

SENATE BILL No. 14

By Special Committee on Judiciary

1-3

9 AN ACT concerning the death penalty; relating to mental retardation;
10 amending K.S.A. 21-4634 and K.S.A. 2004 Supp. 21-3110 and 21-4624
11 and repealing the existing sections; also repealing K.S.A. 21-3110, as
12 amended by section 10 of chapter 145 of the 2004 session laws of
13 Kansas and K.S.A. 2004 Supp. 21-4623.

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

16 New Section 1. (a) No person who is mentally retarded at the time
17 of the commission of a capital murder pursuant to K.S.A. 21-3439, and
18 amendments thereto, is eligible for the death penalty.

19 (b) Mental retardation shall be determined at a pre-trial hearing pur-
20 suant to sections 2 and 3, and amendments thereto.

21 New Sec. 2. (a) If the defense counsel has a good faith belief that
22 the defendant in a capital murder case is mentally retarded, counsel shall
23 file a motion with the court, requesting a finding that the defendant is
24 not eligible to be sentenced to death because of mental retardation. Such
25 a motion shall be filed at any time, but not later than 180 days after the
26 prosecution files notice of intent to seek the sentence of death unless the
27 information in support of the motion came to the counsel's attention at
28 a later date.

29 (b) Upon receipt of such a motion, the trial court shall conduct a
30 hearing for the presentation of evidence regarding the defendant's pos-
31 sible mental retardation. Both the defense and the prosecution shall have
32 the opportunity to present evidence, including expert testimony. After
33 considering the evidence, the court shall find the defendant is not eligible
34 for the sentence of death if the defendant proves, by a preponderance of
35 the evidence, that the defendant was mentally retarded at the time of the
36 commission of the capital murder. If the defendant is not eligible for the
37 sentence of death because of mental retardation, the trial may proceed
38 as a capital murder trial, and, if convicted, the defendant may be sen-
39 tenced to any penalty under state law, other than death.

40 (c) If the court finds that the defendant is eligible for the sentence
41 of death, the case may proceed as a capital murder trial. The jury shall
42 not be informed of the prior proceedings or the judge's findings con-
43 cerning the defendant's claim of mental retardation.

1 (d) If the capital murder trial results in a verdict of guilty, the parties
2 shall be entitled to present evidence to the jury on the issue of whether
3 the defendant was mentally retarded at the time of the commission of
4 the capital murder. Having heard the evidence and arguments, the jury
5 shall be asked to render a special verdict on the issue of mental retar-
6 dation. The special verdict shall ask the jury to answer the question: “Do
7 you unanimously find, beyond a reasonable doubt, that the defendant was
8 not mentally retarded at the time of the commission of the capital mur-
9 der?” If the jury answers “yes,” the case shall proceed to a penalty phase
10 under K.S.A. 21-4624, and amendments thereto. If the jury answers the
11 question “no,” the defendant may be sentenced to any penalty available
12 under state law, other than death.

13 New Sec. 3. In cases in which the defendant has been convicted of
14 capital murder, sentenced to death and is in custody pending execution
15 of the sentence of death, the following procedures apply:

16 (a) The Kansas state board of indigents’ defense services shall arrange
17 to provide counsel to any such person who is unrepresented at the time
18 this act takes effect to determine whether to file a petition for relief from
19 the sentence of death on the grounds that the defendant was an individual
20 who was mentally retarded at the time of the commission of the capital
21 offense.

22 (b) If such a petition is filed, it shall proceed under section 2, and
23 amendments thereto.

24 New Sec. 4. Sections 1 through 3, and amendments thereto, shall be
25 a part of and supplemental to the Kansas criminal code.

26 Sec. 5. K.S.A. 2004 Supp. 21-3110 is hereby amended to read as
27 follows: 21-3110. The following definitions shall apply when the words
28 and phrases defined are used in ~~this~~ *the Kansas criminal code*, except
29 when a particular context clearly requires a different meaning.

30 (1) “Act” includes a failure or omission to take action.

31 (2) “Another” means a person or persons as defined in this code other
32 than the person whose act is claimed to be criminal.

33 (3) “Conduct” means an act or a series of acts, and the accompanying
34 mental state.

35 (4) “Conviction” includes a judgment of guilt entered upon a plea of
36 guilty.

37 (5) “Deception” means knowingly and willfully making a false state-
38 ment or representation, express or implied, pertaining to a present or past
39 existing fact.

40 (6) To “deprive permanently” means to:

41 (a) Take from the owner the possession, use or benefit of property,
42 without an intent to restore the same; or

43 (b) Retain property without intent to restore the same or with intent

- 1 to restore it to the owner only if the owner purchases or leases it back,
2 or pays a reward or other compensation for its return; or
- 3 (c) Sell, give, pledge or otherwise dispose of any interest in property
4 or subject it to the claim of a person other than the owner.
- 5 (7) “Dwelling” means a building or portion thereof, a tent, a vehicle
6 or other enclosed space which is used or intended for use as a human
7 habitation, home or residence.
- 8 (8) “Forcible felony” includes any treason, murder, voluntary man-
9 slaughter, rape, robbery, burglary, arson, kidnapping, aggravated battery,
10 aggravated sodomy and any other felony which involves the use or threat
11 of physical force or violence against any person.
- 12 (9) “Intent to defraud” means an intention to deceive another person,
13 and to induce such other person, in reliance upon such deception, to
14 assume, create, transfer, alter or terminate a right, obligation or power
15 with reference to property.
- 16 (10) “Law enforcement officer” means:
- 17 (a) Any person who by virtue of such person’s office or public em-
18 ployment is vested by law with a duty to maintain public order or to make
19 arrests for crimes, whether that duty extends to all crimes or is limited to
20 specific crimes;
- 21 (b) any officer of the Kansas department of corrections or, for the
22 purposes of K.S.A. 21-3409, 21-3411 and 21-3415, and amendments
23 thereto, any employee of the Kansas department of corrections; or
- 24 (c) any university police officer or campus police officer, as defined
25 in K.S.A. 22-2401a, and amendments thereto.
- 26 (11) “Obtain” means to bring about a transfer of interest in or pos-
27 session of property, whether to the offender or to another.
- 28 (12) “Obtains or exerts control” over property includes but is not
29 limited to, the taking, carrying away, or the sale, conveyance, or transfer
30 of title to, interest in, or possession of property.
- 31 (13) “Owner” means a person who has any interest in property.
- 32 (14) “Person” means an individual, public or private corporation, gov-
33 ernment, partnership, or unincorporated association.
- 34 (15) “Personal property” means goods, chattels, effects, evidences of
35 rights in action and all written instruments by which any pecuniary obli-
36 gation, or any right or title to property real or personal, shall be created,
37 acknowledged, assigned, transferred, increased, defeated, discharged, or
38 dismissed.
- 39 (16) “Property” means anything of value, tangible or intangible, real
40 or personal.
- 41 (17) “Prosecution” means all legal proceedings by which a person’s
42 liability for a crime is determined.
- 43 (18) “Public employee” is a person employed by or acting for the

- 1 state or by or for a county, municipality or other subdivision or govern-
2 mental instrumentality of the state for the purpose of exercising their
3 respective powers and performing their respective duties, and who is not
4 a “public officer.”
- 5 (19) “Public officer” includes the following, whether elected or
6 appointed:
- 7 (a) An executive or administrative officer of the state, or a county,
8 municipality or other subdivision or governmental instrumentality of or
9 within the state.
- 10 (b) A member of the legislature or of a governing board of a county,
11 municipality, or other subdivision of or within the state.
- 12 (c) A judicial officer, which shall include a judge of the district court,
13 juror, master or any other person appointed by a judge or court to hear
14 or determine a cause or controversy.
- 15 (d) A hearing officer *or presiding officer*, which shall include any per-
16 son authorized by law or private agreement, to hear or determine a cause
17 or controversy and who is not a judicial officer.
- 18 (e) A law enforcement officer.
- 19 (f) Any other person exercising the functions of a public officer under
20 color of right.
- 21 (20) “Real property” or “real estate” means every estate, interest, and
22 right in lands, tenements and hereditaments.
- 23 (21) “Solicit” or “solicitation” means to command, authorize, urge,
24 incite, request, or advise another to commit a crime.
- 25 (22) “State” or “this state” means the state of Kansas and all land and
26 water in respect to which the state of Kansas has either exclusive or con-
27 current jurisdiction, and the air space above such land and water. “Other
28 state” means any state or territory of the United States, the District of
29 Columbia and the Commonwealth of Puerto Rico.
- 30 (23) “Stolen property” means property over which control has been
31 obtained by theft.
- 32 (24) “Threat” means a communicated intent to inflict physical or
33 other harm on any person or on property.
- 34 (25) “Written instrument” means any paper, document or other in-
35 strument containing written or printed matter or the equivalent thereof,
36 used for purposes of reciting, embodying, conveying or recording infor-
37 mation, and any money, token, stamp, seal, badge, trademark, or other
38 evidence or symbol of value, right, privilege or identification, which is
39 capable of being used to the advantage or disadvantage of some person.
- 40 (26) “*Mental retardation*” or “*mentally retarded*” means *significantly*
41 *subaverage general intellectual functioning existing concurrently with def-*
42 *icits in adaptive behavior.*
- 43 (27) “*Significantly subaverage general intellectual functioning*”

1 *means performance which is two or more standard deviations from the*
2 *mean score on a standardized intelligence test specified by the secretary*
3 *of social and rehabilitation services.*

4 Sec. 6. K.S.A. 2004 Supp. 21-4624 is hereby amended to read as
5 follows: 21-4624. (a) If a defendant is charged with capital murder, the
6 county or district attorney shall file written notice if such attorney intends,
7 upon conviction of the defendant, to request a separate sentencing pro-
8 ceeding to determine whether the defendant should be sentenced to
9 death. Such notice shall be filed with the court and served on the de-
10 fendant or the defendant's attorney not later than five days after the time
11 of arraignment. If such notice is not filed and served as required by this
12 subsection, the county or district attorney may not request such a sen-
13 tencing proceeding and the defendant, if convicted of capital murder,
14 shall be sentenced to life without the possibility of parole, and no sentence
15 of death shall be imposed hereunder.

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

35 (c) In the sentencing proceeding, evidence may be presented con-
36 cerning any matter that the court deems relevant to the question of sen-
37 tence and shall include matters relating to any of the aggravating circum-
38 stances enumerated in K.S.A. 21-4625 and amendments thereto and any
39 mitigating circumstances. Any such evidence which the court deems to
40 have probative value may be received regardless of its admissibility under
41 the rules of evidence, provided that the defendant is accorded a fair op-
42 portunity to rebut any hearsay statements. Only such evidence of aggra-
43 vating circumstances as the state has made known to the defendant prior

1 to the sentencing proceeding shall be admissible, and no evidence se-
2 curred in violation of the constitution of the United States or of the state
3 of Kansas shall be admissible. No testimony by the defendant at the sen-
4 tencing proceeding shall be admissible against the defendant at any sub-
5 sequent criminal proceeding. At the conclusion of the evidentiary pres-
6 entation, the court shall allow the parties a reasonable period of time in
7 which to present oral argument.

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

11 (e) If, by unanimous vote, the jury finds beyond a reasonable doubt
12 that one or more of the aggravating circumstances enumerated in K.S.A.
13 21-4625 and amendments thereto exist and, further, that the existence of
14 such aggravating circumstances is not outweighed by any mitigating cir-
15 cumstances which are found to exist, the defendant shall be sentenced to
16 death; otherwise, the defendant shall be sentenced to life without the
17 possibility of parole. The jury, if its verdict is a unanimous recommen-
18 dation of a sentence of death, shall designate in writing, signed by the
19 foreman of the jury, the statutory aggravating circumstances which it
20 found beyond a reasonable doubt. If, after a reasonable time for delib-
21 eration, the jury is unable to reach a verdict, the judge shall dismiss the
22 jury and impose a sentence of life without the possibility of parole and
23 shall commit the defendant to the custody of the secretary of corrections.
24 In nonjury cases, the court shall follow the requirements of this subsection
25 in determining the sentence to be imposed.

26 (f) Notwithstanding the verdict of the jury, the trial court shall review
27 any jury verdict imposing a sentence of death hereunder to ascertain
28 whether the imposition of such sentence is supported by the evidence. If
29 the court determines that the imposition of such a sentence is not sup-
30 ported by the evidence, the court shall modify the sentence and sentence
31 the defendant to life without the possibility of parole, and no sentence of
32 death shall be imposed hereunder. Whenever the court enters a judgment
33 modifying the sentencing verdict of the jury, the court shall set forth its
34 reasons for so doing in a written memorandum which shall become part
35 of the record.

36 (g) A defendant who is sentenced to imprisonment for life without
37 the possibility of parole shall spend the remainder of the defendant's
38 natural life incarcerated and in the custody of the secretary of corrections.
39 A defendant who is sentenced to imprisonment for life without the pos-
40 sibility of parole shall not be eligible for parole, probation, assignment to
41 a community correctional services program, conditional release, post-
42 release supervision, or suspension, modification or reduction of sentence.
43 Upon sentencing a defendant to imprisonment for life without the pos-

1 sibility of parole, the court shall commit the defendant to the custody of
2 the secretary of corrections and the court shall state in the sentencing
3 order of the judgment form or journal entry, whichever is delivered with
4 the defendant to the correctional institution, that the defendant has been
5 sentenced to imprisonment for life without the possibility of parole.

6 Sec. 7. K.S.A. 21-4634 is hereby amended to read as follows: 21-
7 4634. (a) If a defendant is convicted of the crime of capital murder and
8 a sentence of death is not imposed, or if a defendant is convicted of the
9 crime of murder in the first degree based upon the finding of premeditated
10 murder, the defendant's counsel or the director of the correctional
11 institution or sheriff having custody of the defendant may request a de-
12 termination by the court of whether the defendant is mentally retarded.
13 If the court determines that there is not sufficient reason to believe that
14 the defendant is mentally retarded, the court shall so find and the de-
15 fendant shall be sentenced in accordance with K.S.A. 21-4635 through
16 21-4638. If the court determines that there is sufficient reason to believe
17 that the defendant is mentally retarded, the court shall conduct a hearing
18 to determine whether the defendant is mentally retarded.

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

31 (c) If, at the conclusion of a hearing pursuant to this section, the court
32 determines that the defendant is not mentally retarded, the defendant
33 shall be sentenced in accordance with K.S.A. 21-4635 through 21-4638,
34 *and amendments thereto*.

35 (d) If, at the conclusion of a hearing pursuant to this section, the court
36 determines that the defendant is mentally retarded, the court shall sen-
37 tence the defendant as otherwise provided by law, and no mandatory term
38 of imprisonment shall be imposed hereunder.

39 (e) Unless otherwise ordered by the court for good cause shown, the
40 provisions of this section shall not apply if it has been determined, pur-
41 suant to ~~K.S.A. 21-4623~~ *section 2*, and amendments thereto, that the
42 defendant is not mentally retarded.

43 (f) ~~As used in this section, "mentally retarded" means having signif-~~

1 ~~icantly subaverage general intellectual functioning, as defined by K.S.A.~~
2 ~~76-12b01 and amendments thereto, to an extent which substantially im-~~
3 ~~pairs one's capacity to appreciate the criminality of one's conduct or to~~
4 ~~conform one's conduct to the requirements of law.~~

5 Sec. 8. K.S.A. 21-3110, as amended by section 10 of chapter 145 of
6 the 2004 session laws of Kansas, and 21-4634 and K.S.A. 2004 Supp. 21-
7 3110, 21-4623 and 21-4624 are hereby repealed.

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