N.C.P.I.—Crim 150.05
DEATH PENALTY—INTELLECTUAL DISABILITY JURY DETERMINATION (WITH SPECIAL VERDICT FORM).
CRIMINAL VOLUME
REPLACEMENT JUNE 2016
N.C. Gen. Stat. § 15A-2005(a),(b),(e),(f), and (g)

150.05 DEATH PENALTY—INTELLECTUAL DISABILITY JURY DETERMINATION (WITH SPECIAL VERDICT FORM). *(This document has an attachment at Crim. 150.05A. See Instruction References.)*

NOTE WELL: N.C. Gen. Stat. § 15A-2005 was amended in 2015 to refer to defendants with an intellectual disability, rather than mental retardation. The revised statute also seeks to comport with the United States Supreme Court's decisions in Hall v. Florida, 134 S. Ct. 1986 (2014), and Brumfield v. Cain, 135 S. Ct. 2269 (2015), which held that it was unconstitutional to require a defendant to show an IQ test score of 70 or below in order to establish intellectual disability. The revised statute makes clear that an IQ test score of 70 or below is evidence of intellectual disability, but that such score is approximate and a higher score resulting from the application of the standard error of measurement shall not preclude the defendant from being able to present additional evidence of intellectual disability including testimony regarding adaptive deficits.

N.C. Gen. Stat. § 15A-2005(e) provides that "... upon the introduction of evidence of the defendant's intellectual disability during the sentencing hearing, the court shall submit a special issue to the jury as to whether the defendant is intellectually disabled 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 [circumstances] and the determination of sentence. If the jury determines the defendant to be intellectually disabled, the court shall declare the case noncapital and the defendant shall be sentenced to life imprisonment without parole. However, if the offense occurred prior to October 1, 1994, the sentence would be life imprisonment.

Per N.C. Gen. Stat. § 15A-2005(e), this instruction is to be used at the sentencing hearing and requires the jury to answer the intellectually disabled question prior to hearing arguments and being instructed according to N.C.P.I.-Crim. 150.10.

At the sentencing hearing, "the defendant has the burden of production and persuasion to demonstrate intellectual disability to the jury by a preponderance of the evidence," according to N.C. Gen. Stat. § 15A-2005(e).

The issue of intellectual disability may be raised at a pretrial hearing. N.C. Gen. Stat. § 15A-2005(c) provides that

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> *"[u]pon motion of the defendant, supported by appropriate affidavits, the court may order a pretrial hearing with consent of the State to determine if the defendant has an intellectual disability. The defendant has the burden of production and persuasion to demonstrate intellectual disability by clear and convincing evidence. If the court determines that the defendant has an intellectual disability, the court shall declare the case noncapital, and the State may not seek the death penalty against the defendant."*

Members of the jury, [having found the defendant guilty of] [the defendant having pled guilty to] murder in the first degree, you must now determine whether or not the defendant is intellectually disabled.

All of the evidence relevant to this determination has been presented, and it is now your duty to decide what the facts are. You must then apply to those facts the law, which I am about to give you, concerning intellectual disability. It is absolutely necessary that you understand and apply the law as I give it to you and not as you think it is or might like it to be. This is important because justice requires that anyone found to be guilty of first-degree murder who has presented evidence of his or her intellectual disability is entitled to have his or her mental status determined in the same manner and to have the same law applied to the person.

You are the sole judges of the credibility of each witness, meaning that you must decide for yourselves whether to believe the testimony of any witness. You may believe all, any part, or none of what a witness has testified to on the stand.

In determining whether to believe any witness, you should apply the same tests of truthfulness, which you apply in your everyday affairs. As applied to this trial, these tests may include: the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which the

witness testified; the manner and appearance of the witness; any interest, bias, or prejudice the witness may have; the apparent understanding and fairness of the witness; whether the witness's testimony is reasonable; and whether the witness's testimony is consistent with other believable evidence in the case.

You are also the sole judges of the weight to be given any evidence. By this I mean, if you decide that certain evidence is believable you must then determine the importance of that evidence in light of all other believable evidence in the case.

You have heard evidence relevant to the defendant's intellectual disability from [a witness] [witnesses] who [has] [have] testified as (an) expert witness(es). An expert witness is permitted to testify in the form of an opinion in a field where the expert witness purports to have specialized skill or knowledge.

As I have instructed you, you are the sole judges of the credibility of each witness and the weight to be given to the testimony of each witness. In making this determination as to the testimony of an expert witness, you should consider, in addition to the other tests of credibility and weight, the witness's training, qualifications, and experience or lack thereof; the reasons, if any, given for the opinion; whether the opinion is supported by facts that you find from the evidence; whether the opinion is reasonable; and whether it is consistent with other believable evidence in the case.

You should consider the opinion of an expert witness, but you are not bound by it. In other words, you are not required to accept an expert witness's opinion to the exclusion of the facts and circumstances disclosed by other testimony.

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The law provides that no defendant who is intellectually disabled shall be sentenced to death.[1] In the event the jury determines the defendant to be intellectually disabled, the court shall impose a sentence of life imprisonment without parole.[2]

The one issue for you to determine at this stage of the proceedings reads:

"Is the defendant, (*name*), intellectually disabled?"

The defendant has the burden of persuading you by a preponderance of the evidence that the defendant is intellectually disabled.[3] Preponderance of the evidence means that the evidence taken as a whole must satisfy you - not beyond a reasonable doubt, but simply satisfy you - that the defendant is intellectually disabled. To meet this burden, the defendant must persuade you by a preponderance of the evidence of the following three things:

First, that the defendant has significant sub-average general intellectual functioning,[4] which means that the defendant has an intelligence quotient of approximately 70 or below.[5] An intelligence quotient of approximately 70 or below[6] on an individually administered scientifically recognized standardized intelligence quotient test administered by a licensed psychiatrist or psychologist is evidence of significant sub-average general intellectual functioning.[7] Significant means important or notable. An intelligence quotient is not conclusive of the determination of intellectual disability, and an intelligence quotient higher than 70 would not preclude you from determining the defendant is intellectually disabled, if you conclude from the evidence that defendant has significant sub-average general intellectual functioning. It is for you to determine whether or not you find the defendant intellectually disabled.

Second, that the defendant has significant limitations in adaptive functioning,[8] which means having 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] [work skills].[9]

And Third, that the defendant's sub-average general intellectual functioning and the defendant's significant limitations in adaptive skill areas both were manifested before the defendant reached the age of 18.[10]

If the defendant has persuaded you by a preponderance of the evidence that the defendant has significant sub-average general intellectual functioning existing concurrently with significant limitations in adaptive functioning, it would be your duty to answer this issue "yes."

If you are not persuaded by a preponderance of the evidence, it would be your duty to answer this issue "no."

Your answer to this intellectual disability issue, either "yes" or "no," must be unanimous.

When you have agreed upon a unanimous answer, your foreperson should so indicate on the Intellectual Disability Issue Form.

NOTE WELL: Inform the alternate jurors to remain seated as the first twelve retire, then segregate them to have them available to continue with issues and punishment recommendation in the event the jury answers the intellectual disability issue "no."

After reaching the jury room your first order of business is to select your foreperson. You may begin your deliberations when the bailiff delivers the Intellectual Disability Issue Form to you. Your foreperson should lead the deliberations. When you have unanimously agreed upon an answer to this issue and are ready to announce it, your foreperson should record your

answer, sign and date the form, and notify the bailiff by knocking on the jury room door (or otherwise summoning the bailiff). You will be returned to the courtroom and your answer will be announced.

Thank you. You may retire and select your foreperson.

Intellectual Disability Issue Form found in N.C.P.I.—Crim. 150.05A

1 N.C. Gen. Stat. § 15A-2005(b).

2 *See State v. Locklear*, 363 N.C. 438, 681 S.E.2d 293, 2009 WL 2753029 (2009).

3 N.C. Gen. Stat. § 15A-2005(f).

4 N.C. Gen. Stat. § 15A-2005(a)(2)1.

5 N.C. Gen. Stat. § 15A-2005(a)(1)c.

6 The Supreme Court of the United States has held the strict IQ cutoff score of 70 to be unconstitutional. Further, the Court provided that the rule is invalid under the Constitution's Cruel and Unusual Punishments Clause. *Hall v. Florida,* 134 S. Ct. 1986 (2014). The North Carolina General Assembly addressed this issue with amendments to N.C. Gen Stat. § 15A-2005 in 2015 N.C. Sess. Law. 247.

7 N.C. Gen. Stat. § 15A-2005(a)(2).

8 *Id*.

9 N.C. Gen. Stat. § 15A-2005(a)(1)b. Adaptive functioning is a person's ability to function in the adaptive skill areas of communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure skills and work skills.

10 N.C. Gen. Stat. § 15A-2005(a)(1)a and (2). While the statute indicates that both of these conditions must be manifested before the defendant reaches the age of 18, the Pattern Jury Committee recognizes that such conditions could both manifest themselves after the age of 18, e.g., as a result of an injury or disease such as a traumatic brain injury, Alzheimer's, dementia, etc. If there was a capital prosecution of an individual who met the definition of intellectual disability *except for the age of onset*, it would seem that principles of equality likely would require comparable exemption from capital punishment. In addition, the age onset provision would create other Constitutional concerns as it could potentially allow for the imposition of the death penalty against a defendant who is actually intellectually disabled at the time of sentencing in contravention of United States Supreme Court precedent. *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that the imposition of the death penalty against defendants with intellectual disabilities violates the Eighth Amendment's ban on cruel and unusual punishments). While the Court in *Atkins* allowed states to define who qualifies as intellectually disabled, the Court in *Hall v. Florida*, 134 S. Ct. 1986 (2014), limited the states' discretion in this regard by concluding that a state

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statute providing a hard and fast demarcation of intellectual disability as an IQ of 70 is unconstitutional. This age onset requirement is likely subject to such Constitutional challenge as well, since it contradicts the Court's precedent in *Atkins*. If there is evidence that a defendant meets the definition of intellectual disability, *except for the age of onset*, the trial judge should consider whether to edit the instruction accordingly to eliminate this third element and its prior to age 18 onset requirement.