SUBJECT: Submitting issue of mental retardation at sentencing phase of capital trials

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 7 ayes — Hinojosa, Dunnam, Keel, Garcia, Green, Kitchen, Martinez Fischer

0 nays

2 absent — Talton, Shields

WITNESSES: For — Keith S. Hampton, Texas Criminal Defense Lawyers Association; William Harrell, American Civil Liberties Union of Texas and National Association for the Advancement of Colored People of Texas; James C. Harrington, Texas Civil Rights Project; Charles C. Holt, Common Cause of Texas; Chuck Mallin, Tarrant County District Attorney's Office; Susan Marshall, The Arc of Texas; *Registered but did not testify:* Richard Daly, Texas Catholic Conference; Amy Mizcles, National Alliance for the Mentally Ill of Texas

Against — Christine Ballard, Family of John Sepeda; Kim Chiasson; Greg Davis, Dallas County District Attorney's Office; Erin Gerald; Guy James Gray, Jasper County District Attorney's Office; William Lee Hon, Polk County District Attorney's Office; William "Rusty" Hubbarth, Justice For All; Ellen May; Karla Ryman Needels; Joe Price, Trinity County District Attorney's Office; Charles "Chuck" Rosenthal, Harris County District Attorney; Shirley Ryman; Willie A. Ryman

On — *Registered but did not testify:* Lon Curtis, Bell County District Attorney's Office; Susan Murphree, Advocacy Inc.

BACKGROUND: Health and Safety Code, sec. 591.003 defines "mental retardation" as "significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period. A person must meet all three criteria to be considered mentally retarded. The code defines significantly subaverage intellectual functioning as a score on a standard IQ test that is two or more standard deviations below the mean, or average, score. For most tests, a score of 70 or below

qualifies for mental retardation. Adaptive behavior means the effectiveness with or degree to which a person meets the standards of personal independence and social responsibility expected of the person's age and cultural group. Although state law does not define the developmental period, mental health professionals generally consider that it ends at age 18.

Code of Criminal Procedure (CCP), art. 37.071, sec. 2 prescribes the procedure in a capital murder case after a defendant is found guilty. Subsection (a) requires a separate sentencing proceeding for a defendant found guilty of a capital offense in which the state seeks the death penalty. The proceeding, which determines whether the defendant will be sentenced to death or to life imprisonment, must be conducted before the trial jury as soon as practicable. In the proceeding, both the state and the defendant or the defendant's counsel may presented evidence as to any matter that the court deems relevant to the sentence, including evidence of the defendant's background or character or the circumstances of the offense that mitigate against imposing the death penalty. The court, the state's attorney, and the defendant or the defendant's counsel may not inform a juror or a prospective juror of the effect of the jury's failure to agree on issues submitted under subsection (c) or (e).

Subsection (b) requires the court to submit the following issues to the jury after presentation of the evidence:

- whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
- in cases in which the jury finds the defendant guilty as a party, whether the defendant actually caused the death of the deceased *or* did not actually cause the death of the deceased but intended to kill the deceased or someone else or anticipated that a human life would be taken.

Subsection (c) requires the state to prove each issue submitted under subsection (b) beyond a reasonable doubt. The jury must return a special verdict of "yes" or "no" on each issue.

Subsection (e)(1) requires the court to instruct the jury that if the jury returns an affirmative finding to each issue submitted under subsection (b), it must answer the following issue: whether, considering all of the evidence,

including the circumstances of the offense and the defendant's character, background, and personal moral culpability, sufficient mitigating circumstances exist to warrant imposition of a sentence of life imprisonment rather than a death sentence.

Section (e)(2) requires the court, on the written request of the defense attorney, to:

- instruct the jury that if the jury answers that circumstances warrant a sentence of life imprisonment rather than death, the court must sentence the defendant to life imprisonment; and
- tell the jury in writing that if the defendant is given a life sentence, he or she will become eligible for release on parole, but not until the actual time served is 40 years, without consideration for good-conduct time. The judge also must write that, if the defendant is sentenced to life in prison, the application of parole laws to this defendant cannot be predicted accurately and will depend on decisions made by prison and parole authorities, but that eligibility for parole does not guarantee that parole will be granted.

Subsection (f) requires the court to charge the jury that, regarding subsection (e), the jury:

- must answer the issue "yes" or "no";
- may not answer "no" unless the jury agrees unanimously and may not answer "yes" unless 10 or more jurors agree;
- does not have to agree on what particular evidence supports an affirmative finding on the issue; and
- must consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness.

Subsection (g) requires the court to sentence the defendant to death if the jury returns an affirmative finding on each issue submitted under subsection (b) and a negative finding on an issue submitted under subsection (e). The court must sentence the defendant to life in prison if the jury returns a negative finding under subsection (b) or an affirmative finding under

subsection (e) or cannot answer any issue submitted under subsection (b) or (e).

For additional background, see House Research Organization Focus Report Number 77-8, *Should Texas Ban Execution of Mentally Retarded Offenders?*, March 19, 2001.

DIGEST:

CSHB 236 would allow a defendant in a capital case to request the submission of a special issue during the sentencing phase under CCP, art. 37.071, sec. 2(e)(2) regarding whether the defendant was mentally retarded, if certain conditions were met.

The defendant would have to file a notice of intent to request the submission with the court and the state's attorney not later than the 30th day before the trial began. Once the court received the notice of intent, it would have to hold a hearing to determine whether to appoint disinterested experts to examine the defendant and determine if he or she were mentally retarded, as defined under the Health and Safety Code. If the court found that the defendant had presented sufficient evidence to justify appointment of experts, the court would have to appoint disinterested experts in the field of diagnosing mental retardation to examine the defendant and determine if he or she were mentally retarded. The court would have to order the defendant to submit to the examination.

The court would have to instruct the jury to answer the issue of whether the defendant were mentally retarded if the defendant were found in the pre-trial hearing to be mentally retarded and if the defendant's attorney requested the instruction. The court would have to instruct the jury that if it answered that the defendant was mentally retarded, the court would have to sentence the defendant to life imprisonment. The jury would have to return a negative finding on each issue submitted under subsection (e) — both mitigating circumstances and mental retardation — before the court could sentence the defendant to death.

CSHB 236 would require the court to charge the jury that, in respect to only the issue of the defendant's mental retardation submitted under CCP, art. 37.071, sec. 2 (e)(2), it would have to consider mitigating evidence to be

evidence that a juror might regard as reducing the defendant's moral blameworthiness.

CSHB 236 also would amend CCP, art. 37.071, sec. 2(a) to include mental retardation in the category of mitigating evidence about the defendant's background or character that the state, defendant, or defendant's counsel could present during the sentencing phase of any capital trial.

This bill would take effect September 1, 2001, and would apply only to a capital case that began on or after that date.

SUPPORTERS SAY:

Justice is not served when the state executes a mentally retarded person. CSHB 236 would ensure that the death penalty would be limited only to the morally most culpable offenders.

Mentally retarded people cannot appreciate sufficiently the consequences of their actions and should not be held to the same standards and subjected to the same punishment as other offenders. Texas already recognizes that some groups of people are less culpable than others. For example, the law protects from the death penalty those who commit murder while age 16 or younger. The state does not execute children, so it should not execute someone with the mind of a child. Life in prison would be an appropriate punishment for a mentally retarded person found guilty of capital murder.

Exempting mentally retarded offenders from the death penalty would bring Texas law into line with public opinion. In a February 2001 Scripps Howard Texas Poll, 66 percent of Texans opposed executing mentally retarded offenders. Even among supporters of capital punishment, only 16 percent of respondents nationwide and 20 percent in Harris County supported executing mentally retarded offenders, according to a *Houston Chronicle* poll published in February 2001. Thirteen states and the federal government already outlaw executing these offenders, and at least three other states are considering similar legislation. Also, many nations around the world prohibit execution of the mentally retarded. Even some countries that appear on the U.S. State Department's list of human-rights violators do not execute mentally retarded offenders.

Texas does not need to wait for the U.S. Supreme Court to decide the case of *McCarver v. North Carolina* and to determine whether or not executing the mentally retarded is constitutional. Executing the mentally retarded is morally reprehensible and, regardless of how the court rules, Texas should stop these executions.

For various reasons, the criminal justice system often is unfair to mentally retarded people accused of crimes. Safeguards in current law to protect the mentally retarded from being sentenced to death are insufficient. People with mental retardation have been sentenced to death in Texas, and as many as six have been executed.

Mentally retarded people often cannot understand the charges against them and the consequences of what they tell law enforcement officials. They may give up their constitutional rights voluntarily without understanding that they have done so. Many mentally retarded people have learned to be agreeable when authority figures ask them questions, and they will agree with leading questions from police, even if they had no involvement in a crime. For example, the *New York Times* reported in February 2001 that detectives who interrogated a mentally retarded Virginia man asked leading questions to which he gave "monosyllabic answers and even corrected himself at their suggestion when his response did not fit their account." The man was convicted of rape and murder and was given a death sentence, which was commuted to life in prison after early DNA tests cast doubt on his guilt. Last year, new DNA tests in the case prompted Virginia Gov. James Gilmore to pardon the defendant, who had spent 18 years in prison for the crime.

Mentally retarded people also are susceptible to coercion from criminals. Penal Code, art. 7.01 allows a person to be held criminally responsible as a party to an offense, even if that person did not actually commit the crime. It is not uncommon for a criminal to use a mentally retarded person as a scapegoat to avoid justice.

Most mentally retarded people have limited resources and cannot afford expensive lawyers or expert testimony. Court-appointed lawyers often are not trained to recognize mental retardation and may not know to request a competency hearing. Appointed experts may not be properly qualified. The

insanity defense offers little protection for mentally retarded offenders and is rarely used.

CSHB 236 would help address these problems by establishing specific procedures to examine whether a defendant is mentally retarded and by allowing juries to receive this information and to decide if the defendant was mentally retarded. This would help attorneys, judges, and juries focus on mental retardation as a specific issue instead of lumping it together with other trial procedures and issues that courts must consider. The bill also would specify that experienced, qualified experts must determine if an offender is mentally retarded.

CSHB 236 would protect the role of juries. Juries still would decide the guilt or innocence of mentally retarded defendants and would decide whether a defendant were mentally retarded.

Prohibiting the execution of mentally retarded offenders would not lead to a large number of new appeals, because mental retardation already may be raised in the appeals process. Inmates who had gone through the state appeals process likely could not have a new appeal unless they could show new evidence of mental retardation, which already is allowed as a ground for appeal.

Changing the law would not create equal-protection issues for those who had mental impairments other than mental retardation. The Court of Criminal Appeals already considers post-developmental organic brain damage in the same manner as mental retardation in cases it reviews. Brain damage incurred after commission of the crime — in a prison brawl, for example — can be considered by the courts in a claim of incompetence to be executed.

OPPONENTS SAY:

Before enacting any legislation, Texas should wait for the U.S. Supreme Court to decide the case of *McCarver v. North Carolina*, in which a man on death row who claims to be mentally retarded argues that executing the mentally retarded is unconstitutional. The Supreme Court has agreed to hear oral arguments in the case this fall.

While the state does not execute children, it also does not allow children to marry, drive vehicles, sign contracts, raise families, or do any of the other

things that adults with mental retardation have the right to do. Whether people understand the wrongfulness of their actions is more important than whether or not they fit the definition of mental retardation. When criminals formulate plans to commit murder, actually commit it, and in some cases, try to hide it, juries should have the option to sentence them to death.

By definition, “mental age” means that a person received the same number of correct responses on a standardized IQ test as the average person of that age in the sample population. Saying that a 35-year-old person with mental retardation has the “mind” of a 10-year-old is inaccurate. Mental age refers only to the IQ test score, not to the level and nature of the person’s experience and functioning.

CSHB 236 is unnecessary because Texas already has safeguards to protect defendants who lack the mental capacity to understand the consequences of their crimes. There is no credible evidence that a person fitting the Health and Safety Code definition of mental retardation has been executed in Texas or is on death row. A court can declare someone incompetent to stand trial, or a defendant may be found not guilty by reason of insanity. A jury can consider mental retardation as a mitigating circumstance when imposing a sentence. If even one juror votes that a defendant’s mental retardation mitigates his or her guilt, the defendant cannot be sentenced to death. Also, prosecutors typically will not seek the death penalty when they know that the defendant is mentally retarded because of the time, expense, and difficulty in proving competence and culpability for a conviction. Each convicted capital defendant is entitled to a thorough and often lengthy appeal through state and federal courts. Another safeguard in place is the prohibition against execution of incompetent inmates.

Texans express public opinion when they serve on capital juries, which are drawn from a cross-section of Texans chosen at random. It takes only a single juror to give a capital offender a life sentence instead of death. If the majority of Texans are against executing the mentally retarded, it stands to reason that most people on a jury would feel that way and would vote for life.

The decision to sentence a mentally retarded offender to death should continue to be made on a case-by-case basis instead of imposing a blanket

prohibition against executing the mentally retarded. It would be unfair to strip juries of their ability to decide appropriate punishment for a capital murderer. Juries already can consider mental retardation as a mitigating factor in the punishment phase of capital trials.

CSHB 236 could lengthen the appeals process unnecessarily and extend the suffering of victims' families and friends. If some proposed changes were enacted, current death-row inmates could be eligible to raise mental retardation on a new appeal even if they did not raise it at the time of their trial. Texas' procedures in capital murder cases have been well established through litigation and may not withstand change easily. Changes to the law could be subject to court scrutiny, halting executions while challenges were litigated. Although supporters of CSHB 236 say the bill would not be retroactive to include offenders already on death row who allege mental retardation, defense and prosecution attorneys agree that a new law likely would result in additional appeals.

A special exception for mentally retarded offenders could raise equal-protection issues. CSHB 236 would bar the execution of mentally retarded offenders but would not protect offenders with other mental disabilities. For example, a paranoid schizophrenic or a person who suffered a traumatic brain injury in a car accident at age 20 and who subsequently had the same IQ and level of functioning as a mentally retarded person would not be exempted automatically from execution.

Tampering with death-penalty law and creating new categories of exceptions could weaken the death penalty and ultimately lead to its abolition. Death penalty law has been well-litigated. Changes would be subject to court scrutiny, and the law might not withstand change.

OTHER OPPONENTS SAY:

Allowing a jury to determine mental retardation would be disadvantageous to the defendant. The average person believes that a mentally retarded person is someone who cannot read or write, has difficulty speaking, and cannot survive without assistance. That description fits only about 6 percent of the mentally retarded population. Jurors may think that defendants who can drive, work, or read and write are faking their mental retardation. It is unlikely, however, that someone could fake mental retardation.

CSHB 236 would be prejudicial against a defendant by requiring a jury to determine after a trial if the defendant were mentally retarded. The jury already would have found the defendant guilty and would be considering the death penalty. In an analogous situation, the Court of Criminal Appeals has stated that when a jury decides whether or not a defendant is competent to stand trial, it should not be informed of any evidence against the defendant because it could prejudice the jury's decision about competency. Similarly, a jury should not be informed of evidence for a defendant's defense before determining if he or she is mentally retarded.

It would be inefficient to determine mental retardation after a capital trial, as CSHB 236 proposes. Capital trials are very expensive, and if the defendant were ineligible for the death penalty because of mental retardation, it would make better sense for the state to avoid the expense of a trial seeking the death penalty.

CSHB 236 would create an unfair burden on the defendant to produce a notice of intent 30 days before the trial began to submit a special issue in the punishment phase of the trial if the defendant were found guilty. If the defendant did not have an attorney 30 days before the trial or if the defense counsel were ineffective, the defendant would not be eligible for exclusion from the death penalty on the basis of mental retardation.

Even though current law allows the defense to request a competency hearing, defense attorneys often do not bring up the issue of mental retardation because they are unaware of the defendant's disability or because they want to conceal it as a trial tactic. CSHB 236 would depend on counsel to bring up the issue and still would miss some defendants' mental retardation.

A pre-trial hearing, such as this bill would require, is unnecessary because there already should be ample evidence of mental retardation in a defendant's records, which could be used to exempt the defendant from the death penalty. Legislation instead should address improving jail intake procedures and analysis of inmates' mental health. The Texas Department of Mental Health and Mental Retardation could share its records with jails so that when they received an inmate, they could tell whether he or she had a history of mental retardation. With those records, the defendant would not need a hearing to determine mental retardation.

NOTES:

HB 236 as filed would have prohibited a sentence of death for a defendant who was mentally retarded at the time of the commission of a capital offense. It would have allowed the defense counsel to request a hearing at any time before the capital trial began to ask the judge to hold a hearing to determine if the defendant were mentally retarded at the time of the alleged offense. The court would have to schedule a hearing and notify all interested parties. The burden of proof would be on the defendant. If the court found that the defendant was mentally retarded at the time of the offense and the defendant were subsequently convicted of the offense, the court would have to sentence the defendant to life imprisonment. If the court found that the defendant was not mentally retarded at the time of the offense, the court would have to hold the trial in the same manner as if the hearing never had occurred. The jury could not be informed of the court's finding, and the defendant could present evidence at trial of mental disability as permitted by CCP, art. 37.071.

Other bills in the 77th Legislature that address this issue are outlined below.

HB 242 by Gallego would prohibit punishing a person by death for an offense committed if the person were mentally retarded. The House Criminal Jurisprudence Committee considered HB 242 in a public hearing but left the bill pending.

HB 1247 by S. Turner would prohibit the death penalty for a person who at the time of the commission of a capital offense was mentally retarded. Mental retardation would be defined as an IQ of 65 or less or would track the Health and Safety Code definition. Before the criminal trial began, the defendant's counsel could request that the trial judge hold a hearing to determine if the defendant were mentally retarded at the time of the offense. The court would have to schedule a hearing, and the burden of proving mental retardation would be on the defendant. The court would have to make a finding 10 days before the trial of whether or not the defendant were mentally retarded or else state that it would not make a finding. The decision could be appealed directly to the Court of Criminal Appeals. Also, on the request of the prosecution, the defense, or on the court's own motion, the court would have to appoint disinterested experts to examine the defendant and determine if he or she were mentally retarded.

If the trial court found that the defendant was mentally retarded, the jury could consider the court's ruling in determining whether to convict the defendant. If the jury voted to convict, the defendant would be sentenced to life imprisonment. If the court found that the defendant was not mentally retarded at the time of the offense, the jury could not be informed of the hearing results. However, at the defendant's request, the judge would have to permit the defendant to present to the jury evidence of his or her assertion of mental retardation. At the punishment phase of the trial, the defendant could request to have the jury determine whether he or she were mentally retarded at the time of the offense. If the jury found that the defendant was mentally retarded, the judge would have to sentence the defendant to life in prison. The House Criminal Jurisprudence Committee considered HB 1247 in a public hearing but left the bill pending.

SB 686 by Ellis/Moncrief, similar to HB 1247, would prohibit the death penalty for a person who at the time of the commission of a capital offense was mentally retarded. Mental retardation would be defined as an IQ of 70 or less or would track the Health and Safety Code definition. The pre-trial hearing process would be identical to that in HB 1247. The court would have to announce its finding before the trial. SB 686 would authorize defendants convicted of a capital offense before September 1, 2001 to ask the convicting court for a hearing to determine if they were mentally retarded at the time of the crime. If the court found that documentary evidence supported the defendant's claim of mental retardation, it could order a hearing. If the court found the defendant to be mentally retarded at the time of the crime, it would have to forward a copy of that finding immediately to the Court of Criminal Appeals. SB 686 has been referred to the Senate Criminal Justice Committee.

At least three bills were introduced in the 76th Legislature to prohibit execution of mentally retarded capital offenders. SB 326 by Ellis passed the Senate and was reported favorably by the House Criminal Jurisprudence Committee but died in the House Calendars Committee. HB 2121 by Gallego died in a subcommittee of the House Criminal Jurisprudence Committee. HB 3069 by Hinojosa was reported favorably by the subcommittee but died in the full committee.