be detained in custody until completion of the hearing. The hearing shall be conducted at the earliest opportunity after the expiration of the 30 days' evaluation period but in any event within 30 days after receipt by the prosecuting attorney of the evaluation report from the mental health facility. The court may take judicial notice of evidence introduced during the trial of the defendant and may call for testimony from any person with knowledge concerning whether the defendant is currently a mentally ill person in need of involuntary treatment or currently mentally retarded and in need of being ordered to receive services, as those terms are defined by paragraph (12) of Code Section 37-3-1 and Code Section 37-4-40. The prosecuting attorney may cross-examine the witnesses called by the court and the defendant's witnesses and present relevant evidence concerning the issues presented at the hearing.

(4) If the judge determines that the defendant meets the inpatient commitment criteria of Chapter 3 of Title 37 or Chapter 4 of Title 37, the judge shall order the defendant to be committed to the Department of Human Resources to receive involuntary treatment under Chapter 3 of Title 37 or to receive services under Chapter 4 of Title 37. The defendant is entitled to the following rights specified below and shall be notified in writing of these rights at the time of his admission for evaluation under subsection (d) of this Code section. Such rights are:

(A) A notice that a hearing will be held and the time and place thereof;

(B) A notice that the defendant has the right to counsel and that the defendant or his representatives may apply immediately to the court to have counsel appointed if the defendant cannot afford counsel and that the court will appoint counsel for the defendant unless he indicates in writing that he does not desire to be represented by counsel;

(C) The right to confront and cross-examine witnesses and to offer evidence;

(D) The right to subpoena witnesses and to require testimony before the court in person or by deposition from any person upon whose evaluation the decision of the court may rest;

(E) Notice of the right to have established an individualized service plan specifically tailored to the person's treatment needs, as such plans are defined in Chapter 3 of Title 37 and Chapter 4 of Title 37; and

(F) A notice that the defendant has the right to be examined by a physician or a licensed clinical psychologist of his own choice at his own expense and to have that physician or

psychologist submit a suggested service plan for the patient which conforms with the requirements of Chapter 3 of Title 37 or Chapter 4 of Title 37, whichever is applicable.

(5) (A) If a defendant appears to meet the criteria for outpatient involuntary treatment as defined in Part 3 of Article 3 of Chapter 3 of Title 37, which shall be the criteria for release on a trial basis in the community in preparation for a full release, the court may order a period of conditional release subject to certain conditions set by the court. The court is authorized to appoint an appropriate community service provider to work in conjunction with the Department of Human Resources to monitor the defendant's compliance with these conditions and to make regular reports to the court.

(B) If the defendant successfully completes all requirements during this period of conditional release, the court shall discharge the individual from commitment at the end of that period. Such individuals may be referred for community mental health, mental retardation, or substance abuse services as appropriate. The court may require the individual to participate in outpatient treatment or any other services or programs authorized by Chapter 3, 4, or 7 of Title 37.

(C) If the defendant does not successfully complete any or all requirements of the conditional release period, the court may:

(i) Revoke the period of conditional release and return the defendant to a state hospital for inpatient services; or

(ii) Impose additional or revise existing conditions on the defendant as appropriate and continue the period of conditional release.

(D) For any decision rendered under subparagraph (C) of this paragraph, the defendant may request a review by the court of such decision within 20 days of the order of the court.

(E) The Department of Human Resources and any community services providers, including the employees and agents of both, providing supervision or treatment during a period of conditional release shall not be held criminally or civilly liable for any acts committed by a defendant placed by the committing court on a period of conditional release.

(f) A defendant who has been found not guilty by reason of insanity at the time of the crime and is ordered committed to the Department of Human Resources under subsection (e) of this Code section may only be discharged from that commitment by order of the committing court in accordance with the procedures specified in this subsection:

(1) Application for the release of a defendant who has been committed to the Department of Human Resources under subsection (e) of this Code section upon the ground that he does not meet the civil commitment criteria under Chapter 3 of Title 37 or Chapter 4 of Title 37 may be made to the committing court, either by such defendant or by the superintendent of the state hospital in which the said defendant is detained;

(2) The burden of proof in such release hearing shall be upon the applicant. The defendant shall have the same rights in the release hearing as set forth in subsection (e) of this Code section; and

(3) If the finding of the court is adverse to release in such hearing held pursuant to this subsection on the grounds that such

defendant does meet the inpatient civil commitment criteria, a further release application by the defendant shall not be heard by the court until 12 months have elapsed from the date of the hearing upon the last preceding application. The Department of Human Resources shall have the independent right to request a release hearing once every 12 months.

(g) (1) Whenever a defendant is found guilty but mentally ill at the time of a felony or guilty but mentally retarded, or enters a plea to that effect that is accepted by the court, the court shall sentence him in the same manner as a defendant found guilty of the offense, except as otherwise provided in subsection (j) of this Code section. A defendant who is found guilty but mentally ill at the time of the felony or guilty but mentally retarded shall be evaluated by a psychiatrist or a licensed psychologist from the Department of Human Resources after sentencing and prior to transfer to a Department of Corrections facility. The Board of Human Resources shall develop appropriate rules and regulations for the implementation of such procedures.

(2) If the defendant who is found guilty but mentally ill at the time of the felony or guilty but mentally retarded is not in need of immediate hospitalization, as indicated by the evaluation, then the defendant shall be committed to an appropriate penal facility and shall be further evaluated and then treated, within the limits of state funds appropriated therefor, in such manner as is psychiatrically indicated for his mental illness or mental retardation.

(3) If at any time following the defendant's transfer to a penal facility it is determined that a transfer to the Department of Human Resources is psychiatrically indicated for his mental illness or mental retardation, then the defendant shall be transferred to the Department of Human Resources pursuant to procedures set forth in regulations of the Department of Corrections and the Department of Human Resources.

(4) If it is determined by the evaluation that the defendant found guilty but mentally ill at the time of the felony or guilty but mentally retarded is in need of immediate hospitalization, then the defendant shall be transferred by the Department of Corrections to a mental health facility designated by the Department of Human Resources in accordance with rules and regulations of such departments.

(h) If a defendant who is found guilty but mentally ill at the time of a felony or guilty but mentally retarded is placed on probation under the "State-wide Probation Act," Article 2 of Chapter 8 of Title 42, the court may require that the defendant undergo available outpatient medical or psychiatric treatment or seek similar available voluntary inpatient treatment as a condition of probation. Persons required to receive such services may be charged fees by the provider of the services.

(i) In any case in which the defense of insanity is interposed or a plea of guilty but mentally ill at the time of the felony or a plea of guilty but mentally retarded is made and an examination is made of the defendant pursuant to Code Section 17-7-130.1 or paragraph (2) of subsection (b) of this Code section, upon the defendant's being found guilty or guilty but mentally ill at the time of the crime or guilty but mentally retarded, a copy of any such examination report shall be forwarded to the Department of Corrections with the official sentencing document.

(j) In the trial of any case in which the death penalty is sought which commences on or after July 1, 1988, should the judge find in

accepting a plea of guilty but mentally retarded or the jury or court find in its verdict that the defendant is guilty of the crime charged but mentally retarded, the death penalty shall not be imposed and the court shall sentence the defendant to imprisonment for life.

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Indiana

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IC 35-36-9**Chapter 9. Pretrial Determination of Mental Retardation in Death Sentence Cases****IC 35-36-9-1**

Sec. 1. This chapter applies when a defendant is charged with a murder for which the state seeks a death sentence under IC 35-50-2-9.

As added by P.L.158-1994, SEC.3. Amended by P.L.2-1996, SEC.283.

IC 35-36-9-2

Sec. 2. As used in this chapter, "mentally retarded individual" means an individual who, before becoming twenty-two (22) years of age, manifests:

- (1) significantly subaverage intellectual functioning; and
- (2) substantial impairment of adaptive behavior;

that is documented in a court ordered evaluative report.

As added by P.L.158-1994, SEC.3.

IC 35-36-9-3

Sec. 3. (a) The defendant may file a petition alleging that the defendant is a mentally retarded individual.

(b) The petition must be filed not later than twenty (20) days before the omnibus date.

(c) Whenever the defendant files a petition under this section, the court shall order an evaluation of the defendant for the purpose of providing evidence of the following:

- (1) Whether the defendant has a significantly subaverage level of intellectual functioning.
- (2) Whether the defendant's adaptive behavior is substantially impaired.

(3) Whether the conditions described in subdivisions (1) and (2) existed before the defendant became twenty-two (22) years of age.

As added by P.L.158-1994, SEC.3.

IC 35-36-9-4

Sec. 4. (a) The court shall conduct a hearing on the petition under this chapter.

(b) At the hearing, the defendant must prove by clear and convincing evidence that the defendant is a mentally retarded individual.

As added by P.L.158-1994, SEC.3.

IC 35-36-9-5

Sec. 5. Not later than ten (10) days before the initial trial date, the court shall determine whether the defendant is a mentally retarded individual based on the evidence set forth at the hearing under section 4 of this chapter. The court shall articulate findings supporting the court's determination under this section.

As added by P.L.158-1994, SEC.3.

IC 35-36-9-6

Sec. 6. If the court determines that the defendant is a mentally retarded individual under section 5 of this chapter, the part of the state's charging instrument filed under IC 35-50-2-9(a) that seeks a death sentence against the defendant shall be dismissed.



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21-4623

Chapter 21.--CRIMES AND PUNISHMENTS
PART III.--CLASSIFICATION OF CRIMES AND SENTENCING
Part 2.--Prohibited Conduct
Article 46.--SENTENCING

21-4623. Same; persons determined to be mentally retarded. (a) If, under K.S.A. 21-4624 and amendments thereto, the county or district attorney has filed a notice of intent to request a separate sentencing proceeding to determine whether the defendant should be sentenced to death and the defendant is convicted of the crime of capital murder, the defendant's counsel or the warden of the correctional institution or sheriff having custody of the defendant may request a determination by the court of whether the defendant is mentally retarded. If the court determines that there is not sufficient reason to believe that the defendant is mentally retarded, the court shall so find and the defendant shall be sentenced in accordance with K.S.A. 21-4624 through 21-4627, 21-4629 and 21-4631 and amendments thereto. If the court determines that there is sufficient reason to believe that the defendant is mentally retarded, the court shall conduct a hearing to determine whether the defendant is mentally retarded.

(b) At the hearing, the court shall determine whether the defendant is mentally retarded. The court shall order a psychiatric or psychological examination of the defendant. For that purpose, the court shall appoint two licensed physicians or licensed psychologists, or one of each, qualified by training and practice to make such examination, to examine the defendant and report their findings in writing to the judge within 10 days after the order of examination is issued. The defendant shall have the right to present evidence and cross-examine any witnesses at the hearing. No statement made by the defendant in the course of any examination provided for by this section, whether or not the defendant consents to the examination, shall be admitted in evidence against the defendant in any criminal proceeding.

(c) If, at the conclusion of a hearing pursuant to this section, the court determines that the defendant is not mentally retarded, the defendant shall be sentenced in accordance with K.S.A. 21-4624 through 21-4627, 21-4629 and 21-4631 and amendments thereto.

(d) If, at the conclusion of a hearing pursuant to this section, the court determines that the defendant is mentally retarded, the court shall sentence the defendant as otherwise provided by law, and no sentence of death shall be imposed hereunder.

(e) As used in this section, "mentally retarded" means having significantly subaverage general intellectual functioning, as defined by K.S.A. 76-12b01 and amendments thereto, to an extent which substantially impairs one's capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law.

1994



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76-12b01

Chapter 76.--STATE INSTITUTIONS AND AGENCIES; HISTORICAL PROPERTY Article 12b.--STATE INSTITUTIONS FOR THE MENTALLY RETARDED

76-12b01. Definitions. When used in this act:

- (a) "Adaptive behavior" means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of that person's age, cultural group and community.
- (b) "Care" means supportive services, including, but not limited to, provision of room and board, supervision, protection, assistance in bathing, dressing, grooming, eating and other activities of daily living.
- (c) "Institution" means a state institution for the mentally retarded including the following institutions: Kansas neurological institute, Parsons state hospital and training center and Winfield state hospital and training center.
- (d) "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from birth to age 18.
- (e) "Respite care" means temporary, short-term care not exceeding 90 days per calendar year to provide relief from the daily pressures involved in caring for a mentally retarded person.
- (f) "Restraint" means the use of a totally enclosed crib or any material to restrict or inhibit the free movement of one or more limbs of a person except medical devices which limit movement for examination, treatment or to insure the healing process.
- (g) "Seclusion" means being placed alone in a locked room where the individual's freedom to leave is thereby restricted and where such placement is not under continuous observation.
- (h) "Secretary" means the secretary of social and rehabilitation services or the designee of the secretary.
- (i) "Significantly subaverage general intellectual functioning" means performance which is two or more standard deviations from the mean score on a standardized intelligence test specified by the secretary.
- (j) "Superintendent" means the chief administrative officer of the institution or the designee of the chief administrative officer.

(k) "Training" means the provision of specific environmental, physical, mental, social and educational interventions and therapies for the purpose of halting, controlling or reversing processes that cause, aggravate or complicate malfunctions or dysfunctions of development.

History: L. 1984, ch. 339, § 1; L. 1996, ch. 60, § 1; July 1.



KENTUCKY

532.135 Determination by court that defendant is mentally retarded.

- (1) At least thirty (30) days before trial, the defendant shall file a motion with the trial court wherein the defendant may allege that he is a seriously mentally retarded defendant and present evidence with regard thereto. The Commonwealth may offer evidence in rebuttal.
- (2) At least ten (10) days before the beginning of the trial, the court shall determine whether or not the defendant is a seriously mentally retarded defendant in accordance with the definition in KRS 532.130.
- (3) The decision of the court shall be placed in the record.
- (4) The pretrial determination of the trial court shall not preclude the defendant from raising any legal defense during the trial. If it is determined the defendant is a seriously mentally retarded offender, he shall be sentenced as provided in KRS 532.140.

History: Created 1990 Ky. Acts ch. 488, sec. 2, effective July 13, 1990.

KENTUCKY

532.140 Mentally retarded offender not subject to execution – Authorized sentences.

- (1) KRS 532.010, 532.025, and 532.030 to the contrary notwithstanding, no offender who has been determined to be a seriously mentally retarded offender under the provisions of KRS 532.135, shall be subject to execution. The same procedure as required in KRS 532.025 and 532.030 shall be utilized in determining the sentence of the seriously mentally retarded offender under the provisions of KRS 532.135 and 532.140.
- (2) The provisions of KRS 532.135 and 532.140 do not preclude the sentencing of a seriously mentally retarded offender to any other sentence authorized by KRS 532.010, 532.025, or 532.030 for a crime which is a capital offense.
- (3) The provisions of KRS 532.135 and 532.140 shall apply only to trials commenced after July 13, 1990.

Effective: July 13, 1990

History: Created 1990 Ky. Acts ch. 488, sec. 3, effective July 13, 1990.

KENTUCKY

532.130 Definitions for KRS 532.135 and 532.140.

- (1) An adult, or a minor under eighteen (18) years of age who may be tried as an adult, convicted of a crime and subject to sentencing, is referred to in KRS 532.135 and 532.140 as a defendant.
- (2) A defendant with significant subaverage intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested during the developmental period is referred to in KRS 532.135 and 532.140 as a seriously mentally retarded defendant. "Significantly subaverage general intellectual functioning" is defined as an intelligence quotient (I.Q.) of seventy (70) or below.

Effective: July 13, 1990

History: Created 1990 Ky. Acts ch. 488, sec. 1, effective July 13, 1990.

Article - Crimes and Punishments

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§ 412.

- (a) If a person is found guilty of murder, the court or jury that determined the person's guilt shall state in the verdict whether the person is guilty of murder in the first degree or murder in the second degree.
- (b) Except as provided under subsection (g) of this section, a person found guilty of murder in the first degree shall be sentenced to death, imprisonment for life, or imprisonment for life without the possibility of parole. The sentence shall be imprisonment for life unless: (1)(i) the State notified the person in writing at least 30 days prior to trial that it intended to seek a sentence of death, and advised the person of each aggravating circumstance upon which it intended to rely, and (ii) a sentence of death is imposed in accordance with § 413; or (2) the State notified the person in writing at least 30 days prior to trial that it intended to seek a sentence of imprisonment for life without the possibility of parole under § 412 or § 413 of this article.
- (c) (1) If a State's Attorney files or withdraws a notice of intent to seek a sentence of death, the State's Attorney shall file a copy of the notice or withdrawal with the clerk of the Court of Appeals.
- (2) The validity of a notice of intent to seek a sentence of death that is served on a defendant in a timely manner shall in no way be affected by the State's Attorney's failure to file a copy of the death notice in a timely manner with the clerk of the Court of Appeals.
- (d) A person found guilty of murder in the second degree shall be sentenced to imprisonment for not more than 30 years.
- (e) Except as provided by § 413 of this article, the court shall decide whether to impose a sentence of life imprisonment or life imprisonment without the possibility of parole.
- (f) (1) In this section, the following terms have the meanings indicated.
- (2) "Imprisonment for life without the possibility of parole" means imprisonment for the natural life of an inmate under the custody of a correctional institution, including the Patuxent Institution.
- (3) "Mentally retarded" means the individual has significantly subaverage intellectual functioning as evidenced by an intelligence quotient of 70 or below on an individually administered intelligence quotient test and impairment in adaptive behavior, and the mental retardation is manifested before the individual attains the age of 22.
- (g) (1) If a person found guilty of murder in the first degree was, at the time the murder was committed, less than 18 years old or if the person establishes by a preponderance of the evidence that the person was, at the time the murder was committed, mentally retarded, the person shall be sentenced to imprisonment for life or imprisonment for life without the possibility of parole and may not be sentenced to death.
- (2) The sentence shall be imprisonment for life unless the State notified the person in writing at least 30 days prior to trial that the State intended to seek a sentence of imprisonment for life without the possibility of parole under this section or § 413 of this article.

Missouri Revised Statutes

Chapter 565 Offenses Against the Person Section 565.030

August 28, 2001

Trial procedure, first degree murder.

565.030. 1. Where murder in the first degree is charged but not submitted or where the state waives the death penalty, the submission to the trier and all subsequent proceedings in the case shall proceed as in all other criminal cases with a single stage trial in which guilt and punishment are submitted together.

2. Where murder in the first degree is submitted to the trier without a waiver of the death penalty, the trial shall proceed in two stages before the same trier. At the first stage the trier shall decide only whether the defendant is guilty or not guilty of any submitted offense. The issue of punishment shall not be submitted to the trier at the first stage. If an offense is charged other than murder in the first degree in a count together with a count of murder in the first degree, the trial judge shall assess punishment on any such offense according to law, after the defendant is found guilty of such offense and after he finds the defendant to be a prior offender pursuant to chapter 558, RSMo.

3. If murder in the first degree is submitted and the death penalty was not waived but the trier finds the defendant guilty of a lesser homicide, a second stage of the trial shall proceed at which the only issue shall be the punishment to be assessed and declared. No further evidence shall be received. If the trier is a jury it shall be instructed on the law. The attorneys may then argue as in other criminal cases the issue of punishment, after which the trier shall assess and declare the punishment as in all other criminal cases.

4. If the trier at the first stage of a trial where the death penalty was not waived finds the defendant guilty of murder in the first degree, a second stage of the trial shall proceed at which the only issue shall be the punishment to be assessed and declared. Evidence in aggravation and mitigation of punishment, including but not limited to evidence supporting any of the aggravating or mitigating circumstances listed in subsection 2 or 3 of section 565.032, may be presented subject to the rules of evidence at criminal trials. Such evidence may include, within the discretion of the court, evidence concerning the murder victim and the impact of the crime upon the family of the victim and others. Rebuttal and surrebuttal evidence may be presented. The state shall be the first to proceed. If the trier is a jury it shall be instructed on the law. The attorneys may then argue the issue of punishment to the jury, and the state shall have the right to open and close the argument. The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor:

(1) If the trier finds by a preponderance of the evidence that the defendant is mentally retarded; or

(2) If the trier does not find beyond a reasonable doubt at least one of the statutory aggravating circumstances set out in subsection 2 of section 565.032; or

(3) If the trier concludes that there is evidence in mitigation of punishment, including but not limited to evidence supporting the statutory mitigating circumstances listed in subsection 3 of section 565.032, which is sufficient to outweigh the evidence in aggravation of punishment found by the trier; or

(4) If the trier decides under all of the circumstances not to assess and declare the punishment at death. If the trier is a jury it shall be so instructed.

If the trier assesses and declares the punishment at death it shall, in its findings or verdict, set out in

writing the aggravating circumstance or circumstances listed in subsection 2 of section 565.032 which it found beyond a reasonable doubt. If the trier is a jury it shall be instructed before the case is submitted that if it is unable to decide or agree upon the punishment the court shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor or death. The court shall follow the same procedure as set out in this section whenever it is required to determine punishment for murder in the first degree.

5. Upon written agreement of the parties and with leave of the court, the issue of the defendant's mental retardation may be taken up by the court and decided prior to trial without prejudicing the defendant's right to have the issue submitted to the trier of fact as provided in subsection 4 of this section.

6. As used in this section, the terms "mental retardation" or "mentally retarded" refer to a condition involving substantial limitations in general functioning characterized by significantly subaverage intellectual functioning with continual extensive related deficits and limitations in two or more adaptive behaviors such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work, which conditions are manifested and documented before eighteen years of age.

7. The provisions of this section shall only govern offenses committed on or after August 28, 2001.

(L. 1983 S.B. 276, A.L. 1984 S.B. 448 A, A.L. 1993 H.B. 562, A.L. 2001 S.B. 267)

(C) Copyright



Missouri General Assembly

Nebraska

28-105.01

Death penalty imposition; restriction on person under eighteen years; restriction on person with mental retardation; vacation of sentence; procedure.

(1) Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person who was under the age of eighteen years at the time of the commission of the crime.

(2) Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person with mental retardation.

(3) As used in subsection (2) of this section, mental retardation means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior. An intelligence quotient of seventy or below on a reliably administered intelligence quotient test shall be presumptive evidence of mental retardation.

(4) Within one hundred twenty days after July 15, 1998, a convicted person sentenced to the penalty of death prior to July 15, 1998, may bring a verified motion in the district court which imposed such sentence requesting a ruling that the penalty of death be precluded under subsection (2) of this section and that the sentence be vacated. The court shall cause notice of each such request to be served on the county attorney, grant a prompt hearing on the request, and determine the issues and make findings of fact with respect to the request. If the court finds by a preponderance of the evidence that the convicted person is a person with mental retardation, the sentence of death shall be vacated and a sentence of life imprisonment imposed.

(5) For any convicted person who may be sentenced to the penalty of death on or after July 15, 1998, the court shall hold a hearing prior to any sentencing hearing upon a verified motion of the defense requesting a ruling that the penalty of death be precluded under subsection (2) of this section. If the court finds, by a preponderance of the evidence, that the defendant is a person with mental retardation, the death sentence shall not be imposed. A ruling by the court that the evidence of diminished intelligence introduced by the defendant does not preclude the death penalty under subsection (2) of this section shall not restrict the defendant's opportunity to introduce such evidence at the sentencing hearing or to argue that such evidence should be given mitigating significance.

Source:

Laws 1982, LB 787, § 23; Laws 1998, LB 1266, § 2.

New Mexico

31-20A-2.1. Prohibition against capital punishment of mentally retarded persons; presentencing hearing.

A. As used in this section, "mentally retarded" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior. An intelligence quotient of seventy or below on a reliably administered intelligence quotient test shall be presumptive evidence of mental retardation.

B. The penalty of death shall not be imposed on any person who is mentally retarded.

C. Upon motion of the defense requesting a ruling that the penalty of death be precluded under this section, the court shall hold a hearing, prior to conducting the sentencing proceeding under Section 31-20A-3 NMSA 1978. If the court finds, by a preponderance of the evidence, that the defendant is mentally retarded, it shall sentence the defendant to life imprisonment. A ruling by the court that evidence of diminished intelligence introduced by the defendant does not preclude the death penalty under this section shall not restrict the defendant's opportunity to introduce such evidence at the sentencing proceeding or to argue that that evidence should be given mitigating significance. If the sentencing proceeding is conducted before a jury, the jury shall not be informed of any ruling denying a defendant's motion under this section.

History: 1978 Comp., § 31-20A-2.1, enacted by Laws 1991, ch. 30, § 1.

such certificate for the purposes of any proceeding under section 400.20.

S 400.27 Procedure for determining sentence upon conviction for the offense of murder in the first degree.

1. Upon the conviction of a defendant for the offense of murder in the first degree as defined by section 125.27 of the penal law, the court shall promptly conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or to life imprisonment without parole pursuant to subdivision five of section 70.00 of the penal law. Nothing in this section shall be deemed to preclude the people at any time from determining that the death penalty shall not be sought in a particular case, in which case the separate sentencing proceeding shall not be conducted and the court may sentence such defendant to life imprisonment without parole or to a sentence of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole.

2. The separate sentencing proceeding provided for by this section shall be conducted before the court sitting with the jury that found the defendant guilty. The court may discharge the jury and impanel another jury only in extraordinary circumstances and upon a showing of good cause, which may include, but is not limited to, a finding of prejudice to either party. If a new jury is impaneled, it shall be formed in accordance with the procedures in article two hundred seventy of this chapter. Before proceeding with the jury that found the defendant guilty, the court shall determine whether any juror has a state of mind that is likely to preclude the juror from rendering an impartial decision based upon the evidence adduced during the proceeding. In making such determination the court shall personally examine each juror individually outside the presence of the other jurors. The scope of the examination shall be within the discretion of the court and may include questions supplied by the parties as the court deems proper. The proceedings provided for in this subdivision shall be conducted on the record; provided, however, that upon motion of either party, and for good cause shown, the court may direct that all or a portion of the record of such proceedings be sealed. In the event the court determines that a juror has such a state of mind, the court shall discharge the juror and replace the juror with the alternate juror whose name was first drawn and called. If no alternate juror is available, the court must discharge the jury and impanel another jury in accordance with article two hundred seventy of this chapter.

3. For the purposes of a proceeding under this section each subparagraph of paragraph (a) of subdivision one of section 125.27 of the penal law shall be deemed to define an aggravating factor. Except as provided in subdivision seven of this section, at a sentencing proceeding pursuant to this section the only aggravating factors that the jury may consider are those proven beyond a reasonable doubt at trial, and no other aggravating factors may be considered. Whether a sentencing proceeding is conducted before the jury that found the defendant guilty or before another jury, the aggravating factor or factors proved at trial shall be deemed established beyond a reasonable doubt at the separate sentencing proceeding and shall not be relitigated. Where the jury is to determine sentences for concurrent counts of murder in the first degree, the aggravating factor included in each count shall be deemed to be an aggravating factor for the purpose of the jury's consideration in determining the sentence to be imposed on each such count.

4. The court on its own motion or on motion of either party, in the interest of justice or to avoid prejudice to either party, may delay the commencement of the separate sentencing proceeding.

5. Notwithstanding the provisions of article three hundred ninety of this chapter, where a defendant is found guilty of murder in the first degree, no presentence investigation shall be conducted; provided, however, that where the court is to impose a sentence of imprisonment, a presentence investigation shall be conducted and a presentence report shall be prepared in accordance with the provisions of such article.

6. At the sentencing proceeding the people shall not relitigate the existence of aggravating factors proved at the trial or otherwise present evidence, except, subject to the rules governing admission of evidence in the trial of a criminal action, in rebuttal of the defend-

ant's evidence. However, when the sentencing proceeding is conducted before a newly impaneled jury, the people may present evidence to the extent reasonably necessary to inform the jury of the nature and circumstances of the count or counts of murder in the first degree for which the defendant was convicted in sufficient detail to permit the jury to determine the weight to be accorded the aggravating factor or factors established at trial. Whenever the people present such evidence, the court must instruct the jury in its charge that any facts elicited by the people that are not essential to the verdict of guilty on such count or counts shall not be deemed established beyond a reasonable doubt. Subject to the rules governing the admission of evidence in the trial of a criminal action, the defendant may present any evidence relevant to any mitigating factor set forth in subdivision nine of this section; provided, however, the defendant shall not be precluded from the admission of reliable hearsay evidence. The burden of establishing any of the mitigating factors set forth in subdivision nine of this section shall be on the defendant, and must be proven by a preponderance of the evidence. The people shall not offer evidence or argument relating to any mitigating factor except in rebuttal of evidence offered by the defendant.

7. (a) The people may present evidence at the sentencing proceeding to prove that in the ten year period prior to the commission of the crime of murder in the first degree for which the defendant was convicted, the defendant has previously been convicted of two or more offenses committed on different occasions; provided, that each such offense shall be either (i) a class A felony offense other than one defined in article two hundred twenty of the penal law, a class B violent felony offense specified in paragraph (a) of subdivision one of section 70.02 of the penal law, or a felony offense under the penal law a necessary element of which involves either the use or attempted use or threatened use of a deadly weapon or the intentional infliction of or the attempted intentional infliction of serious physical injury or death, or (ii) an offense under the laws of another state or of the United States punishable by a term of imprisonment of more than one year a necessary element of which involves either the use or attempted use or threatened use of a deadly weapon or the intentional infliction of or the attempted intentional infliction of serious physical injury or death. For the purpose of this paragraph, the term "deadly weapon" shall have the meaning set forth in subdivision twelve of section 10.00 of the penal law. In calculating the ten year period under this paragraph, any period of time during which the defendant was incarcerated for any reason between the time of commission of any of the prior felony offenses and the time of commission of the crime of murder in the first degree shall be excluded and such ten year period shall be extended by a period or periods equal to the time served under such incarceration. The defendant's conviction of two or more such offenses shall, if proven at the sentencing proceeding, constitute an aggravating factor.

(b) In order to be deemed established, an aggravating factor set forth in this subdivision must be proven by the people beyond a reasonable doubt and the jury must unanimously find such factor to have been so proven. The defendant may present evidence relating to an aggravating factor defined in this subdivision and either party may offer evidence in rebuttal. Any evidence presented by either party relating to such factor shall be subject to the rules governing admission of evidence in the trial of a criminal action.

(c) Whenever the people intend to offer evidence of an aggravating factor set forth in this subdivision, the people must within a reasonable time prior to trial file with the court and serve upon the defendant a notice of intention to offer such evidence. Whenever the people intend to offer evidence of the aggravating factor set forth in paragraph (a) of this subdivision, the people shall file with the notice of intention to offer such evidence a statement setting forth the date and place of each of the alleged offenses in paragraph (a) of this subdivision. The provisions of section 400.15 of this chapter, except for subdivisions one and two thereof, shall be followed.

8. Consistent with the provisions of this section, the people and the defendant shall be given fair opportunity to rebut any evidence received at the separate sentencing proceeding.

9. Mitigating factors shall include the following:

- (a) The defendant has no significant history of prior criminal convictions involving the use of violence against another person;
- (b) The defendant was mentally retarded at the time of the crime, or the defendant's mental capacity was impaired or his ability to conform his conduct to the requirements of law was impaired but not so impaired in either case as to constitute a defense to prosecution;
- (c) The defendant was under duress or under the domination of another person, although not such duress or domination as to constitute a defense to prosecution;
- (d) The defendant was criminally liable for the present offense of murder committed by another, but his participation in the offense was relatively minor although not so minor as to constitute a defense to prosecution;
- (e) The murder was committed while the defendant was mentally or emotionally disturbed or under the influence of alcohol or any drug, although not to such an extent as to constitute a defense to prosecution; or
- (f) Any other circumstance concerning the crime, the defendant's state of mind or condition at the time of the crime, or the defendant's character, background or record that would be relevant to mitigation or punishment for the crime.

10. At the conclusion of all the evidence, the people and the defendant may present argument in summation for or against the sentence sought by the people. The people may deliver the first summation and the defendant may then deliver the last summation. Thereafter, the court shall deliver a charge to the jury on any matters appropriate in the circumstances. In its charge, the court must instruct the jury that with respect to each count of murder in the first degree the jury should consider whether or not a sentence of death should be imposed and whether or not a sentence of life imprisonment without parole should be imposed, and that the jury must be unanimous with respect to either sentence. The court must also instruct the jury that in the event the jury fails to reach unanimous agreement with respect to the sentence, the court will sentence the defendant to a term of imprisonment with a minimum term of between twenty and twenty-five years and a maximum term of life. Following the court's charge, the jury shall retire to consider the sentence to be imposed. Unless inconsistent with the provisions of this section, the provisions of sections 310.10, 310.20 and 310.30 shall govern the deliberations of the jury.

11. (a) The jury may not direct imposition of a sentence of death unless it unanimously finds beyond a reasonable doubt that the aggravating factor or factors substantially outweigh the mitigating factor or factors established, if any, and unanimously determines that the penalty of death should be imposed. Any member or members of the jury who find a mitigating factor to have been proven by the defendant by a preponderance of the evidence may consider such factor established regardless of the number of jurors who concur that the factor has been established.

(b) If the jury directs imposition of either a sentence of death or life imprisonment without parole, it shall specify on the record those mitigating and aggravating factors considered and those mitigating factors established by the defendant, if any.

(c) With respect to a count or concurrent counts of murder in the first degree, the court may direct the jury to cease deliberation with respect to the sentence or sentences to be imposed if the jury has deliberated for an extensive period of time without reaching unanimous agreement on the sentence or sentences to be imposed and the court is satisfied that any such agreement is unlikely within a reasonable time. The provisions of this paragraph shall apply with respect to consecutive counts of murder in the first degree. In the event the jury is unable to reach unanimous agreement, the court must sentence the defendant in accordance with subdivisions one through three of section 70.00 of the penal law with respect to any count or counts of murder in the first degree upon which the jury failed to reach unanimous agreement as to the sentence to be imposed.

(d) If the jury unanimously determines that a sentence of death should be imposed, the court must thereupon impose a sentence of death. Thereafter, however, the court may, upon written motion of the defendant, set

aside the sentence of death upon any of the grounds set forth in section 330.30. The procedures set forth in sections 330.40 and 330.50, as applied to separate sentencing proceedings under this section, shall govern the motion and the court upon granting the motion shall, except as may otherwise be required by subdivision one of section 330.50, direct a new sentencing proceeding pursuant to this section. Upon granting the motion upon any of the grounds set forth in section 330.30 and setting aside the sentence, the court must afford the people a reasonable period of time, which shall not be less than ten days, to determine whether to take an appeal from the order setting aside the sentence of death. The taking of an appeal by the people stays the effectiveness of that portion of the court's order that directs a new sentencing proceeding.

(e) If the jury unanimously determines that a sentence of life imprisonment without parole should be imposed the court must thereupon impose a sentence of life imprisonment without parole.

(f) Where a sentence has been unanimously determined by the jury it must be recorded on the minutes and read to the jury, and the jurors must be collectively asked whether such is their sentence. Even though no juror makes any declaration in the negative, the jury must, if either party makes such an application, be polled and each juror separately asked whether the sentence announced by the foreman is in all respects his or her sentence. If, upon either the collective or the separate inquiry, any juror answers in the negative, the court must refuse to accept the sentence and must direct the jury to resume its deliberation. If no disagreement is expressed, the jury must be discharged from the case.

12. (a) Upon the conviction of a defendant for the offense of murder in the first degree as defined in section 125.27 of the penal law, the court shall, upon oral or written motion of the defendant based upon a showing that there is reasonable cause to believe that the defendant is mentally retarded, promptly conduct a hearing without a jury to determine whether the defendant is mentally retarded. Upon the consent of both parties, such a hearing, or a portion thereof, may be conducted by the court contemporaneously with the separate sentencing proceeding in the presence of the sentencing jury, which in no event shall be the trier of fact with respect to the hearing. At such hearing the defendant has the burden of proof by a preponderance of the evidence that he or she is mentally retarded. The court shall defer rendering any finding pursuant to this subdivision as to whether the defendant is mentally retarded until a sentence is imposed pursuant to this section.

(b) In the event the defendant is sentenced pursuant to this section to life imprisonment without parole or to a term of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole, the court shall not render a finding with respect to whether the defendant is mentally retarded.

(c) In the event the defendant is sentenced pursuant to this section to death, the court shall thereupon render a finding with respect to whether the defendant is mentally retarded. If the court finds the defendant is mentally retarded, the court shall set aside the sentence of death and sentence the defendant either to life imprisonment without parole or to a term of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole. If the court finds the defendant is not mentally retarded, then such sentence of death shall not be set aside pursuant to this subdivision.

(d) In the event that a defendant is convicted of murder in the first degree pursuant to subparagraph (iii) of paragraph (a) of subdivision one of section 125.27 of the penal law, and the killing occurred while the defendant was confined or under custody in a state correctional facility or local correctional institution, and a sentence of death is imposed, such sentence may not be set aside pursuant to this subdivision upon the ground that the defendant is mentally retarded. Nothing in this paragraph or paragraph (a) of this subdivision shall preclude a defendant from presenting mitigating evidence of mental retardation at the separate sentencing proceeding.

(e) The foregoing provisions of this subdivision notwithstanding, at a reasonable time prior to the commencement of trial the defendant may,

upon a written motion alleging reasonable cause to believe the defendant is mentally retarded, apply for an order directing that a mental retardation hearing be conducted prior to trial. If, upon review of the defendant's motion and any response thereto, the court finds reasonable cause to believe the defendant is mentally retarded, it shall promptly conduct a hearing without a jury to determine whether the defendant is mentally retarded. In the event the court finds after the hearing that the defendant is not mentally retarded, the court must, prior to commencement of trial, enter an order so stating, but nothing in this paragraph shall preclude a defendant from presenting mitigating evidence of mental retardation at a separate sentencing proceeding. In the event the court finds after the hearing that the defendant, based upon a preponderance of the evidence, is mentally retarded, the court must, prior to commencement of trial, enter an order so stating. Unless the order is reversed on an appeal by the people or unless the provisions of paragraph (d) of this subdivision apply, a separate sentencing proceeding under this section shall not be conducted if the defendant is thereafter convicted of murder in the first degree. In the event a separate sentencing proceeding is not conducted, the court, upon conviction of a defendant for the crime of murder in the first degree, shall sentence the defendant to life imprisonment without parole or to a sentence of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole. Whenever a mental retardation hearing is held and a finding is rendered pursuant to this paragraph, the court may not conduct a hearing pursuant to paragraph (a) of this subdivision. For purposes of this subdivision and paragraph (b) of subdivision nine of this section, "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior which were manifested before the age of eighteen.

(f) In the event the court enters an order pursuant to paragraph (e) of this subdivision finding that the defendant is mentally retarded, the people may appeal as of right from the order pursuant to subdivision ten of section 450.20 of this chapter. Upon entering such an order the court must afford the people a reasonable period of time, which shall not be less than ten days, to determine whether to take an appeal from the order finding that the defendant is mentally retarded. The taking of an appeal by the people stays the effectiveness of the court's order and any order fixing a date for trial. Within six months of the effective date of this subdivision, the court of appeals shall adopt rules to ensure that appeals pursuant to this paragraph are expeditiously perfected, reviewed and determined so that pretrial delays are minimized. Prior to adoption of the rules, the court of appeals shall issue proposed rules and receive written comments thereon from interested parties.

13. (a) As used in this subdivision, the term "psychiatric evidence" means evidence of mental disease, defect or condition in connection with either a mitigating factor defined in this section or a mental retardation hearing pursuant to this section to be offered by a psychiatrist, psychologist or other person who has received training, or education, or has experience relating to the identification, diagnosis, treatment or evaluation of mental disease, mental defect or mental condition.

(b) When either party intends to offer psychiatric evidence, the party must, within a reasonable time prior to trial, serve upon the other party and file with the court a written notice of intention to present psychiatric evidence. The notice shall include a brief but detailed statement specifying the witness, nature and type of psychiatric evidence sought to be introduced. If either party fails to serve and file written notice, no psychiatric evidence is admissible unless the party failing to file thereafter serves and files such notice and the court affords the other party an adjournment for a reasonable period. If a party fails to give timely notice, the court in its discretion may impose upon offending counsel a reasonable monetary sanction for an intentional failure but may not in any event preclude the psychiatric evidence. In the event a monetary sanction is imposed, the offending counsel shall be personally liable therefor, and shall not receive reimbursement of any kind from any source in order to pay the cost of such monetary sanction. Nothing contained herein shall preclude the

court from entering an order directing a party to provide timely notice.

(c) When a defendant serves notice pursuant to this subdivision, the district attorney may make application, upon notice to the defendant, for an order directing that the defendant submit to an examination by a psychiatrist, licensed psychologist, or licensed psychiatric social worker designated by the district attorney, for the purpose of rebutting evidence offered by the defendant with respect to a mental disease, defect, or condition in connection with either a mitigating factor defined in this section, including whether the defendant was acting under duress, was mentally or emotionally disturbed or mentally retarded, or was under the influence of alcohol or any drug. If the application is granted, the district attorney shall schedule a time and place for the examination, which shall be recorded. Counsel for the people and the defendant shall have the right to be present at the examination. A transcript of the examination shall be made available to the defendant and the district attorney promptly after its conclusion. The district attorney shall promptly serve on the defendant a written copy of the findings and evaluation of the examiner. If the court finds that the defendant has wilfully refused to cooperate fully in an examination pursuant to this paragraph, it shall, upon request of the district attorney, instruct the jury that the defendant did not submit to or cooperate fully in such psychiatric examination. When a defendant is subjected to an examination pursuant to an order issued in accordance with this subdivision, any statement made by the defendant for the purpose of the examination shall be inadmissible in evidence against him in any criminal action or proceeding on any issue other than that of whether a mitigating factor has been established or whether the defendant is mentally retarded, but such statement is admissible upon such an issue whether or not it would otherwise be deemed a privileged communication.

14. (a) At a reasonable time prior to the sentencing proceeding or a mental retardation hearing:

(i) the prosecutor shall, unless previously disclosed and subject to a protective order, make available to the defendant the statements and information specified in subdivision one of section 240.45 and make available for inspection, photographing, copying or testing the property specified in subdivision one of section 240.20; and

(ii) the defendant shall, unless previously disclosed and subject to a protective order, make available to the prosecution the statements and information specified in subdivision two of section 240.45 and make available for inspection, photographing, copying or testing, subject to constitutional limitations, the reports, documents and other property specified in subdivision one of section 240.30.

(b) Where a party refuses to make disclosure pursuant to this section, the provisions of section 240.35, subdivision one of section 240.40 and section 240.50 shall apply.

(c) If, after complying with the provisions of this section or an order pursuant thereto, a party finds either before or during a sentencing proceeding or mental retardation hearing, additional material subject to discovery or covered by court order, the party shall promptly make disclosure or apply for a protective order.

(d) If the court finds that a party has failed to comply with any of the provisions of this section, the court may enter any of the orders specified in subdivision one of section 240.70.

15. The court of appeals shall formulate and adopt rules for the development of forms for use by the jury in recording its findings and determinations of sentence.

S 400.30 Procedure for determining the amount of a fine based upon the defendant's gain from the offense.

1. Order directing a hearing. In any case where the court is of the opinion that the sentence should consist of or include a fine and that, pursuant to article eighty of the penal law, the amount of the fine should be based upon the defendant's gain from the commission of the offense, the court may order a hearing to determine the amount of such gain. The order must be filed with the clerk of the court and must specify a date for the hearing not less than ten days after the filing of the order.

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

1 E. In any case in which a defendant charged with capital murder intends, in the event of
2 conviction, to present testimony of an expert witness to support a claim that he is mentally
3 retarded, he or his attorney shall give notice in writing to the attorney for the Commonwealth,
4 at least 21 days before trial, of his intention to present such testimony. In the event that such
5 notice is not given and the defendant tenders testimony by an expert witness at the sentencing
6 phase of the trial, then the court may, in its discretion, upon objection of the Commonwealth,
7 either allow the Commonwealth a continuance or, under appropriate circumstances, bar the
8 defendant from presenting such evidence.

9 F. 1. If the attorney for the defendant gives notice pursuant to subsection E and the
10 Commonwealth thereafter seeks an evaluation concerning the existence or absence of the
11 defendant's mental retardation, the court shall appoint 1 or more qualified experts to perform
12 such an evaluation. The court shall order the defendant to submit to such an evaluation, and
13 advise the defendant on the record in court that a refusal to cooperate with the
14 Commonwealth's experts could result in exclusion of the defendant's expert evidence. The
15 qualification of the experts shall be governed by subsection A. The location of the evaluation
16 shall be governed by subsection B. The attorney for the Commonwealth shall be responsible
17 for providing the experts the information specified in subsection C of § 19.2-169.5. After
18 performing their evaluation, the experts shall report their findings and opinions and provide
19 copies of psychiatric, psychological, medical or other records obtained during the course of the
20 evaluation to the attorneys for the Commonwealth and the defense.

21 2. If the court finds, after hearing evidence presented by the parties, out of the presence
22 of the jury, that the defendant has refused to cooperate with an evaluation requested by the
23 Commonwealth, the court may admit evidence of such refusal or, in the discretion of the court,
24 bar the defendant from presenting his expert evidence.

25 § 19.2-264.3:3. Limitations on use of statements or disclosure by defendant during
26 evaluations.

1 No statement or disclosure by the defendant made during a competency evaluation
2 performed pursuant to § 19.2-169.1, an evaluation performed pursuant to § 19.2-169.5 to
3 determine sanity at the time of the offense, treatment provided pursuant to § 19.2-169.2 or §
4 19.2-169.6, a mental condition evaluation performed pursuant to § 19.2-264.3:1 or a mental
5 retardation evaluation performed pursuant to § 19.2-264.3:1.2, and no evidence derived from
6 any such statements or disclosures may be introduced against the defendant at the sentencing
7 phase of a capital murder trial for the purpose of proving the aggravating circumstances
8 specified in § 19.2-264.4. Such statements or disclosures shall be admissible in rebuttal only
9 when relevant to issues in mitigation raised by the defense.

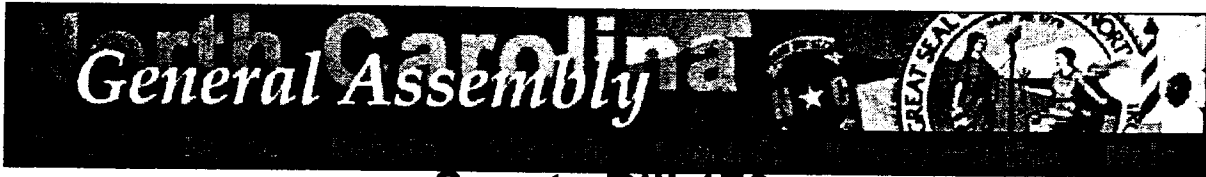
10 § 19.2-264.4. Sentence proceeding.

11 A. Upon a finding that the defendant is guilty of an offense which may be punishable by
12 death, a proceeding shall be held which shall be limited to a determination as to whether the
13 defendant shall be sentenced to death or life imprisonment. Upon request of the defendant, a
14 jury shall be instructed that for all Class 1 felony offenses committed after January 1, 1995, a
15 defendant shall not be eligible for parole if sentenced to imprisonment for life. In case of trial by
16 jury, where a sentence of death is not recommended, the defendant shall be sentenced to
17 imprisonment for life.

18 A1. In any proceeding conducted pursuant to this section, the court shall permit the
19 victim, as defined in § 19.2-11.01, upon the motion of the attorney for the Commonwealth, and
20 with the consent of the victim, to testify in the presence of the accused regarding the impact of
21 the offense upon the victim. The court shall limit the victim's testimony to the factors set forth in
22 clauses (i) through (vi) of subsection A of § 19.2-299.1.

23 B. In cases of trial by jury, evidence may be presented as to any matter which the court
24 deems relevant to sentence, except that reports under the provisions of § 19.2-299, or under
25 any rule of court, shall not be admitted into evidence.

26 Evidence which may be admissible, subject to the rules of evidence governing
27 admissibility, may include the circumstances surrounding the offense, the history and



Senate Bill 173

No Death Penalty/Mentally Retarded. (= H 141)

Bill Text: [Edition 1](#) [Edition 2](#) [Edition 3](#) [Edition 4](#) [Edition 5](#) [Edition 6](#) [Edition 7](#) [Ratified](#)
[Chapered](#)

Introduced by: Charlie S. Dannelly, Eleanor Kinnaird, Frank W. Ballance, Jr., Hamilton C. Horton, Jr., Jeanne H. Lucas, Larry Shaw, Luther H. Jordan, Jr., Martin, William N., Oscar N. Harris

P/L = Public/Local Bill | \$ = Affects Appropriations
 * = Bill Text Has Changed

Session:	2001-2002 Session	Prime Sponsors:	Frank W. Ballance, Jr.
Fiscal Note:	Edition 6	Attributes:	P *

<u>Date</u>		<u>Action</u>
02/15/2001	S	Filed
02/19/2001	S	Ref To Com On Judiciary II
04/19/2001	S	Reptd Fav Com Substitute
04/19/2001	SA	Com Substitute Adopted
04/23/2001	SA	Amend Adopted #2
04/23/2001	S	Amend Failed #3
04/23/2001	SA	Amend Adopted #4
04/23/2001	SA	Amend Adopted #5
04/23/2001	S	Passed 2nd & 3rd Reading
04/25/2001	H	Rec From Senate
04/25/2001	H	Ref To Com On Judiciary I
07/04/2001	HA	Reptd Fav Com Substitute
07/04/2001	H	Cal Pursuant Rule 36(b)
07/10/2001	H	Placed On Cal For 7/11/2001
07/11/2001	HA	Amend Adopted #1A,#1B,#3,#4,#2
07/11/2001	H	Passed 2nd Reading
07/16/2001	HA	Amend Adopted #5
07/16/2001	H	Amend Failed #6
07/16/2001	H	Passed 3rd Reading
07/18/2001	S	Rec To Concur H Com Sub
07/18/2001	S	Placed On Cal For 7/19/2001
07/19/2001	S	Withdrawn From Cal
07/19/2001	S	Placed On Cal For 7/24/2001
07/24/2001	S	Concurred In H/com Sub
07/25/2001	S	Ratified
07/26/2001	S	Pres. To Gov. 7/26/2001
08/04/2001	S	Signed By Gov. 8/4/2001
08/04/2001	R	Ch. SL 2001-346

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TOC: [General Statutes of North Carolina > CHAPTER 15A. CRIMINAL PROCEDURE ACT > § 15A-2005. Mentally retarded defendants; death sentence prohibited](#)

N.C. Gen. Stat. § 15A-2005

GENERAL STATUTES OF NORTH CAROLINA
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*** STATUTES CURRENT THROUGH THE 2002 REGULAR SESSION ***
*** AUGUST 2002 ANNOTATION SERVICE ***

CHAPTER 15A. CRIMINAL PROCEDURE ACT

♦ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

N.C. Gen. Stat. § 15A-2005 (2002)

§ 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.

KENTUCKY

532.130 Definitions for KRS 532.135 and 532.140.

- (1) An adult, or a minor under eighteen (18) years of age who may be tried as an adult, convicted of a crime and subject to sentencing, is referred to in KRS 532.135 and 532.140 as a defendant.
- (2) A defendant with significant subaverage intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested during the developmental period is referred to in KRS 532.135 and 532.140 as a seriously mentally retarded defendant. "Significantly subaverage general intellectual functioning" is defined as an intelligence quotient (I.Q.) of seventy (70) or below.

Effective: July 13, 1990

History: Created 1990 Ky. Acts ch. 488, sec. 1, effective July 13, 1990.

Article - Crimes and Punishments

[\[Previous\]](#) [\[Next\]](#) [\[Another Article\]](#)

§ 412.

(a) If a person is found guilty of murder, the court or jury that determined the person's guilt shall state in the verdict whether the person is guilty of murder in the first degree or murder in the second degree.

(b) Except as provided under subsection (g) of this section, a person found guilty of murder in the first degree shall be sentenced to death, imprisonment for life, or imprisonment for life without the possibility of parole. The sentence shall be imprisonment for life unless: (1)(i) the State notified the person in writing at least 30 days prior to trial that it intended to seek a sentence of death, and advised the person of each aggravating circumstance upon which it intended to rely, and (ii) a sentence of death is imposed in accordance with § 413; or (2) the State notified the person in writing at least 30 days prior to trial that it intended to seek a sentence of imprisonment for life without the possibility of parole under § 412 or § 413 of this article.

(c) (1) If a State's Attorney files or withdraws a notice of intent to seek a sentence of death, the State's Attorney shall file a copy of the notice or withdrawal with the clerk of the Court of Appeals.

(2) The validity of a notice of intent to seek a sentence of death that is served on a defendant in a timely manner shall in no way be affected by the State's Attorney's failure to file a copy of the death notice in a timely manner with the clerk of the Court of Appeals.

(d) A person found guilty of murder in the second degree shall be sentenced to imprisonment for not more than 30 years.

(e) Except as provided by § 413 of this article, the court shall decide whether to impose a sentence of life imprisonment or life imprisonment without the possibility of parole.

(f) (1) In this section, the following terms have the meanings indicated.

(2) "Imprisonment for life without the possibility of parole" means imprisonment for the natural life of an inmate under the custody of a correctional institution, including the Patuxent Institution.

(3) "Mentally retarded" means the individual has significantly subaverage intellectual functioning as evidenced by an intelligence quotient of 70 or below on an individually administered intelligence quotient test and impairment in adaptive behavior, and the mental retardation is manifested before the individual attains the age of 22.

(g) (1) If a person found guilty of murder in the first degree was, at the time the murder was committed, less than 18 years old or if the person establishes by a preponderance of the evidence that the person was, at the time the murder was committed, mentally retarded, the person shall be sentenced to imprisonment for life or imprisonment for life without the possibility of parole and may not be sentenced to death.

(2) The sentence shall be imprisonment for life unless the State notified the person in writing at least 30 days prior to trial that the State intended to seek a sentence of imprisonment for life without the possibility of parole under this section or § 413 of this article.

Missouri Revised Statutes

Chapter 565 Offenses Against the Person Section 565.030

August 28, 2001

Trial procedure, first degree murder.

565.030. 1. Where murder in the first degree is charged but not submitted or where the state waives the death penalty, the submission to the trier and all subsequent proceedings in the case shall proceed as in all other criminal cases with a single stage trial in which guilt and punishment are submitted together.

2. Where murder in the first degree is submitted to the trier without a waiver of the death penalty, the trial shall proceed in two stages before the same trier. At the first stage the trier shall decide only whether the defendant is guilty or not guilty of any submitted offense. The issue of punishment shall not be submitted to the trier at the first stage. If an offense is charged other than murder in the first degree in a count together with a count of murder in the first degree, the trial judge shall assess punishment on any such offense according to law, after the defendant is found guilty of such offense and after he finds the defendant to be a prior offender pursuant to chapter 558, RSMo.

3. If murder in the first degree is submitted and the death penalty was not waived but the trier finds the defendant guilty of a lesser homicide, a second stage of the trial shall proceed at which the only issue shall be the punishment to be assessed and declared. No further evidence shall be received. If the trier is a jury it shall be instructed on the law. The attorneys may then argue as in other criminal cases the issue of punishment, after which the trier shall assess and declare the punishment as in all other criminal cases.

4. If the trier at the first stage of a trial where the death penalty was not waived finds the defendant guilty of murder in the first degree, a second stage of the trial shall proceed at which the only issue shall be the punishment to be assessed and declared. Evidence in aggravation and mitigation of punishment, including but not limited to evidence supporting any of the aggravating or mitigating circumstances listed in subsection 2 or 3 of section 565.032, may be presented subject to the rules of evidence at criminal trials. Such evidence may include, within the discretion of the court, evidence concerning the murder victim and the impact of the crime upon the family of the victim and others. Rebuttal and surrebuttal evidence may be presented. The state shall be the first to proceed. If the trier is a jury it shall be instructed on the law. The attorneys may then argue the issue of punishment to the jury, and the state shall have the right to open and close the argument. The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor:

- (1) If the trier finds by a preponderance of the evidence that the defendant is mentally retarded; or
- (2) If the trier does not find beyond a reasonable doubt at least one of the statutory aggravating circumstances set out in subsection 2 of section 565.032; or
- (3) If the trier concludes that there is evidence in mitigation of punishment, including but not limited to evidence supporting the statutory mitigating circumstances listed in subsection 3 of section 565.032, which is sufficient to outweigh the evidence in aggravation of punishment found by the trier; or
- (4) If the trier decides under all of the circumstances not to assess and declare the punishment at death. If the trier is a jury it shall be so instructed.

If the trier assesses and declares the punishment at death it shall, in its findings or verdict, set out in

writing the aggravating circumstance or circumstances listed in subsection 2 of section 565.032 which it found beyond a reasonable doubt. If the trier is a jury it shall be instructed before the case is submitted that if it is unable to decide or agree upon the punishment the court shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor or death. The court shall follow the same procedure as set out in this section whenever it is required to determine punishment for murder in the first degree.

5. Upon written agreement of the parties and with leave of the court, the issue of the defendant's mental retardation may be taken up by the court and decided prior to trial without prejudicing the defendant's right to have the issue submitted to the trier of fact as provided in subsection 4 of this section.

6. As used in this section, the terms "mental retardation" or "mentally retarded" refer to a condition involving substantial limitations in general functioning characterized by significantly subaverage intellectual functioning with continual extensive related deficits and limitations in two or more adaptive behaviors such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work, which conditions are manifested and documented before eighteen years of age.

7. The provisions of this section shall only govern offenses committed on or after August 28, 2001.

(L. 1983 S.B. 276, A.L. 1984 S.B. 448 A, A.L. 1993 H.B. 562, A.L. 2001 S.B. 267)

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Missouri General Assembly

Nebraska

28-105.01

Death penalty imposition; restriction on person under eighteen years; restriction on person with mental retardation; vacation of sentence; procedure.

(1) Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person who was under the age of eighteen years at the time of the commission of the crime.

(2) Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person with mental retardation.

(3) As used in subsection (2) of this section, mental retardation means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior. An intelligence quotient of seventy or below on a reliably administered intelligence quotient test shall be presumptive evidence of mental retardation.

(4) Within one hundred twenty days after July 15, 1998, a convicted person sentenced to the penalty of death prior to July 15, 1998, may bring a verified motion in the district court which imposed such sentence requesting a ruling that the penalty of death be precluded under subsection (2) of this section and that the sentence be vacated. The court shall cause notice of each such request to be served on the county attorney, grant a prompt hearing on the request, and determine the issues and make findings of fact with respect to the request. If the court finds by a preponderance of the evidence that the convicted person is a person with mental retardation, the sentence of death shall be vacated and a sentence of life imprisonment imposed.

(5) For any convicted person who may be sentenced to the penalty of death on or after July 15, 1998, the court shall hold a hearing prior to any sentencing hearing upon a verified motion of the defense requesting a ruling that the penalty of death be precluded under subsection (2) of this section. If the court finds, by a preponderance of the evidence, that the defendant is a person with mental retardation, the death sentence shall not be imposed. A ruling by the court that the evidence of diminished intelligence introduced by the defendant does not preclude the death penalty under subsection (2) of this section shall not restrict the defendant's opportunity to introduce such evidence at the sentencing hearing or to argue that such evidence should be given mitigating significance.

Source:

Laws 1982, LB 787, § 23; Laws 1998, LB 1266, § 2.

New Mexico

31-20A-2.1. Prohibition against capital punishment of mentally retarded persons; presentencing hearing.

A. As used in this section, "mentally retarded" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior. An intelligence quotient of seventy or below on a reliably administered intelligence quotient test shall be presumptive evidence of mental retardation.

B. The penalty of death shall not be imposed on any person who is mentally retarded.

C. Upon motion of the defense requesting a ruling that the penalty of death be precluded under this section, the court shall hold a hearing, prior to conducting the sentencing proceeding under Section 31-20A-3 NMSA 1978. If the court finds, by a preponderance of the evidence, that the defendant is mentally retarded, it shall sentence the defendant to life imprisonment. A ruling by the court that evidence of diminished intelligence introduced by the defendant does not preclude the death penalty under this section shall not restrict the defendant's opportunity to introduce such evidence at the sentencing proceeding or to argue that that evidence should be given mitigating significance. If the sentencing proceeding is conducted before a jury, the jury shall not be informed of any ruling denying a defendant's motion under this section.

History: 1978 Comp., § 31-20A-2.1, enacted by Laws 1991, ch. 30, § 1.

such certificate for the purposes of any proceeding under section 400.20.

S 400.27 Procedure for determining sentence upon conviction for the offense of murder in the first degree.

1. Upon the conviction of a defendant for the offense of murder in the first degree as defined by section 125.27 of the penal law, the court shall promptly conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or to life imprisonment without parole pursuant to subdivision five of section 70.00 of the penal law. Nothing in this section shall be deemed to preclude the people at any time from determining that the death penalty shall not be sought in a particular case, in which case the separate sentencing proceeding shall not be conducted and the court may sentence such defendant to life imprisonment without parole or to a sentence of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole.

2. The separate sentencing proceeding provided for by this section shall be conducted before the court sitting with the jury that found the defendant guilty. The court may discharge the jury and impanel another jury only in extraordinary circumstances and upon a showing of good cause, which may include, but is not limited to, a finding of prejudice to either party. If a new jury is impaneled, it shall be formed in accordance with the procedures in article two hundred seventy of this chapter. Before proceeding with the jury that found the defendant guilty, the court shall determine whether any juror has a state of mind that is likely to preclude the juror from rendering an impartial decision based upon the evidence adduced during the proceeding. In making such determination the court shall personally examine each juror individually outside the presence of the other jurors. The scope of the examination shall be within the discretion of the court and may include questions supplied by the parties as the court deems proper. The proceedings provided for in this subdivision shall be conducted on the record; provided, however, that upon motion of either party, and for good cause shown, the court may direct that all or a portion of the record of such proceedings be sealed. In the event the court determines that a juror has such a state of mind, the court shall discharge the juror and replace the juror with the alternate juror whose name was first drawn and called. If no alternate juror is available, the court must discharge the jury and impanel another jury in accordance with article two hundred seventy of this chapter.

3. For the purposes of a proceeding under this section each subparagraph of paragraph (a) of subdivision one of section 125.27 of the penal law shall be deemed to define an aggravating factor. Except as provided in subdivision seven of this section, at a sentencing proceeding pursuant to this section the only aggravating factors that the jury may consider are those proven beyond a reasonable doubt at trial, and no other aggravating factors may be considered. Whether a sentencing proceeding is conducted before the jury that found the defendant guilty or before another jury, the aggravating factor or factors proved at trial shall be deemed established beyond a reasonable doubt at the separate sentencing proceeding and shall not be relitigated. Where the jury is to determine sentences for concurrent counts of murder in the first degree, the aggravating factor included in each count shall be deemed to be an aggravating factor for the purpose of the jury's consideration in determining the sentence to be imposed on each such count.

4. The court on its own motion or on motion of either party, in the interest of justice or to avoid prejudice to either party, may delay the commencement of the separate sentencing proceeding.

5. Notwithstanding the provisions of article three hundred ninety of this chapter, where a defendant is found guilty of murder in the first degree, no presentence investigation shall be conducted; provided, however, that where the court is to impose a sentence of imprisonment, a presentence investigation shall be conducted and a presentence report shall be prepared in accordance with the provisions of such article.

6. At the sentencing proceeding the people shall not relitigate the existence of aggravating factors proved at the trial or otherwise present evidence, except, subject to the rules governing admission of evidence in the trial of a criminal action, in rebuttal of the defend-

ant's evidence. However, when the sentencing proceeding is conducted before a newly impaneled jury, the people may present evidence to the extent reasonably necessary to inform the jury of the nature and circumstances of the count or counts of murder in the first degree for which the defendant was convicted in sufficient detail to permit the jury to determine the weight to be accorded the aggravating factor or factors established at trial. Whenever the people present such evidence, the court must instruct the jury in its charge that any facts elicited by the people that are not essential to the verdict of guilty on such count or counts shall not be deemed established beyond a reasonable doubt. Subject to the rules governing the admission of evidence in the trial of a criminal action, the defendant may present any evidence relevant to any mitigating factor set forth in subdivision nine of this section; provided, however, the defendant shall not be precluded from the admission of reliable hearsay evidence. The burden of establishing any of the mitigating factors set forth in subdivision nine of this section shall be on the defendant, and must be proven by a preponderance of the evidence. The people shall not offer evidence or argument relating to any mitigating factor except in rebuttal of evidence offered by the defendant.

7. (a) The people may present evidence at the sentencing proceeding to prove that in the ten year period prior to the commission of the crime of murder in the first degree for which the defendant was convicted, the defendant has previously been convicted of two or more offenses committed on different occasions; provided, that each such offense shall be either (i) a class A felony offense other than one defined in article two hundred twenty of the penal law, a class B violent felony offense specified in paragraph (a) of subdivision one of section 70.02 of the penal law, or a felony offense under the penal law a necessary element of which involves either the use or attempted use or threatened use of a deadly weapon or the intentional infliction of or the attempted intentional infliction of serious physical injury or death, or (ii) an offense under the laws of another state or of the United States punishable by a term of imprisonment of more than one year a necessary element of which involves either the use or attempted use or threatened use of a deadly weapon or the intentional infliction of or the attempted intentional infliction of serious physical injury or death. For the purpose of this paragraph, the term "deadly weapon" shall have the meaning set forth in subdivision twelve of section 10.00 of the penal law. In calculating the ten year period under this paragraph, any period of time during which the defendant was incarcerated for any reason between the time of commission of any of the prior felony offenses and the time of commission of the crime of murder in the first degree shall be excluded and such ten year period shall be extended by a period or periods equal to the time served under such incarceration. The defendant's conviction of two or more such offenses shall, if proven at the sentencing proceeding, constitute an aggravating factor.

(b) In order to be deemed established, an aggravating factor set forth in this subdivision must be proven by the people beyond a reasonable doubt and the jury must unanimously find such factor to have been so proven. The defendant may present evidence relating to an aggravating factor defined in this subdivision and either party may offer evidence in rebuttal. Any evidence presented by either party relating to such factor shall be subject to the rules governing admission of evidence in the trial of a criminal action.

(c) Whenever the people intend to offer evidence of an aggravating factor set forth in this subdivision, the people must within a reasonable time prior to trial file with the court and serve upon the defendant a notice of intention to offer such evidence. Whenever the people intend to offer evidence of the aggravating factor set forth in paragraph (a) of this subdivision, the people shall file with the notice of intention to offer such evidence a statement setting forth the date and place of each of the alleged offenses in paragraph (a) of this subdivision. The provisions of section 400.15 of this chapter, except for subdivisions one and two thereof, shall be followed.

8. Consistent with the provisions of this section, the people and the defendant shall be given fair opportunity to rebut any evidence received at the separate sentencing proceeding.

9. Mitigating factors shall include the following:

- (a) The defendant has no significant history of prior criminal convictions involving the use of violence against another person;
- (b) The defendant was mentally retarded at the time of the crime, or the defendant's mental capacity was impaired or his ability to conform his conduct to the requirements of law was impaired but not so impaired in either case as to constitute a defense to prosecution;
- (c) The defendant was under duress or under the domination of another person, although not such duress or domination as to constitute a defense to prosecution;
- (d) The defendant was criminally liable for the present offense of murder committed by another, but his participation in the offense was relatively minor although not so minor as to constitute a defense to prosecution;
- (e) The murder was committed while the defendant was mentally or emotionally disturbed or under the influence of alcohol or any drug, although not to such an extent as to constitute a defense to prosecution; or
- (f) Any other circumstance concerning the crime, the defendant's state of mind or condition at the time of the crime, or the defendant's character, background or record that would be relevant to mitigation or punishment for the crime.

10. At the conclusion of all the evidence, the people and the defendant may present argument in summation for or against the sentence sought by the people. The people may deliver the first summation and the defendant may then deliver the last summation. Thereafter, the court shall deliver a charge to the jury on any matters appropriate in the circumstances. In its charge, the court must instruct the jury that with respect to each count of murder in the first degree the jury should consider whether or not a sentence of death should be imposed and whether or not a sentence of life imprisonment without parole should be imposed, and that the jury must be unanimous with respect to either sentence. The court must also instruct the jury that in the event the jury fails to reach unanimous agreement with respect to the sentence, the court will sentence the defendant to a term of imprisonment with a minimum term of between twenty and twenty-five years and a maximum term of life. Following the court's charge, the jury shall retire to consider the sentence to be imposed. Unless inconsistent with the provisions of this section, the provisions of sections 310.10, 310.20 and 310.30 shall govern the deliberations of the jury.

11. (a) The jury may not direct imposition of a sentence of death unless it unanimously finds beyond a reasonable doubt that the aggravating factor or factors substantially outweigh the mitigating factor or factors established, if any, and unanimously determines that the penalty of death should be imposed. Any member or members of the jury who find a mitigating factor to have been proven by the defendant by a preponderance of the evidence may consider such factor established regardless of the number of jurors who concur that the factor has been established.

(b) If the jury directs imposition of either a sentence of death or life imprisonment without parole, it shall specify on the record those mitigating and aggravating factors considered and those mitigating factors established by the defendant, if any.

(c) With respect to a count or concurrent counts of murder in the first degree, the court may direct the jury to cease deliberation with respect to the sentence or sentences to be imposed if the jury has deliberated for an extensive period of time without reaching unanimous agreement on the sentence or sentences to be imposed and the court is satisfied that any such agreement is unlikely within a reasonable time. The provisions of this paragraph shall apply with respect to consecutive counts of murder in the first degree. In the event the jury is unable to reach unanimous agreement, the court must sentence the defendant in accordance with subdivisions one through three of section 70.00 of the penal law with respect to any count or counts of murder in the first degree upon which the jury failed to reach unanimous agreement as to the sentence to be imposed.

(d) If the jury unanimously determines that a sentence of death should be imposed, the court must thereupon impose a sentence of death. Thereafter, however, the court may, upon written motion of the defendant, set

aside the sentence of death upon any of the grounds set forth in section 330.30. The procedures set forth in sections 330.40 and 330.50, as applied to separate sentencing proceedings under this section, shall govern the motion and the court upon granting the motion shall, except as may otherwise be required by subdivision one of section 330.50, direct a new sentencing proceeding pursuant to this section. Upon granting the motion upon any of the grounds set forth in section 330.30 and setting aside the sentence, the court must afford the people a reasonable period of time, which shall not be less than ten days, to determine whether to take an appeal from the order setting aside the sentence of death. The taking of an appeal by the people stays the effectiveness of that portion of the court's order that directs a new sentencing proceeding.

(e) If the jury unanimously determines that a sentence of life imprisonment without parole should be imposed the court must thereupon impose a sentence of life imprisonment without parole.

(f) Where a sentence has been unanimously determined by the jury it must be recorded on the minutes and read to the jury, and the jurors must be collectively asked whether such is their sentence. Even though no juror makes any declaration in the negative, the jury must, if either party makes such an application, be polled and each juror separately asked whether the sentence announced by the foreman is in all respects his or her sentence. If, upon either the collective or the separate inquiry, any juror answers in the negative, the court must refuse to accept the sentence and must direct the jury to resume its deliberation. If no disagreement is expressed, the jury must be discharged from the case.

12. (a) Upon the conviction of a defendant for the offense of murder in the first degree as defined in section 125.27 of the penal law, the court shall, upon oral or written motion of the defendant based upon a showing that there is reasonable cause to believe that the defendant is mentally retarded, promptly conduct a hearing without a jury to determine whether the defendant is mentally retarded. Upon the consent of both parties, such a hearing, or a portion thereof, may be conducted by the court contemporaneously with the separate sentencing proceeding in the presence of the sentencing jury, which in no event shall be the trier of fact with respect to the hearing. At such hearing the defendant has the burden of proof by a preponderance of the evidence that he or she is mentally retarded. The court shall defer rendering any finding pursuant to this subdivision as to whether the defendant is mentally retarded until a sentence is imposed pursuant to this section.

(b) In the event the defendant is sentenced pursuant to this section to life imprisonment without parole or to a term of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole, the court shall not render a finding with respect to whether the defendant is mentally retarded.

(c) In the event the defendant is sentenced pursuant to this section to death, the court shall thereupon render a finding with respect to whether the defendant is mentally retarded. If the court finds the defendant is mentally retarded, the court shall set aside the sentence of death and sentence the defendant either to life imprisonment without parole or to a term of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole. If the court finds the defendant is not mentally retarded, then such sentence of death shall not be set aside pursuant to this subdivision.

(d) In the event that a defendant is convicted of murder in the first degree pursuant to subparagraph (iii) of paragraph (a) of subdivision one of section 125.27 of the penal law, and the killing occurred while the defendant was confined or under custody in a state correctional facility or local correctional institution, and a sentence of death is imposed, such sentence may not be set aside pursuant to this subdivision upon the ground that the defendant is mentally retarded. Nothing in this paragraph or paragraph (a) of this subdivision shall preclude a defendant from presenting mitigating evidence of mental retardation at the separate sentencing proceeding.

(e) The foregoing provisions of this subdivision notwithstanding, at a reasonable time prior to the commencement of trial the defendant may,

upon a written motion alleging reasonable cause to believe the defendant is mentally retarded, apply for an order directing that a mental retardation hearing be conducted prior to trial. If, upon review of the defendant's motion and any response thereto, the court finds reasonable cause to believe the defendant is mentally retarded, it shall promptly conduct a hearing without a jury to determine whether the defendant is mentally retarded. In the event the court finds after the hearing that the defendant is not mentally retarded, the court must, prior to commencement of trial, enter an order so stating, but nothing in this paragraph shall preclude a defendant from presenting mitigating evidence of mental retardation at a separate sentencing proceeding. In the event the court finds after the hearing that the defendant, based upon a preponderance of the evidence, is mentally retarded, the court must, prior to commencement of trial, enter an order so stating. Unless the order is reversed on an appeal by the people or unless the provisions of paragraph (d) of this subdivision apply, a separate sentencing proceeding under this section shall not be conducted if the defendant is thereafter convicted of murder in the first degree. In the event a separate sentencing proceeding is not conducted, the court, upon conviction of a defendant for the crime of murder in the first degree, shall sentence the defendant to life imprisonment without parole or to a sentence of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole. Whenever a mental retardation hearing is held and a finding is rendered pursuant to this paragraph, the court may not conduct a hearing pursuant to paragraph (a) of this subdivision. For purposes of this subdivision and paragraph (b) of subdivision nine of this section, "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior which were manifested before the age of eighteen.

(f) In the event the court enters an order pursuant to paragraph (e) of this subdivision finding that the defendant is mentally retarded, the people may appeal as of right from the order pursuant to subdivision ten of section 450.20 of this chapter. Upon entering such an order the court must afford the people a reasonable period of time, which shall not be less than ten days, to determine whether to take an appeal from the order finding that the defendant is mentally retarded. The taking of an appeal by the people stays the effectiveness of the court's order and any order fixing a date for trial. Within six months of the effective date of this subdivision, the court of appeals shall adopt rules to ensure that appeals pursuant to this paragraph are expeditiously perfected, reviewed and determined so that pretrial delays are minimized. Prior to adoption of the rules, the court of appeals shall issue proposed rules and receive written comments thereon from interested parties.

13. (a) As used in this subdivision, the term "psychiatric evidence" means evidence of mental disease, defect or condition in connection with either a mitigating factor defined in this section or a mental retardation hearing pursuant to this section to be offered by a psychiatrist, psychologist or other person who has received training, or education, or has experience relating to the identification, diagnosis, treatment or evaluation of mental disease, mental defect or mental condition.

(b) When either party intends to offer psychiatric evidence, the party must, within a reasonable time prior to trial, serve upon the other party and file with the court a written notice of intention to present psychiatric evidence. The notice shall include a brief but detailed statement specifying the witness, nature and type of psychiatric evidence sought to be introduced. If either party fails to serve and file written notice, no psychiatric evidence is admissible unless the party failing to file thereafter serves and files such notice and the court affords the other party an adjournment for a reasonable period. If a party fails to give timely notice, the court in its discretion may impose upon offending counsel a reasonable monetary sanction for an intentional failure but may not in any event preclude the psychiatric evidence. In the event a monetary sanction is imposed, the offending counsel shall be personally liable therefor, and shall not receive reimbursement of any kind from any source in order to pay the cost of such monetary sanction. Nothing contained herein shall preclude the

court from entering an order directing a party to provide timely notice.

(c) When a defendant serves notice pursuant to this subdivision, the district attorney may make application, upon notice to the defendant, for an order directing that the defendant submit to an examination by a psychiatrist, licensed psychologist, or licensed psychiatric social worker designated by the district attorney, for the purpose of rebutting evidence offered by the defendant with respect to a mental disease, defect, or condition in connection with either a mitigating factor defined in this section, including whether the defendant was acting under duress, was mentally or emotionally disturbed or mentally retarded, or was under the influence of alcohol or any drug. If the application is granted, the district attorney shall schedule a time and place for the examination, which shall be recorded. Counsel for the people and the defendant shall have the right to be present at the examination. A transcript of the examination shall be made available to the defendant and the district attorney promptly after its conclusion. The district attorney shall promptly serve on the defendant a written copy of the findings and evaluation of the examiner. If the court finds that the defendant has wilfully refused to cooperate fully in an examination pursuant to this paragraph, it shall, upon request of the district attorney, instruct the jury that the defendant did not submit to or cooperate fully in such psychiatric examination. When a defendant is subjected to an examination pursuant to an order issued in accordance with this subdivision, any statement made by the defendant for the purpose of the examination shall be inadmissible in evidence against him in any criminal action or proceeding on any issue other than that of whether a mitigating factor has been established or whether the defendant is mentally retarded, but such statement is admissible upon such an issue whether or not it would otherwise be deemed a privileged communication.

14. (a) At a reasonable time prior to the sentencing proceeding or a mental retardation hearing:

(i) the prosecutor shall, unless previously disclosed and subject to a protective order, make available to the defendant the statements and information specified in subdivision one of section 240.45 and make available for inspection, photographing, copying or testing the property specified in subdivision one of section 240.20; and

(ii) the defendant shall, unless previously disclosed and subject to a protective order, make available to the prosecution the statements and information specified in subdivision two of section 240.45 and make available for inspection, photographing, copying or testing, subject to constitutional limitations, the reports, documents and other property specified in subdivision one of section 240.30.

(b) Where a party refuses to make disclosure pursuant to this section, the provisions of section 240.35, subdivision one of section 240.40 and section 240.50 shall apply.

(c) If, after complying with the provisions of this section or an order pursuant thereto, a party finds either before or during a sentencing proceeding or mental retardation hearing, additional material subject to discovery or covered by court order, the party shall promptly make disclosure or apply for a protective order.

(d) If the court finds that a party has failed to comply with any of the provisions of this section, the court may enter any of the orders specified in subdivision one of section 240.70.

15. The court of appeals shall formulate and adopt rules for the development of forms for use by the jury in recording its findings and determinations of sentence.

S 400.30 Procedure for determining the amount of a fine based upon the defendant's gain from the offense.

1. Order directing a hearing. In any case where the court is of the opinion that the sentence should consist of or include a fine and that, pursuant to article eighty of the penal law, the amount of the fine should be based upon the defendant's gain from the commission of the offense, the court may order a hearing to determine the amount of such gain. The order must be filed with the clerk of the court and must specify a date for the hearing not less than ten days after the filing of the order.

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

1 E. In any case in which a defendant charged with capital murder intends, in the event of
2 conviction, to present testimony of an expert witness to support a claim that he is mentally
3 retarded, he or his attorney shall give notice in writing to the attorney for the Commonwealth,
4 at least 21 days before trial, of his intention to present such testimony. In the event that such
5 notice is not given and the defendant tenders testimony by an expert witness at the sentencing
6 phase of the trial, then the court may, in its discretion, upon objection of the Commonwealth,
7 either allow the Commonwealth a continuance or, under appropriate circumstances, bar the
8 defendant from presenting such evidence.

9 F. 1. If the attorney for the defendant gives notice pursuant to subsection E and the
10 Commonwealth thereafter seeks an evaluation concerning the existence or absence of the
11 defendant's mental retardation, the court shall appoint 1 or more qualified experts to perform
12 such an evaluation. The court shall order the defendant to submit to such an evaluation, and
13 advise the defendant on the record in court that a refusal to cooperate with the
14 Commonwealth's experts could result in exclusion of the defendant's expert evidence. The
15 qualification of the experts shall be governed by subsection A. The location of the evaluation
16 shall be governed by subsection B. The attorney for the Commonwealth shall be responsible
17 for providing the experts the information specified in subsection C of § 19.2-169.5. After
18 performing their evaluation, the experts shall report their findings and opinions and provide
19 copies of psychiatric, psychological, medical or other records obtained during the course of the
20 evaluation to the attorneys for the Commonwealth and the defense.

21 2. If the court finds, after hearing evidence presented by the parties, out of the presence
22 of the jury, that the defendant has refused to cooperate with an evaluation requested by the
23 Commonwealth, the court may admit evidence of such refusal or, in the discretion of the court,
24 bar the defendant from presenting his expert evidence.

25 § 19.2-264.3:3. Limitations on use of statements or disclosure by defendant during
26 evaluations.

1 No statement or disclosure by the defendant made during a competency evaluation
2 performed pursuant to § 19.2-169.1, an evaluation performed pursuant to § 19.2-169.5 to
3 determine sanity at the time of the offense, treatment provided pursuant to § 19.2-169.2 or §
4 19.2-169.6, a mental condition evaluation performed pursuant to § 19.2-264.3:1 or a mental
5 retardation evaluation performed pursuant to § 19.2-264.3:1.2, and no evidence derived from
6 any such statements or disclosures may be introduced against the defendant at the sentencing
7 phase of a capital murder trial for the purpose of proving the aggravating circumstances
8 specified in § 19.2-264.4. Such statements or disclosures shall be admissible in rebuttal only
9 when relevant to issues in mitigation raised by the defense.

10 § 19.2-264.4. Sentence proceeding.

11 A. Upon a finding that the defendant is guilty of an offense which may be punishable by
12 death, a proceeding shall be held which shall be limited to a determination as to whether the
13 defendant shall be sentenced to death or life imprisonment. Upon request of the defendant, a
14 jury shall be instructed that for all Class 1 felony offenses committed after January 1, 1995, a
15 defendant shall not be eligible for parole if sentenced to imprisonment for life. In case of trial by
16 jury, where a sentence of death is not recommended, the defendant shall be sentenced to
17 imprisonment for life.

18 A1. In any proceeding conducted pursuant to this section, the court shall permit the
19 victim, as defined in § 19.2-11.01, upon the motion of the attorney for the Commonwealth, and
20 with the consent of the victim, to testify in the presence of the accused regarding the impact of
21 the offense upon the victim. The court shall limit the victim's testimony to the factors set forth in
22 clauses (i) through (vi) of subsection A of § 19.2-299.1.

23 B. In cases of trial by jury, evidence may be presented as to any matter which the court
24 deems relevant to sentence, except that reports under the provisions of § 19.2-299, or under
25 any rule of court, shall not be admitted into evidence.

26 Evidence which may be admissible, subject to the rules of evidence governing
27 admissibility, may include the circumstances surrounding the offense, the history and



Senate Bill 173

No Death Penalty/Mentally Retarded. (= H 141)

Bill Text: [Edition 1](#) [Edition 2](#) [Edition 3](#) [Edition 4](#) [Edition 5](#) [Edition 6](#) [Edition 7](#) [Ratified](#)
[Chapered](#)

Introduced by: Charlie S. Dannelly, Eleanor Kinnaird, Frank W. Ballance, Jr., Hamilton C. Horton, Jr., Jeanne H. Lucas, Larry Shaw, Luther H. Jordan, Jr., Martin, William N., Oscar N. Harris

P/L = Public/Local Bill | \$ = Affects Appropriations
 * = Bill Text Has Changed

Session:	2001-2002 Session	Prime Sponsors:	Frank W. Ballance, Jr..
Fiscal Note:	Edition 6	Attributes:	P *

<u>Date</u>		<u>Action</u>
02/15/2001	S	Filed
02/19/2001	S	Ref To Com On Judiciary II
04/19/2001	S	Reptd Fav Com Substitute
04/19/2001	SA	Com Substitute Adopted
04/23/2001	SA	Amend Adopted #2
04/23/2001	S	Amend Failed #3
04/23/2001	SA	Amend Adopted #4
04/23/2001	SA	Amend Adopted #5
04/23/2001	S	Passed 2nd & 3rd Reading
04/25/2001	H	Rec From Senate
04/25/2001	H	Ref To Com On Judiciary I
07/04/2001	HA	Reptd Fav Com Substitute
07/04/2001	H	Cal Pursuant Rule 36(b)
07/10/2001	H	Placed On Cal For 7/11/2001
07/11/2001	HA	Amend Adopted #1A,#1B,#3,#4,#2
07/11/2001	H	Passed 2nd Reading
07/16/2001	HA	Amend Adopted #5
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07/16/2001	H	Passed 3rd Reading
07/18/2001	S	Rec To Concur H Com Sub
07/18/2001	S	Placed On Cal For 7/19/2001
07/19/2001	S	Withdrawn From Cal
07/19/2001	S	Placed On Cal For 7/24/2001
07/24/2001	S	Concurred In H/com Sub
07/25/2001	S	Ratified
07/26/2001	S	Pres. To Gov. 7/26/2001
08/04/2001	S	Signed By Gov. 8/4/2001
08/04/2001	R	Ch. SL 2001-346

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TOC: [General Statutes of North Carolina](#) > [CHAPTER 15A. CRIMINAL PROCEDURE ACT](#) > **§ 15A-2005. Mentally retarded defendants; death sentence prohibited**

N.C. Gen. Stat. § 15A-2005

GENERAL STATUTES OF NORTH CAROLINA
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*** STATUTES CURRENT THROUGH THE 2002 REGULAR SESSION ***
*** AUGUST 2002 ANNOTATION SERVICE ***

CHAPTER 15A. CRIMINAL PROCEDURE ACT

◆ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

N.C. Gen. Stat. § 15A-2005 (2002)

§ 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.

HISTORY: 2001-346, s. 1.

NOTES:

EDITOR'S NOTE. --Session Laws 2001-346, s. 4, made this section effective October 1, 2001, and applicable to trials docketed to begin on or after that date.

CASE NOTES

CITED in State v. Anderson, 355 N.C. 136, 558 S.E.2d 87 (2002).

USER NOTE: For more generally applicable notes, see notes under the first section of this subpart, part, article, or chapter.

Source: [Legal](#) > [States Legal - U.S.](#) > [North Carolina](#) > [Statutes & Regulations](#) > **NC - General Statutes of North Carolina** ⓘ

TOC: [General Statutes of North Carolina](#) > [CHAPTER 15A. CRIMINAL PROCEDURE ACT](#) > **§ 15A-2005. Mentally retarded defendants; death sentence prohibited**

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South Dakota

23A-27A-26.1. Death penalty not to be imposed on person mentally retarded when crime committed. Notwithstanding any other provision of law, the death penalty may not be imposed upon any person who was mentally retarded at the time of the commission of the offense and whose mental retardation was manifested and documented before the age of eighteen years.

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23A-27A-26.2. Mental retardation defined. As used in § § 23A-27A-26.1 to 23A-27A-26.7, inclusive, mental retardation means significant subaverage general intellectual functioning existing concurrently with substantial related deficits in applicable adaptive skill areas. An intelligence quotient exceeding seventy on a reliable standardized measure of intelligence is presumptive evidence that the defendant does not have significant subaverage general intellectual functioning.

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23A-27A-26.3. Procedures for establishing mental retardation of defendant. Not later than ninety days prior to the commencement of trial, the defendant may upon a motion alleging reasonable cause to believe the defendant was mentally retarded at the time of the commission of the offense, apply for an order directing that a mental retardation hearing be conducted prior to trial. If, upon review of the defendant's motion and any response thereto, the court finds reasonable cause to believe the defendant was mentally retarded, it shall promptly conduct a hearing without a jury to determine whether the defendant was mentally retarded. If the court finds after the hearing that the defendant was not mentally retarded at the time of the commission of the offense, the court shall, prior to commencement of trial, enter an order so stating, but nothing in this paragraph precludes the defendant from presenting mitigating evidence of mental retardation at the sentencing phase of the trial. If the court finds after the hearing that the defendant established mental retardation by a preponderance of the evidence, the court shall prior to commencement of trial, enter an order so stating. Unless the order is reversed on appeal, a separate sentencing proceeding under this section may not be conducted if the defendant is thereafter convicted of murder in the first degree. If a separate sentencing proceeding is not conducted, the court, upon conviction of a defendant for the crime of murder in the first degree, shall sentence the defendant to life imprisonment without parole.

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23A-27A-26.4. Appeal by state. If the court enters an order pursuant to § 23A-27A-26.3 finding that the defendant was mentally retarded at the time of the commission of the offense, the state may appeal as of right from the order. Upon entering such an order, the court shall afford the state a reasonable period of time, which may not be less than ten days, to determine whether to take an appeal from the order finding that the defendant was mentally retarded. The taking of an appeal by the state stays the effectiveness of the court's order and any order fixing a date for trial.

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23A-27A-26.5. Examination of defendant by state -- Videotaped recording -- Defendant's statements inadmissible except as to mental retardation. If a defendant serves notice pursuant to § 23A-27A-26.3, the state may make application, upon notice to the defendant, for an order directing that the defendant submit to an examination by a psychiatrist, licensed psychologist, or licensed psychiatric social worker designated by the state's attorney, for the purpose of rebutting evidence offered by the defendant. Counsel for the state and the defendant have the right to be present at the examination. A videotaped recording of the examination shall be made available to the defendant and the state's attorney promptly after its conclusion. The state's attorney shall promptly serve on the defendant a written copy of the findings and evaluation of the examiner. If a defendant is subjected to an examination pursuant to an order issued in accordance with this section, any statement made by the defendant for the purpose of the examination is *inadmissible in evidence* against the defendant in any criminal action or proceeding on every issue other than that of whether the defendant was mentally retarded at the time of the commission of the offense, but such statement is admissible upon such an issue whether or not it would otherwise be deemed a privileged communication.

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23A-27A-26.6. Applicability of §§ 23A-27A-26.1 to 23A-27A-26.7, inclusive. The provisions of § 23A-27A-26.1 to 23A-27A-26.7, inclusive, apply only to offenses alleged to have been committed by the defendant after July 1, 2000.

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23A-27A-26.7. Inseparability of § § 23A-27A-26.1 to 23A-27A-26.7, inclusive. The provisions of § § 23A-27A-26.1 to 23A-27A-26.7, inclusive, are essentially and inseparably connected and interdependent.

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Tennessee

39-13-203. Mentally retarded defendants - Death sentence prohibited.

(a) As used in this section, "mental retardation" means:

(1) Significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below;

(2) Deficits in adaptive behavior; and

(3) The mental retardation must have been manifested during the developmental period, or by eighteen (18) years of age.

(b) Notwithstanding any provision of law to the contrary, no defendant with mental retardation at the time of committing first degree murder shall be sentenced to death.

(c) The burden of production and persuasion to demonstrate mental retardation by a preponderance of the evidence is upon the defendant. The determination of whether the defendant was mentally retarded at the time of the offense of first degree murder shall be made by the court.

(d) If the court determines that the defendant was a person with mental retardation at the time of the offense, and if the trier of fact finds the defendant guilty of first degree murder, and if the district attorney general has filed notice of intention to ask for the sentence of imprisonment for life without possibility of parole as provided in § 39-13-208(b), the jury shall fix the punishment in a separate sentencing proceeding to determine whether the defendant shall be sentenced to imprisonment for life without possibility of parole or imprisonment for life. The provisions of § 39-13-207 shall govern such sentencing proceeding.

(e) If the issue of mental retardation is raised at trial and the court determines that the defendant is not a person with mental retardation, the defendant shall be entitled to offer evidence to the trier of fact of diminished intellectual capacity as a mitigating circumstance pursuant to § 39-13-204(j)(8).

(f) The determination by the trier of fact that the defendant is not mentally retarded shall not be appealable by interlocutory appeal but may be a basis of appeal by either the state or defendant following the sentencing stage of the trial.

[Acts 1990, ch. 1038, §§ 1, 2; 1993, ch. 473, § 10.]

[Legislature Home](#)[About Us](#)[E-Mail Lists](#)[Search](#)[Help](#)[RCW TITLES >> TITLE 10 >> CHAPTER 10.95 >> SECTION 10.95.030](#)[Print Version](#)[10.95.020](#) << [10.95.030](#) >> [10.95.040](#)**RCW 10.95.030****Sentences for aggravated first degree murder.**

(1) Except as provided in subsection (2) of this section, any person convicted of the crime of aggravated first degree murder shall be sentenced to life imprisonment without possibility of release or parole. A person sentenced to life imprisonment under this section shall not have that sentence suspended, deferred, or commuted by any judicial officer and the indeterminate sentence review board or its successor may not parole such prisoner nor reduce the period of confinement in any manner whatsoever including but not limited to any sort of good-time calculation. The department of social and health services or its successor or any executive official may not permit such prisoner to participate in any sort of release or furlough program.

(2) If, pursuant to a special sentencing proceeding held under RCW [10.95.050](#), the trier of fact finds that there are not sufficient mitigating circumstances to merit leniency, the sentence shall be death. In no case, however, shall a person be sentenced to death if the person was mentally retarded at the time the crime was committed, under the definition of mental retardation set forth in (a) of this subsection. A diagnosis of mental retardation shall be documented by a licensed psychiatrist or licensed psychologist designated by the court, who is an expert in the diagnosis and evaluation of mental retardation. The defense must establish mental retardation by a preponderance of the evidence and the court must make a finding as to the existence of mental retardation.

(a) "Mentally retarded" means the individual has: (i) Significantly subaverage general intellectual functioning; (ii) existing concurrently with deficits in adaptive behavior; and (iii) both significantly subaverage general intellectual functioning and deficits in adaptive behavior were manifested during the developmental period.

(b) "General intellectual functioning" means the results obtained by assessment with one or more of the individually administered general intelligence tests developed for the purpose of assessing intellectual functioning.

(c) "Significantly subaverage general intellectual functioning" means intelligence quotient seventy or below.

(d) "Adaptive behavior" means the effectiveness or degree with which individuals meet the standards of personal independence and social responsibility expected for his or her age.

(e) "Developmental period" means the period of time between conception and the eighteenth birthday.

[1993 c 479 § 1; 1981 c 138 § 3.]

Appendix F

1 A BILL to amend and reenact §§ 18.2-10, 19.2-175, 19.2-264.3:1, 19.2-264.4 and 37.1-1 of the
2 Code of Virginia and to amend the Code of Virginia by adding sections numbered 8.01-
3 654.2, 19.2-264.3:1.1, 19.2-264.3:1.2 and 19.2-264.3:3, relating to capital cases; mental
4 retardation.

5 **Be it enacted by the General Assembly of Virginia:**

6 **1. That §§ 18.2-10, 19.2-175, 19.2-264.3:1, 19.2-264.4 and 37.1-1 of the Code of Virginia**
7 **are amended and reenacted, and that the Code of Virginia is amended by adding**
8 **sections numbered 8.01-654.2, 19.2-264.3:1.1, 19.2-264.3:1.2 and 19.2-264.3:3 as follows:**

9 § 8.01-654.2. Presentation of claim of mental retardation by person sentenced to death
10 before the effective date of this section.

11 Notwithstanding any other provision of law, any person under sentence of death whose
12 sentence became final in the circuit court before the effective date of this section, and who
13 desires to have a claim of his mental retardation presented to the Supreme Court, shall do so
14 by one of the following methods: (i) if the person has not commenced a direct appeal, he shall
15 present his claim of mental retardation by assignment of error and in his brief in that appeal, or
16 if his direct appeal is pending in the Supreme Court, he shall file a supplemental assignment of
17 error and brief containing his claim of mental retardation, or (ii) if the person has not filed a
18 petition for a writ of habeas corpus under subsection C of § 8.01-654, he shall present his
19 claim of mental retardation in a petition for a writ of habeas corpus under such subsection, or if
20 such a petition is pending in the Supreme Court, he shall file an amended petition containing
21 his claim of mental retardation. A person proceeding under this section shall allege the factual
22 basis for his claim of mental retardation. The Supreme Court shall consider a claim raised
23 under this section and if it determines that the claim is not frivolous, it shall remand the claim to
24 the circuit court for a determination of mental retardation; otherwise the Supreme Court shall

1 dismiss the petition. The provisions of §§ 19.2-264.3:1.1 and 19.2-264.3:1.2 shall govern a
2 determination of mental retardation made pursuant to this section. If the claim is before the
3 Supreme Court on direct appeal and is remanded to the circuit court and the case wherein the
4 sentence of death was imposed was tried by a jury, the circuit court shall empanel a new jury
5 for the sole purpose of making a determination of mental retardation.

6 If the person has completed both a direct appeal and a habeas corpus proceeding
7 under subsection C of § 8.01-654, he shall not be entitled to file any further habeas petitions in
8 the Supreme Court and his sole remedy shall lie in federal court.

9 § 18.2-10. Punishment for conviction of felony.

10 The authorized punishments for conviction of a felony are:

11 (a) For Class 1 felonies, death, if the person so convicted was ~~sixteen~~ 16 years of age
12 or older at the time of the offense and is not determined to be mentally retarded pursuant to §
13 19.2-264.3:1.1, or imprisonment for life and, subject to subdivision (g), a fine of not more than
14 \$100,000. If the person was under ~~sixteen~~ 16 years of age at the time of the offense or is
15 determined to be mentally retarded pursuant to § 19.2-264.3:1.1, the punishment shall be
16 imprisonment for life and, subject to subdivision (g), a fine of not more than \$100,000.

17 (b) For Class 2 felonies, imprisonment for life or for any term not less than ~~twenty~~ 20
18 years and, subject to subdivision (g), a fine of not more than \$100,000.

19 (c) For Class 3 felonies, a term of imprisonment of not less than ~~five~~ 5 years nor more
20 than ~~twenty~~ 20 years and, subject to subdivision (g), a fine of not more than \$100,000.

21 (d) For Class 4 felonies, a term of imprisonment of not less than ~~two~~ 2 years nor more
22 than ~~ten~~ 10 years and, subject to subdivision (g), a fine of not more than \$100,000.

23 (e) For Class 5 felonies, a term of imprisonment of not less than ~~one~~ 1 year nor more
24 than ~~ten~~ 10 years, or in the discretion of the jury or the court trying the case without a jury,
25 confinement in jail for not more than ~~twelve~~ 12 months and a fine of not more than \$2,500,
26 either or both.

1 (f) For Class 6 felonies, a term of imprisonment of not less than ~~one~~ 1 year nor more
2 than ~~five~~ 5 years, or in the discretion of the jury or the court trying the case without a jury,
3 confinement in jail for not more than ~~twelve~~ 12 months and a fine of not more than \$2,500,
4 either or both.

5 (g) Except as specifically authorized in subdivision (e) or (f), or in Class 1 felonies for
6 which a sentence of death is imposed, the court shall impose either a sentence of
7 imprisonment together with a fine, or imprisonment only. However, if the defendant is not a
8 natural person, the court shall impose only a fine.

9 For any felony offense committed (i) on or after January 1, 1995, the court may, and (ii)
10 on or after July 1, 2000, shall, except in cases in which the court orders a suspended term of
11 confinement of at least ~~six~~ 6 months, impose an additional term of not less than ~~six~~ 6 months
12 nor more than ~~three~~ 3 years, which shall be suspended conditioned upon successful
13 completion of a period of post-release supervision pursuant to § 19.2-295.2 and compliance
14 with such other terms as the sentencing court may require. However, such additional term may
15 only be imposed when the sentence includes an active term of incarceration in a correctional
16 facility.

17 For a felony offense prohibiting proximity to children as described in subsection A of §
18 18.2-370.2, the sentencing court is authorized to impose the punishment set forth in
19 subsection B of that section in addition to any other penalty provided by law.

20 § 19.2-175. Compensation of experts.

21 Each psychiatrist, clinical psychologist or other expert appointed by the court to render
22 professional service pursuant to §§ 19.2-168.1, 19.2-169.1, 19.2-169.5, subsection A of §
23 19.2-176, §§ 19.2-182.8, 19.2-182.9, 19.2-264.3:1, 19.2-264.3:3 or § 19.2-301, who is not
24 regularly employed by the Commonwealth of Virginia except by the University of Virginia
25 School of Medicine and the Medical College of Virginia, shall receive a reasonable fee for such
26 service. The fee shall be determined in each instance by the court that appointed the expert, in
27 accordance with guidelines established by the Supreme Court after consultation with the

1 Department of Mental Health, Mental Retardation and Substance Abuse Services. Except in
2 capital murder cases the fee shall not exceed \$400, but in addition if any such expert is
3 required to appear as a witness in any hearing held pursuant to such sections, he shall receive
4 mileage and a fee of \$100 for each day during which he is required so to serve. An itemized
5 account of expense, duly sworn to, must be presented to the court, and when allowed shall be
6 certified to the Supreme Court for payment out of the state treasury, and be charged against
7 the appropriations made to pay criminal charges. Allowance for the fee and for the per diem
8 authorized shall also be made by order of the court, duly certified to the Supreme Court for
9 payment out of the appropriation to pay criminal charges.

10 § 19.2-264.3:1. Expert assistance when defendant's mental condition relevant to capital
11 sentencing.

12 A. Upon (i) motion of the attorney for a defendant charged with or convicted of capital
13 murder and (ii) a finding by the court that the defendant is financially unable to pay for expert
14 assistance, the court shall appoint ~~one~~1 or more qualified mental health experts to evaluate
15 the defendant and to assist the defense in the preparation and presentation of information
16 concerning the defendant's history, character, or mental condition, including (i) whether the
17 defendant acted under extreme mental or emotional disturbance at the time of the offense; (ii)
18 whether the capacity of the defendant to appreciate the criminality of his conduct or to conform
19 his conduct to the requirements of the law was significantly impaired at the time of the offense;
20 and (iii) whether there are any other factors in mitigation relating to the history or character of
21 the defendant or the defendant's mental condition at the time of the offense. The mental health
22 expert appointed pursuant to this section shall be (i) a psychiatrist, a clinical psychologist, or
23 an individual with a doctorate degree in clinical psychology who has successfully completed
24 forensic evaluation training as approved by the Commissioner of Mental Health, Mental
25 Retardation and Substance Abuse Services and (ii) qualified by specialized training and
26 experience to perform forensic evaluations. The defendant shall not be entitled to a mental
27 health expert of the defendant's own choosing or to funds to employ such expert.

1 B. Evaluations performed pursuant to subsection A may be combined with evaluations
2 performed pursuant to § 19.2-169.5 and shall be governed by subsections B and C of § 19.2-
3 169.5.

4 C. The expert appointed pursuant to subsection A shall submit to the attorney for the
5 defendant a report concerning the history and character of the defendant and the defendant's
6 mental condition at the time of the offense. The report shall include the expert's opinion as to
7 (i) whether the defendant acted under extreme mental or emotional disturbance at the time of
8 the offense, (ii) whether the capacity of the defendant to appreciate the criminality of his
9 conduct or to conform his conduct to the requirements of the law was significantly impaired,
10 and (iii) whether there are any other factors in mitigation relating to the history or character of
11 the defendant or the defendant's mental condition at the time of the offense.

12 D. The report described in subsection C shall be sent solely to the attorney for the
13 defendant and shall be protected by the attorney-client privilege. However, the Commonwealth
14 shall be given the report and the results of any other evaluation of the defendant's mental
15 condition conducted relative to the sentencing proceeding and copies of psychiatric,
16 psychological, medical or other records obtained during the course of such evaluation, after
17 the attorney for the defendant gives notice of an intent to present psychiatric or psychological
18 evidence in mitigation pursuant to subsection E.

19 E. In any case in which a defendant charged with capital murder intends, in the event of
20 conviction, to present testimony of an expert witness to support a claim in mitigation relating to
21 the defendant's history, character or mental condition, he or his attorney shall give notice in
22 writing to the attorney for the Commonwealth, at least ~~twenty-one~~ 21 days before trial, of his
23 intention to present such testimony. In the event that such notice is not given and the
24 defendant tenders testimony by an expert witness at the sentencing phase of the trial, then the
25 court may, in its discretion, upon objection of the Commonwealth, either allow the
26 Commonwealth a continuance or, under appropriate circumstances, bar the defendant from
27 presenting such evidence.

1 F. 1. If the attorney for the defendant gives notice pursuant to subsection E and the
2 Commonwealth thereafter seeks an evaluation concerning the existence or absence of
3 mitigating circumstances relating to the defendant's mental condition at the time of the offense,
4 the court shall appoint ~~one~~ 1 or more qualified experts to perform such an evaluation. The
5 court shall order the defendant to submit to such an evaluation, and advise the defendant on
6 the record in court that a refusal to cooperate with the Commonwealth's expert could result in
7 exclusion of the defendant's expert evidence. The qualification of the experts shall be
8 governed by subsection A. The location of the evaluation shall be governed by subsection B of
9 § 19.2-169.5. The attorney for the Commonwealth shall be responsible for providing the
10 experts the information specified in subsection C of § 19.2-169.5. After performing their
11 evaluation, the experts shall report their findings and opinions and provide copies of
12 psychiatric, psychological, medical or other records obtained during the course of the
13 evaluation to the attorneys for the Commonwealth and the defense.

14 2. If the court finds, after hearing evidence presented by the parties, out of the presence
15 of the jury, that the defendant has refused to cooperate with an evaluation requested by the
16 Commonwealth, the court may admit evidence of such refusal or, in the discretion of the court,
17 bar the defendant from presenting his expert evidence.

18 ~~G. No statement or disclosure by the defendant made during a competency evaluation~~
19 ~~performed pursuant to § 19.2-169.1, an evaluation performed pursuant to § 19.2-169.5 to~~
20 ~~determine sanity at the time of the offense, treatment provided pursuant to § 19.2-169.2 or §~~
21 ~~19.2-169.6 or a capital sentencing evaluation performed pursuant to this section, and no~~
22 ~~evidence derived from any such statements or disclosures may be introduced against the~~
23 ~~defendant at the sentencing phase of a capital murder trial for the purpose of proving the~~
24 ~~aggravating circumstances specified in § 19.2-264.4. Such statements or disclosures shall be~~
25 ~~admissible in rebuttal only when relevant to issues in mitigation raised by the defense.~~

26 § 19.2-264.3:1.1. Capital cases; determination of mental retardation.

27 A. As used in this section and § 19.2-264.3:1.2, the following definition applies:

1 "Mentally retarded" means a disability, originating before the age of 18 years,
2 characterized concurrently by (i) significantly subaverage intellectual functioning as
3 demonstrated by performance on a standardized measure of intellectual functioning carried out
4 in conformity with accepted professional practice, that is at least 2 standard deviations below
5 the mean, considering the standard error of measurement for the specific instruments used
6 and (ii) significant limitations in adaptive behavior as expressed in conceptual, social and
7 practical adaptive skills.

8 B. Assessments of mental retardation under this section and § 19.2-264.3:1.2 shall
9 conform to the following requirements:

10 1. Assessment of intellectual functioning shall include administration of at least one
11 standardized measure generally accepted by the field and appropriate for administration to the
12 particular defendant being assessed, taking into account cultural, linguistic, sensory, motor,
13 behavioral and other individual factors. Testing of intellectual functioning shall be carried out in
14 conformity with accepted professional practice, and whenever indicated, the assessment shall
15 include information from multiple sources. The Commissioner of Mental Health, Mental
16 Retardation and Substance Abuse Services shall maintain a nonexclusive list of standardized
17 measures of intellectual functioning generally accepted by the field.

18 2. Assessment of adaptive behavior shall be based on multiple sources of information,
19 including clinical interview, psychological testing and educational, correctional and vocational
20 records. The assessment shall include at least one standardized measure generally accepted
21 by the field and appropriate for administration to the particular defendant being assessed, for
22 assessing adaptive behavior, taking into account the environments in which the person has
23 lived as well as cultural, linguistic, sensory, motor, behavioral and other individual factors,
24 unless not feasible. In reaching a clinical judgment regarding whether the defendant exhibits
25 significant limitations in adaptive behavior, the examiner shall give performance on
26 standardized measures whatever weight is clinically appropriate in light of the defendant's
27 history and characteristics and the context of the assessment.

1 3. Assessment of developmental origin shall be based on multiple sources of
2 information generally accepted by the field and appropriate for the particular defendant being
3 assessed, including, whenever available, educational, social service, medical records, prior
4 disability assessments, parental or caregiver reports, and other collateral data, recognizing that
5 valid clinical assessment conducted during the defendant's childhood may not have conformed
6 to current practice standards.

7 C. In any case in which the offense may be punishable by death and is tried before a
8 jury, the issue of mental retardation, if raised by the defendant in accordance with the notice
9 provisions of subsection E of § 19.2-264.3:1.2, shall be determined by the jury as part of the
10 sentencing proceeding required by § 19.2-264.4.

11 In any case in which the offense may be punishable by death and is tried before a
12 judge, the issue of mental retardation, if raised by the defendant in accordance with the notice
13 provisions of subsection E of § 19.2-264.3:1.2, shall be determined by the judge as part of the
14 sentencing proceeding required by § 19.2-264.4.

15 The defendant shall bear the burden of proving that he is mentally retarded by a
16 preponderance of the evidence.

17 D. The verdict of the jury, if the issue of mental retardation is raised, shall be in writing,
18 and, in addition to the forms specified in § 19.2-264.4, shall include one of the following forms:

19 (1) " We the jury, on the issue joined, having found the defendant guilty of (here set out
20 the statutory language of the offense charged), and that the defendant has proven
21 by a preponderance of the evidence that he is mentally retarded, fix his punishment
22 at (i) imprisonment for life or (ii) imprisonment for life and a fine of \$ _____.

23 Signed. foreman"

24 or

25 (2) " We the jury, on the issue joined, having found the defendant guilty of (here set out
26 the statutory language of the offense charged) and find that the defendant has not proven by a
27 preponderance of the evidence that he is mentally retarded.

1 Signed. foreman"

2 § 19.2-264.3:1.2. Expert assistance when issue of defendant's mental retardation
3 relevant to capital sentencing.

4 A. Upon (i) motion of the attorney for a defendant charged with or convicted of capital
5 murder and (ii) a finding by the court that the defendant is financially unable to pay for expert
6 assistance, the court shall appoint 1 or more qualified mental health experts to assess whether
7 or not the defendant is mentally retarded and to assist the defense in the preparation and
8 presentation of information concerning the defendant's mental retardation. The mental health
9 expert appointed pursuant to this section shall be (a) a psychiatrist, a clinical psychologist or
10 an individual with a doctorate degree in clinical psychology, (b) skilled in the administration,
11 scoring and interpretation of intelligence tests and measures of adaptive behavior and (c)
12 qualified by experience and by specialized training, approved by the Commissioner of Mental
13 Health, Mental Retardation and Substance Abuse Services, to perform forensic evaluations.
14 The defendant shall not be entitled to a mental health expert of the defendant's own choosing
15 or to funds to employ such expert.

16 B. Evaluations performed pursuant to subsection A may be combined with evaluations
17 performed pursuant to §§ 19.2-169.1, 19.2-169.5, or § 19.2-264.3:1.

18 C. The expert appointed pursuant to subsection A shall submit to the attorney for the
19 defendant a report assessing whether the defendant is mentally retarded. The report shall
20 include the expert's opinion as to whether the defendant is mentally retarded.

21 D. The report described in subsection C shall be sent solely to the attorney for the
22 defendant and shall be protected by the attorney-client privilege. However, the
23 Commonwealth shall be given a copy of the report, the results of any other evaluation of the
24 defendant's mental retardation and copies of psychiatric, psychological, medical or other
25 records obtained during the course of the evaluation, after the attorney for the defendant gives
26 notice of an intent to present evidence of mental retardation pursuant to subsection E.

1 background of the defendant, and any other facts in mitigation of the offense. Facts in
2 mitigation may include, but shall not be limited to, the following: (i) the defendant has no
3 significant history of prior criminal activity, (ii) the capital felony was committed while the
4 defendant was under the influence of extreme mental or emotional disturbance, (iii) the victim
5 was a participant in the defendant's conduct or consented to the act, (iv) at the time of the
6 commission of the capital felony, the capacity of the defendant to appreciate the criminality of
7 his conduct or to conform his conduct to the requirements of law was significantly impaired, (v)
8 the age of the defendant at the time of the commission of the capital offense, or (vi) ~~mental~~
9 ~~retardation—~~even if § 19.2-264.3:1.1 is inapplicable as a bar to the death penalty, the
10 subaverage intellectual functioning of the defendant.

11 C. The penalty of death shall not be imposed unless the Commonwealth shall prove
12 beyond a reasonable doubt that there is a probability based upon evidence of the prior history
13 of the defendant or of the circumstances surrounding the commission of the offense of which
14 he is accused that he would commit criminal acts of violence that would constitute a continuing
15 serious threat to society, or that his conduct in committing the offense was outrageously or
16 wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated
17 battery to the victim.

18 D. The verdict of the jury shall be in writing, and in one of the following forms:

19 (1) "We, the jury, on the issue joined, having found the defendant guilty of (here set out
20 statutory language of the offense charged) and that (after consideration of his prior history that
21 there is a probability that he would commit criminal acts of violence that would constitute a
22 continuing serious threat to society) or his conduct in committing the offense is outrageously or
23 wantonly vile, horrible or inhuman in that it involved (torture) (depravity of mind) (aggravated
24 battery to the victim), and having considered the evidence in mitigation of the offense,
25 unanimously fix his punishment at death.

26 Signed, foreman"

27 or

1 (2) "We, the jury, on the issue joined, having found the defendant guilty of (here set out
2 statutory language of the offense charged) and having considered all of the evidence in
3 aggravation and mitigation of such offense, fix his punishment at (i) imprisonment for life; or (ii)
4 imprisonment for life and a fine of \$.

5 Signed, foreman"

6 E. In the event the jury cannot agree as to the penalty, the court shall dismiss the jury,
7 and impose a sentence of imprisonment for life.

8 § 37.1-1. Definitions.

9 As used in this title except where the context requires a different meaning or where it is
10 otherwise provided, the following words shall have the meaning ascribed to them:

11 "Abuse" means any act or failure to act by an employee or other person responsible for
12 the care of an individual in a facility or program operated, licensed, or funded by the
13 Department, excluding those operated by the Department of Corrections, that was performed
14 or was failed to be performed knowingly, recklessly, or intentionally, and that caused or might
15 have caused physical or psychological harm, injury, or death to a person receiving care or
16 treatment for mental illness, mental retardation or substance abuse. Examples of abuse
17 include, but are not limited to, acts such as:

- 18 1. Rape, sexual assault, or other criminal sexual behavior;
- 19 2. Assault or battery;
- 20 3. Use of language that demeans, threatens, intimidates or humiliates the person;
- 21 4. Misuse or misappropriation of the person's assets, goods, or property;
- 22 5. Use of excessive force when placing a person in physical or mechanical restraint;
- 23 6. Use of physical or mechanical restraints on a person that is not in compliance with
24 federal and state laws, regulations, and policies, professionally accepted standards of practice
25 or the person's individualized services plan; and
- 26 7. Use of more restrictive or intensive services or denial of services to punish the person
27 or that is not consistent with his individualized services plan;

1 "Alcoholic" means a person who: (i) through use of alcohol has become dangerous to
2 the public or himself; or (ii) because of such alcohol use is medically determined to be in need
3 of medical or psychiatric care, treatment, rehabilitation or counseling;

4 "Board" means the State Mental Health, Mental Retardation and Substance Abuse
5 Services Board;

6 "Client," as used in Chapter 10 (§ 37.1-194 et seq.) of this title, means any person
7 receiving a service provided by personnel or facilities under the jurisdiction or supervision of a
8 community services board;

9 "Commissioner" means the Commissioner of Mental Health, Mental Retardation and
10 Substance Abuse Services;

11 "Community services board" means a citizens' board established pursuant to § 37.1-195
12 which provides mental health, mental retardation and substance abuse programs and services
13 within the political subdivision or political subdivisions participating on the board;

14 "Consumer" means a current or former direct recipient of public or private mental health,
15 mental retardation, or substance abuse treatment or habilitation services;

16 "Department" means the Department of Mental Health, Mental Retardation and
17 Substance Abuse Services;

18 "Director" means the chief executive officer of a hospital or of a training center for the
19 mentally retarded;

20 "Drug addict" means a person who: (i) through use of habit-forming drugs or other drugs
21 enumerated in the Virginia Drug Control Act (§ 54.1-3400 et seq.) as controlled drugs, has
22 become dangerous to the public or himself; or (ii) because of such drug use, is medically
23 determined to be in need of medical or psychiatric care, treatment, rehabilitation or counseling;

24 "Facility" means a state or private hospital, training center for the mentally retarded,
25 psychiatric hospital, or other type of residential and ambulatory mental health or mental
26 retardation facility and when modified by the word "state" it means a facility under the
27 supervision and management of the Commissioner;

1 "Family member" means an immediate family member of a consumer or the principal
2 caregiver of a consumer. A principal caregiver is a person who acts in the place of an
3 immediate family member, including other relatives and foster care providers, but does not
4 have a proprietary interest in the care of the consumer;

5 "Hospital" or "hospitals" when not modified by the words "state" or "private" shall be
6 deemed to include both state hospitals and private hospitals devoted to or with facilities for the
7 care and treatment of the mentally ill or mentally retarded;

8 "Judge" includes only the judges, associate judges and substitute judges of general
9 district courts within the meaning of Chapter 4.1 (§ 16.1-69.1 et seq.) of Title 16.1 and of
10 juvenile and domestic relations district courts within the meaning of Chapter 11 (§ 16.1-226 et
11 seq.) of Title 16.1, as well as the special justices authorized by § 37.1-88;

12 "Legal resident" means any person who is a bona fide resident of the Commonwealth of
13 Virginia;

14 "Mental retardation" means ~~substantial~~ a disability, originating before the age of 18
15 years, characterized concurrently by (i) significantly subaverage general intellectual functioning
16 which originates during the development period and is associated with impairment 2 and (ii)
17 significant limitations in adaptive behavior as expressed in conceptual, social and practical
18 adaptive skills;

19 "Mentally ill" means any person afflicted with mental disease to such an extent that for
20 his own welfare or the welfare of others, he requires care and treatment; provided, that for the
21 purposes of Chapter 2 (§ 37.1-63 et seq.) of this title, the term "mentally ill" shall be deemed to
22 include any person who is a drug addict or alcoholic;

23 "Neglect" means failure by an individual, program or facility responsible for providing
24 services to provide nourishment, treatment, care, goods, or services necessary to the health,
25 safety or welfare of a person receiving care or treatment for mental illness, mental retardation
26 or substance abuse;

1 "Patient" or "resident" means a person voluntarily or involuntarily admitted to or residing
2 in a facility according to the provisions of this title;

3 "Private hospital" means a hospital or institution which is duly licensed pursuant to the
4 provisions of this title;

5 "Private institution" means an establishment which is not operated by the Department
6 and which is licensed under Chapter 8 (§ 37.1-179 et seq.) of this title for the care or treatment
7 of mentally ill or mentally retarded persons, including psychiatric wards of general hospitals;

8 "Property" as used in §§ 37.1-12 and 37.1-13 includes land and structures thereon;

9 "State hospital" means a hospital, training school or other such institution operated by
10 the Department for the care and treatment of the mentally ill or mentally retarded;

11 "System of facilities" or "facility system" means the entire system of hospitals and
12 training centers for the mentally retarded and other types of facilities for the residential and
13 ambulatory treatment, training and rehabilitation of the mentally ill and mentally retarded as
14 defined in this section under the general supervision and management of the Commissioner;

15 "Training center for the mentally retarded" means a regional facility for the treatment,
16 training and habilitation of the mentally retarded in a specific geographical area.

17 **2. That an emergency exists and this act is in force from its passage.**

18 **3. That the provisions of this act may result in a net increase in periods of imprisonment**
19 **or commitment. Pursuant to § 30-19.1:4, the estimated amount of the necessary**
20 **appropriation is \$0 for periods of imprisonment in state adult correctional facilities and**
21 **is \$0 for periods of commitment to the custody of the Department of Juvenile Justice.**

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