

SENATE BILL No. 355

By Committee on Judiciary

1-26

10 AN ACT concerning the death penalty; relating to cognitive disability;
11 amending K.S.A. **21-4624 and** 21-4634 and repealing the existing ~~sec-~~
12 ~~tion sections~~; also repealing K.S.A. 21-4623.

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

15 New Section 1. As used in ~~this act~~ **the Kansas criminal code:**

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

20 (b) “significant limitations” in intellectual functioning means two or
21 more standard deviations below the norm.

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

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

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

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

1 as a ~~first degree~~ **capital** murder trial, and, if convicted, the defendant
2 may be sentenced to any penalty under state law, other than death.

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

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

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

32 Sec. ~~5~~ **6.** K.S.A. 21-4634 is hereby amended to read as follows: 21-
33 4634. (a) If a defendant is convicted of the crime of capital murder and
34 a sentence of death is not imposed, or if a defendant is convicted of the
35 crime of murder in the first degree based upon the finding of premedi-
36 tated murder, the defendant's counsel or the director of the correctional
37 institution or sheriff having custody of the defendant may request a de-
38 termination by the court of whether the defendant ~~is mentally retarded~~
39 *has cognitive disability*. If the court determines that there is not sufficient
40 reason to believe that the defendant ~~is mentally retarded~~ *has cognitive*
41 *disability*, the court shall so find and the defendant shall be sentenced in
42 accordance with K.S.A. 21-4635 through 21-4638 *and amendments*
43 *thereto*. If the court determines that there is sufficient reason to believe

1 that the defendant ~~is mentally retarded~~ *has cognitive disability*, the court
2 shall conduct a hearing to determine whether the defendant ~~is mentally~~
3 ~~retarded~~ *has cognitive disability*.

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

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

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

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

28 (f) ~~As used in this section, “mentally retarded” means having signif-~~
29 ~~icantly subaverage general intellectual functioning, as defined by K.S.A.~~
30 ~~76-12b01 and amendments thereto, to an extent which substantially im-~~
31 ~~pairs one’s capacity to appreciate the criminality of one’s conduct or to~~
32 ~~conform one’s conduct to the requirements of law: (1) “cognitive disa-~~
33 ~~bility” means a disability characterized by significant limitations both in~~
34 ~~intellectual functioning and deficits in adaptive behavior as expressed in~~
35 ~~conceptual, social and practical adaptive skills; and~~
36 ~~—(2) “significant limitations” in intellectual functioning means two or~~
37 ~~more standard deviations below the norm.~~

38 **Sec. 7. K.S.A. 21-4624 is hereby amended to read as follows:**
39 **21-4624. (a) If a defendant is charged with capital murder, the**
40 **county or district attorney shall file written notice if such attorney**
41 **intends, upon conviction of the defendant, to request a separate**
42 **sentencing proceeding to determine whether the defendant should**
43 **be sentenced to death. Such notice shall be filed with the court and**

1 *served on the defendant or the defendant's attorney not later than*
2 *five days after the time of arraignment. If such notice is not filed*
3 *and served as required by this subsection, the county or district*
4 *attorney may not request such a sentencing proceeding and the de-*
5 *fendant, if convicted of capital murder, shall be sentenced as oth-*
6 *erwise provided by law, and no sentence of death shall be imposed*
7 *hereunder.*

8 (b) *Except as provided in K.S.A. 21-4622 and ~~21-4623~~ section 3,*
9 *and amendments thereto, upon conviction of a defendant of capital*
10 *murder, the court, upon motion of the county or district attorney,*
11 *shall conduct a separate sentencing proceeding to determine*
12 *whether the defendant shall be sentenced to death. The proceeding*
13 *shall be conducted by the trial judge before the trial jury as soon*
14 *as practicable. If any person who served on the trial jury is unable*
15 *to serve on the jury for the sentencing proceeding, the court shall*
16 *substitute an alternate juror who has been impaneled for the trial*
17 *jury. If there are insufficient alternate jurors to replace trial jurors*
18 *who are unable to serve at the sentencing proceeding, the trial judge*
19 *may summon a special jury of 12 persons which shall determine the*
20 *question of whether a sentence of death shall be imposed. Jury se-*
21 *lection procedures, qualifications of jurors and grounds for exemp-*
22 *tion or challenge of prospective jurors in criminal trials shall be*
23 *applicable to the selection of such special jury. The jury at the sen-*
24 *tencing proceeding may be waived in the manner provided by K.S.A.*
25 *22-3403 and amendments thereto for waiver of a trial jury. If the*
26 *jury at the sentencing proceeding has been waived or the trial jury*
27 *has been waived, the sentencing proceeding shall be conducted by*
28 *the court.*

29 (c) *In the sentencing proceeding, evidence may be presented*
30 *concerning any matter that the court deems relevant to the question*
31 *of sentence and shall include matters relating to any of the aggra-*
32 *vating circumstances enumerated in K.S.A. 21-4625 and amend-*
33 *ments thereto and any mitigating circumstances. Any such evidence*
34 *which the court deems to have probative value may be received*
35 *regardless of its admissibility under the rules of evidence, provided*
36 *that the defendant is accorded a fair opportunity to rebut any hear-*
37 *say statements. Only such evidence of aggravating circumstances*
38 *as the state has made known to the defendant prior to the sentencing*
39 *proceeding shall be admissible, and no evidence secured in violation*
40 *of the constitution of the United States or of the state of Kansas shall*
41 *be admissible. No testimony by the defendant at the sentencing pro-*
42 *ceeding shall be admissible against the defendant at any subsequent*
43 *criminal proceeding. At the conclusion of the evidentiary presen-*

1 *tation, the court shall allow the parties a reasonable period of time*
2 *in which to present oral argument.*

3 *(d) At the conclusion of the evidentiary portion of the sentenc-*
4 *ing proceeding, the court shall provide oral and written instructions*
5 *to the jury to guide its deliberations.*

6 *(e) If, by unanimous vote, the jury finds beyond a reasonable*
7 *doubt that one or more of the aggravating circumstances enumer-*
8 *ated in K.S.A. 21-4625 and amendments thereto exist and, further,*
9 *that the existence of such aggravating circumstances is not out-*
10 *weighed by any mitigating circumstances which are found to exist,*
11 *the defendant shall be sentenced to death; otherwise, the defendant*
12 *shall be sentenced as provided by law. The jury, if its verdict is a*
13 *unanimous recommendation of a sentence of death, shall designate*
14 *in writing, signed by the foreman of the jury, the statutory aggra-*
15 *vating circumstances which it found beyond a reasonable doubt. If,*
16 *after a reasonable time for deliberation, the jury is unable to reach*
17 *a verdict, the judge shall dismiss the jury and impose a sentence of*
18 *imprisonment as provided by law and shall commit the defendant*
19 *to the custody of the secretary of corrections. In nonjury cases, the*
20 *court shall follow the requirements of this subsection in determining*
21 *the sentence to be imposed.*

22 *(f) Notwithstanding the verdict of the jury, the trial court shall*
23 *review any jury verdict imposing a sentence of death hereunder to*
24 *ascertain whether the imposition of such sentence is supported by*
25 *the evidence. If the court determines that the imposition of such a*
26 *sentence is not supported by the evidence, the court shall modify*
27 *the sentence and sentence the defendant as otherwise provided by*
28 *law, and no sentence of death shall be imposed hereunder. When-*
29 *ever the court enters a judgment modifying the sentencing verdict*
30 *of the jury, the court shall set forth its reasons for so doing in a*
31 *written memorandum which shall become part of the record.*

32 Sec. 68. K.S.A. 21-4623, ~~21-4624~~ and 21-4634 are hereby repealed.

33 Sec. 79. This act shall take effect and be in force from and after its
34 publication in the statute book.