

SENATE BILL No. 32

By Committee on Judiciary

1-12

9 AN ACT concerning the death penalty; relating to cognitive disability;
10 amending K.S.A. 21-4634 and K.S.A. 2004 Supp. 21-4624 and repeal-
11 ing the existing sections; also repealing K.S.A. 2004 Supp. 21-4623.
12

13 *Be it enacted by the Legislature of the State of Kansas:*

14 New Section 1. As used in the Kansas criminal code:

15 (a) "Cognitive disability" means a disability characterized by signifi-
16 cant limitations both in intellectual functioning and deficits in adaptive
17 behavior as expressed in conceptual, social and practical adaptive skills;
18 and

19 (b) "significant limitations" means intellectual functioning that is two
20 or more standard deviations below the norm.

21 New Sec. 2. (a) No person having a cognitive disability at the time
22 of the commission of a capital murder pursuant to K.S.A. 21-3439, and
23 amendments thereto, is eligible for the death penalty.

24 (b) Cognitive disability shall be determined at a pre-trial hearing pur-
25 suant to sections 3 and 4, and amendments thereto.

26 New Sec. 3. (a) If the defense counsel has a good faith belief that
27 the defendant in a capital murder case has a cognitive disability, counsel
28 shall file a motion with the court, requesting a finding that the defendant
29 is not eligible to be sentenced to death because of a cognitive disability.
30 Such a motion shall be filed at any time, but not later than 180 days after
31 the prosecution files notice of intent to seek the sentence of death unless
32 the information in support of the motion comes to the attention of counsel
33 at a later date.

34 (b) Upon receipt of such a motion, the trial court shall conduct a
35 hearing for the presentation of evidence regarding the defendant's pos-
36 sible cognitive disability. Both the defense and the prosecution shall have
37 the opportunity to present evidence, including expert testimony. After
38 considering the evidence, the court shall find the defendant is not eligible
39 for the sentence of death if the defendant proves, by a preponderance of
40 the evidence, that the defendant had a cognitive disability at the time of
41 the commission of the capital murder. If the defendant is not eligible for
42 the sentence of death because of a cognitive disability, the trial may pro-
43 ceed as a capital murder trial, and, if convicted, the defendant may be

1 sentenced to any penalty under state law, other than death.

2 (c) If the court finds that the defendant is eligible for the sentence
3 of death, the case may proceed as a capital murder trial. The jury shall
4 not be informed of the prior proceedings or the judge's findings con-
5 cerning the defendant's claim of a cognitive disability.

6 (d) If the capital murder trial results in a verdict of guilty, the parties
7 shall be entitled to present evidence to the jury on the issue of whether
8 the defendant had a cognitive disability at the time of the commission of
9 the capital murder. Having heard the evidence and arguments, the jury
10 shall be asked to render a special verdict on the issue of whether the
11 defendant had a cognitive disability at the time of the commission of the
12 capital murder. The special verdict shall ask the jury to answer the ques-
13 tion: "Do you unanimously find, beyond a reasonable doubt, that the
14 defendant did not have a cognitive disability at the time of the commission
15 of the capital murder?" If the jury answers "yes," the case shall proceed
16 to a penalty phase under K.S.A. 21-4624, and amendments thereto. If the
17 jury answers the question "no," the defendant may be sentenced to any
18 penalty available under state law, other than death.

19 New Sec. 4. In cases in which the defendant has been convicted of
20 capital murder, sentenced to death and is in custody pending execution
21 of the sentence of death, the following procedures apply:

22 (a) The Kansas state board of indigents' defense services shall arrange
23 to provide counsel to any such person who is unrepresented at the time
24 this act takes effect to determine whether to file a petition for relief from
25 the sentence of death on the grounds that the defendant was an individual
26 having a cognitive disability at the time of the commission of the capital
27 offense.

28 (b) If such a petition is filed, it shall proceed under section 3, and
29 amendments thereto.

30 New Sec. 5. Sections 1 through 4, and amendments thereto, shall be
31 a part of and supplemental to the Kansas criminal code.

32 Sec. 6. K.S.A. 2004 Supp. 21-4624 is hereby amended to read as
33 follows: 21-4624. (a) If a defendant is charged with capital murder, the
34 county or district attorney shall file written notice if such attorney intends,
35 upon conviction of the defendant, to request a separate sentencing pro-
36 ceeding to determine whether the defendant should be sentenced to
37 death. Such notice shall be filed with the court and served on the de-
38 fendant or the defendant's attorney not later than five days after the time
39 of arraignment. If such notice is not filed and served as required by this
40 subsection, the county or district attorney may not request such a sen-
41 tencing proceeding and the defendant, if convicted of capital murder,
42 shall be sentenced to life without the possibility of parole, and no sentence
43 of death shall be imposed hereunder.

1 (b) Except as provided in K.S.A. 21-4622 and ~~21-4623~~ *section 3*, and
2 amendments thereto, upon conviction of a defendant of capital murder,
3 the court, upon motion of the county or district attorney, shall conduct a
4 separate sentencing proceeding to determine whether the defendant shall
5 be sentenced to death. The proceeding shall be conducted by the trial
6 judge before the trial jury as soon as practicable. If any person who served
7 on the trial jury is unable to serve on the jury for the sentencing pro-
8 ceeding, the court shall substitute an alternate juror who has been im-
9 paneled for the trial jury. If there are insufficient alternate jurors to re-
10 place trial jurors who are unable to serve at the sentencing proceeding,
11 the trial judge may summon a special jury of 12 persons which shall
12 determine the question of whether a sentence of death shall be imposed.
13 Jury selection procedures, qualifications of jurors and grounds for ex-
14 emption or challenge of prospective jurors in criminal trials shall be ap-
15 plicable to the selection of such special jury. The jury at the sentencing
16 proceeding may be waived in the manner provided by K.S.A. 22-3403
17 and amendments thereto for waiver of a trial jury. If the jury at the sen-
18 tencing proceeding has been waived or the trial jury has been waived, the
19 sentencing proceeding shall be conducted by the court.

20 (c) In the sentencing proceeding, evidence may be presented con-
21 cerning any matter that the court deems relevant to the question of sen-
22 tence and shall include matters relating to any of the aggravating circum-
23 stances enumerated in K.S.A. 21-4625 and amendments thereto and any
24 mitigating circumstances. Any such evidence which the court deems to
25 have probative value may be received regardless of its admissibility under
26 the rules of evidence, provided that the defendant is accorded a fair op-
27 portunity to rebut any hearsay statements. Only such evidence of aggra-
28 vating circumstances as the state has made known to the defendant prior
29 to the sentencing proceeding shall be admissible, and no evidence se-
30 cured in violation of the constitution of the United States or of the state
31 of Kansas shall be admissible. No testimony by the defendant at the sen-
32 tencing proceeding shall be admissible against the defendant at any sub-
33 sequent criminal proceeding. At the conclusion of the evidentiary pres-
34 entation, the court shall allow the parties a reasonable period of time in
35 which to present oral argument.

36 (d) At the conclusion of the evidentiary portion of the sentencing
37 proceeding, the court shall provide oral and written instructions to the
38 jury to guide its deliberations.

39 (e) If, by unanimous vote, the jury finds beyond a reasonable doubt
40 that one or more of the aggravating circumstances enumerated in K.S.A.
41 21-4625 and amendments thereto exist and, further, that the existence of
42 such aggravating circumstances is not outweighed by any mitigating cir-
43 cumstances which are found to exist, the defendant shall be sentenced to

1 death; otherwise, the defendant shall be sentenced to life without the
2 possibility of parole. The jury, if its verdict is a unanimous recommen-
3 dation of a sentence of death, shall designate in writing, signed by the
4 foreman of the jury, the statutory aggravating circumstances which it
5 found beyond a reasonable doubt. If, after a reasonable time for delib-
6 eration, the jury is unable to reach a verdict, the judge shall dismiss the
7 jury and impose a sentence of life without the possibility of parole and
8 shall commit the defendant to the custody of the secretary of corrections.
9 In nonjury cases, the court shall follow the requirements of this subsection
10 in determining the sentence to be imposed.

11 (f) Notwithstanding the verdict of the jury, the trial court shall review
12 any jury verdict imposing a sentence of death hereunder to ascertain
13 whether the imposition of such sentence is supported by the evidence. If
14 the court determines that the imposition of such a sentence is not sup-
15 ported by the evidence, the court shall modify the sentence and sentence
16 the defendant to life without the possibility of parole, and no sentence of
17 death shall be imposed hereunder. Whenever the court enters a judgment
18 modifying the sentencing verdict of the jury, the court shall set forth its
19 reasons for so doing in a written memorandum which shall become part
20 of the record.

21 (g) A defendant who is sentenced to imprisonment for life without
22 the possibility of parole shall spend the remainder of the defendant's
23 natural life incarcerated and in the custody of the secretary of corrections.
24 A defendant who is sentenced to imprisonment for life without the pos-
25 sibility of parole shall not be eligible for parole, probation, assignment to
26 a community correctional services program, conditional release, post-
27 release supervision, or suspension, modification or reduction of sentence.
28 Upon sentencing a defendant to imprisonment for life without the pos-
29 sibility of parole, the court shall commit the defendant to the custody of
30 the secretary of corrections and the court shall state in the sentencing
31 order of the judgment form or journal entry, whichever is delivered with
32 the defendant to the correctional institution, that the defendant has been
33 sentenced to imprisonment for life without the possibility of parole.

34 Sec. 7. K.S.A. 21-4634 is hereby amended to read as follows: 21-
35 4634. (a) If a defendant is convicted of the crime of capital murder and
36 a sentence of death is not imposed, or if a defendant is convicted of the
37 crime of murder in the first degree based upon the finding of premed-
38 itated murder, the defendant's counsel or the director of the correctional
39 institution or sheriff having custody of the defendant may request a de-
40 termination by the court of whether the defendant ~~is mentally retarded~~
41 *has a cognitive disability*. If the court determines that there is not suffi-
42 cient reason to believe that the defendant ~~is mentally retarded~~ *has a*
43 *cognitive disability*, the court shall so find and the defendant shall be

1 sentenced in accordance with K.S.A. 21-4635 through 21-4638, *and*
2 *amendments thereto*. If the court determines that there is sufficient rea-
3 son to believe that the defendant ~~is mentally retarded~~ *has a cognitive*
4 *disability*, the court shall conduct a hearing to determine whether the
5 defendant ~~is mentally retarded~~ *has a cognitive disability*.

6 (b) At the hearing, the court shall determine whether the defendant
7 ~~is mentally retarded~~ *has a cognitive disability*. The court shall order a
8 psychiatric or psychological examination of the defendant. For that pur-
9 pose, the court shall appoint two licensed physicians or licensed psychol-
10 ogists, or one of each, qualified by training and practice to make such
11 examination, to examine the defendant and report their findings in writing
12 to the judge within 10 days after the order of examination is issued. The
13 defendant shall have the right to present evidence and cross-examine any
14 witnesses at the hearing. No statement made by the defendant in the
15 course of any examination provided for by this section, whether or not
16 the defendant consents to the examination, shall be admitted in evidence
17 against the defendant in any criminal proceeding.

18 (c) If, at the conclusion of a hearing pursuant to this section, the court
19 determines that the defendant ~~is not mentally retarded~~ *does not have a*
20 *cognitive disability*, the defendant shall be sentenced in accordance with
21 K.S.A. 21-4635 through 21-4638, *and amendments thereto*.

22 (d) If, at the conclusion of a hearing pursuant to this section, the court
23 determines that the defendant ~~is mentally retarded~~ *has a cognitive disa-*
24 *bility*, the court shall sentence the defendant as otherwise provided by
25 law, and no mandatory term of imprisonment shall be imposed
26 hereunder.

27 (e) Unless otherwise ordered by the court for good cause shown, the
28 provisions of this section shall not apply if it has been determined, pur-
29 suant to ~~K.S.A. 21-4623~~ *section 3*, and amendments thereto, that the
30 defendant ~~is not mentally retarded~~ *does not have a cognitive disability*.

31 ~~(f) As used in this section, "mentally retarded" means having signif-~~
32 ~~icantly subaverage general intellectual functioning, as defined by K.S.A.~~
33 ~~76-12b01 and amendments thereto, to an extent which substantially im-~~
34 ~~pairs one's capacity to appreciate the criminality of one's conduct or to~~
35 ~~conform one's conduct to the requirements of law.~~

36 Sec. 8. K.S.A. 21-4634 and K.S.A. 2004 Supp. 21-4623 and 21-4624
37 are hereby repealed.

38 Sec. 9. This act shall take effect and be in force from and after its
39 publication in the statute book.