SUBJECT: Prohibiting death sentence for a person found mentally retarded by jury

COMMITTEE: Criminal Jurisprudence — favorable, without amendment

VOTE: 5 ayes — Keel, Riddle, Ellis, Hodge, Talton

0 nays

4 absent — Denny, Dunnam, P. Moreno, Pena

WITNESSES: For — Lee Hon, Polk County Criminal District Attorney's Office; Willie A. Ryman, Jr., Justice for All; Michael Welner; David P. Weeks; Ellen Moseley-May; Karla Needels

Against — Keith S. Hampton, Texas Criminal Defense Lawyers Association; Richard Garnett, ARC of Texas; Hanna Liebman Dershowitz, Texas Appleseed; Leslie Rosenstein, National Academy of Neuropsychology; Ollie J. Seay, Texas Psychological Association; Rona Statman, Texas Advocates; Jordan Steiker; Harry M. Whittington; John E. Wright

On — Shannon Edmonds, Texas District and County Attorneys Association; James Ellis

BACKGROUND: On June 20, 2002, the U.S. Supreme Court ruling, in *Atkins v. Virginia,* 536 U.S. __, banned the execution of mentally retarded offenders, holding that such executions constitute cruel and unusual punishment prohibited by the Eighth Amendment to the U.S. Constitution.

Texas has no explicit ban on executing the mentally retarded, although the issue can be raised at various points during the proceedings in a capital case. The 77th Legislature in 2001 enacted HB 236 by Hinojosa, which would have prohibited a death sentence for any defendant found to be mentally retarded and would have established procedures to determine whether a defendant was mentally retarded. Gov. Perry vetoed the bill, saying that the existing criminal justice system has sufficient safeguards for determining mental competency and that the bill would have allowed a judge to overturn a jury's determination of mental retardation.

HB 236 would have allowed a convicted defendant during the sentencing phase of a trial to request the submission of a special issue for the jury to determine whether the defendant was mentally retarded. If the jury found that the defendant was not mentally retarded and sentenced the defendant to death, the defendant could have petitioned the court to appoint two disinterested experts to examine the defendant. If the judge, after considering the findings of these experts and of experts offered by the prosecution, found the defendant to be mentally retarded, the judge would have had to sentence the defendant to life imprisonment.

Statutory definition of mental retardation. 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 a particular age group. For most tests, a score of 70 or below indicates 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.

Procedure in capital cases. Texas law allows the issue of mental retardation to be a part of pretrial deliberations when determining whether someone is competent to stand trial under Code of Criminal Procedure (CCP), art. 46.02. Mental retardation also can be a factor that defendants use in an insanity defense (outlined in Penal Code, art. 8.01) to assert that as a result of severe mental disease or defects, they did not understand that their conduct was wrong.

Capital defendants also can present mental retardation as an issue at trial, during appeals, and in the clemency process. CCP, art. 37.071, sec. 2 establishes the procedure to be followed in a capital murder trial after a defendant is found guilty. A jury may consider evidence of mental retardation

as mitigating evidence in determining whether to impose a life sentence or the death penalty on a defendant found guilty of capital murder.

A separate sentencing proceeding must be held to determine if the person will be sentenced to death or to life in prison. The sentencing procedure must be conducted before the trial jury as soon as practicable. Both the prosecution and defense may present any evidence that the court deems relevant, including evidence of the defendant's background or character or the circumstances of the offense that might mitigate against imposing the death penalty. After the evidence is presented, the jury must answer the following questions:

- 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 to a crime, whether the defendant actually caused the death or did not actually cause the death but intended to kill the victim or someone else or anticipated that a human life would be taken.

These questions often are referred to as the issue of "future dangerousness" and must be proved beyond a reasonable doubt. The jury must return a special verdict of "yes" or "no" on each issue.

The court must tell the jury that if it returns an affirmative finding to each of these questions, 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. This question often is referred to as "mitigating circumstances."

Upon request by the defense attorney, the court must tell the jury that:

- if it answers that circumstances warrant a sentence of life imprisonment rather than death, the court must sentence the defendant to life in prison; and

- if the defendant receives 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 court must tell the jury that in deciding about mitigating circumstances, it must answer the issue "yes" or "no" and:

- may not answer "no" unless the jury agrees unanimously and may not answer "yes" unless 10 or more jurors agree; and
- must consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness.

The court must sentence the defendant to death if the jury returns an affirmative finding on the two questions concerning future dangerousness and a negative finding on the issue of mitigating evidence. The court must sentence the defendant to life in prison if the jury returns a negative finding on the questions of future dangerousness or an affirmative finding on mitigating evidence, or if the jury cannot answer any of the questions.

Since the U.S. Supreme Court's *Atkins* ruling in June 2002, the executions of eight inmates in Texas have been stayed so that claims of mental retardation can be investigated.

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

DIGEST:

HB 614 would prohibit a death sentence for a person found by a jury to be mentally retarded and would establish procedures for presenting evidence of mental retardation to the jury. The jury's decision would be made during the sentencing phase of a capital trial. The evidence could include evidence of the circumstances of the offense or other crimes, wrongs, or acts.

The bill would take effect September 1, 2003, and would apply only to sentencing proceedings that began on or after that date.

Procedure for bringing mental retardation before the jury. A defendant who wanted the jury to consider the issue of mental retardation would have to

file with the court and the prosecutor a written notice of intent to raise the issue. The notice would have to be filed at least 60 days before examination of prospective jurors began, and it would have to be accompanied by objective evidence that the defendant might be mentally retarded. If a defendant were indigent, the court would have to appoint an expert to make the determination.

Courts would have to order defendants to be examined by qualified experts upon receiving objective evidence of mental retardation from any source and, for evidence submitted by the defense or prosecution, if either party asked for an exam. If a defendant failed or refused to be examined, the court could not allow the specific issue of mental retardation to be put before the jury.

The bill would define mental retardation as significantly subaverage general intellectual functioning that is concurrent with significant deficits in adaptive behavior, if those characteristics originate during the person's developmental period. "Adaptive behavior" would mean the effectiveness with or degree to which a person meets generally recognized standards of personal independence and social responsibility. "Subaverage general intellectual functioning" would refer to measured intelligence on standardized psychometric instruments of two or more standard deviations below the age-group mean for the tests used.

Jury's decision about mental retardation. Upon request by the defense, a jury that returned an affirmative finding to the questions about a defendant's future dangerousness also would have to answer the specific question of whether the person was mentally retarded. The standard for deciding whether a person was mentally retarded would be a preponderance of the evidence.

Courts would have to tell juries that if they decided a defendant was mentally retarded, the defendant would be sentenced to life in prison. If the person was found not to be mentally retarded, the jury would have to consider, as under current law, whether there was mitigating evidence that could warrant a sentence of life in prison. A decision that a defendant did not have mental retardation would have to be unanimous, and at least 10 jurors would have to agree for a person to be considered mentally retarded.

SUPPORTERS SAY:

HB 614 would establish clear, fair procedures to implement the U.S. Supreme Court's ban on the execution of the mentally retarded. Justice is not served when the state executes a mentally retarded person. HB 614 would ensure that the death penalty is reserved for the most morally culpable offenders.

Establishing procedures to decide whether a defendant was mentally retarded would allow juries, judges, and attorneys to focus on mental retardation as a specific issue instead of lumping it together with other trial procedures and issues that courts must consider. While current law allows juries to consider mental retardation as a mitigating factor when deciding punishment in a capital trial, this is not enough. Mental retardation should not be simply a mitigating factor in determining sentences but rather a defining issue in whether someone would be put to death.

HB 614 would protect the role of juries by allowing them to determine whether a defendant is mentally retarded. Juries traditionally have decided in Texas whether the death penalty is appropriate. This provision would mirror current law, which requires juries to decide about whether a defendant is a future danger and whether any mitigating circumstances would preclude a death sentence. Allowing juries to make such decisions would be the safest course in light of another recent U.S. Supreme Court ruling, *Ring v. Arizona*, 536 U.S. __ (2002), that judges should not make certain fact-finding decisions in capital cases.

It is appropriate to ask the jury that hears evidence and facts about a murder to decide whether the defendant has mental retardation. Details about how a defendant planned, carried out, or covered up a murder can shed light on whether the person is mentally retarded and can reflect the person's adaptive, functioning, social, and interpersonal skills. Under HB 614, a jury could receive all relevant medical and historical information about a defendant so that jurors could make an unbiased decision based on the evidence.

HB 614 simply would create one more special issue to be decided by a jury when it decides other special issues during a trial's punishment phase. This would weave the issue of mental retardation into Texas' already established and court-approved death penalty procedures and would allow the issue to be decided without the additional costs of a new pre- or post-trial procedure. Establishing a new type of hearing could lead to court challenges.

The bill would require the determination of mental retardation to be made during the punishment phase of a trial because deciding whether someone will receive a death sentence or life imprisonment is a punishment decision. No other fact relating to punishment is decided before a trial. Requiring the decision before trial would lead to unnecessary delays in capital trials, with most or even all defendants claiming mental retardation. This would force prosecutors to go to the effort and expense of trying their cases twice rather than completing a case in one trial.

HB 614 would offer the best option for preserving the possibility of plea agreements in capital cases. If a determination of mental retardation were made before trial, the defendant would have no incentive to enter into a plea, since the only available punishment would be life in prison.

The bill would not include a specific IQ score for determining whether a person would be presumed to be mentally retarded. Such a finding should not be decided by any hard and fast rule, but by considering all the evidence. Specifying an IQ number in the statutes could lead to wrong decisions in cases within the margin of error of the test and in borderline cases.

HB 614 would be fair to defendants by allowing the standard for deciding mental retardation to be "preponderance of the evidence," a lower standard than the "beyond a reasonable doubt" standard used in most criminal proceedings.

Other states use both pre- and post-trial procedures to decide the issue of mental retardation. HB 614 is similar to legislation enacted by Virginia, the state in which the U.S. Supreme Court's decision originated.

OPPONENTS SAY:

The procedure established by HB 614 would not be fair or cost-effective. It would be better to decide the question of mental retardation *before* a trial begins, not during a trial's sentencing phase. This would be in line with current procedures that allow questions about a defendant's competency to stand trial to be decided before a trial.

HB 614 inappropriately and unfairly would ask jurors who have heard the often horrible and gruesome details of a capital murder and have decided that the defendant was guilty of the murder to decide impartially the question of

mental retardation. Whether a defendant has mental retardation should be an objective, clinical determination that is not colored by the emotion of a murder trial. The facts and circumstances of a crime are irrelevant as to whether someone has mental retardation. HB 614 could lead to court challenges with defendants arguing that they did not receive due process and were harmed because the jury was prejudiced.

Deciding the issue of mental retardation after a trial would be more costly than deciding the issue beforehand. If a defendant was found to be mentally retarded before trial, the cost of a capital trial — which some estimate to average about $2 million — could be avoided. These defendants still could be tried for the crimes and given life sentences, but without the costly special procedures that are part of all capital trials.

Allowing the issue of mental retardation to be decided before trial would not cause unnecessary delays or lead to all defendants claiming mental retardation. Baseless claims of mental retardation could be avoided by requiring a claim of mental retardation to be supported by evidence.

Determining mental retardation before a trial would not hurt the ability of the prosecution and defense to reach plea agreements. Agreements still could be reached involving lesser charges, when appropriate. In any event, a mentally retarded defendant should not be coerced into pleading guilty to a crime and forgoing a jury trial simply to avoid the death penalty.

The issue of mental retardation should be decided before trial because the mental capacity of defendants is important in how well they understand the proceedings and how much they can contribute to their defense. Most states that have enacted legislation to implement the U.S. Supreme Court's ban on executing the mentally retarded have established procedures to raise the issue before trial.

OTHER OPPONENTS SAY:

A judge, not a jury, should decide whether a defendant has mental retardation. Judges have the experience and training necessary to weigh complicated evidence and to make objective decisions.

HB 614 is unnecessary. Texas' criminal justice system already has many safeguards to prevent execution of the mentally retarded, including allowing

the issue of mental retardation to be raised when examining a defendant's competency to stand trial and allowing the issue to be considered as a factor that could mitigate against imposing the death penalty.

NOTES:

The companion bill, SB 332 by Staples, has been referred to the Senate Jurisprudence Committee.

A related bill, SB 163 by Ellis, would prohibit death sentences for people with mental retardation. It would establish a pretrial procedure for determining whether a defendant was mentally retarded. If a judge decided that evidence supported a claim of mental retardation, a hearing would have to be held to decide the issue. A defendant could choose to have a judge or a jury make the determination. A defendant with an IQ of 70 or less would be presumed to have mental retardation. SB 163 also would prohibit the execution of people with mental retardation and would establish a procedure for a person sentenced to death before September 1, 2003, the bill's effective date, to submit a claim of mental retardation and to have a hearing to decide the issue. SB 163 has been referred to the Senate Jurisprudence Committee.

Another related bill, HB 664 by Gallego, would prohibit death sentences for people with mental retardation. The bill would allow a defendant to request that the jury make a specific finding about mental retardation during the sentencing phase of a capital trial. If the jury found that the person was not mentally retarded, the defendant could request that the judge hold a hearing and make a ruling on the issue. The judge would make the decision after hearing medical evidence and, if the judge decided the person was mentally retarded, would sentence the defendant to life in prison. HB 664 has been referred to the House Criminal Jurisprudence Committee.

SB 389 by Ellis also would prohibit the execution of people with mental retardation. It would allow a defendant to request a hearing to determine whether he or she had mental retardation any time after being sentenced to death. If the judge decided that evidence supported the claim of mental retardation, a hearing would have to be held to decide the question. The defendant could choose to have the judge or a jury make the decision. If it was decided that a defendant was mentally retarded, the defendant would

have to be sentenced to life in prison if convicted of the capital murder. SB 389 has been referred to the Senate Jurisprudence Committee.