

## HOUSE BILL No. 2396

By Committee on Appropriations

2-5

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9 AN ACT concerning the death penalty; relating to cognitive disability;  
10 amending K.S.A. 21-4634 and K.S.A. 2006 Supp. 21-4624 and 21-4635  
11 and repealing the existing sections; also repealing K.S.A. 2006 Supp.  
12 21-4623.  
13

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

15 New Section 1. As used in 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" means intellectual functioning that is two  
21 or more standard deviations below the norm.

22 New Sec. 2. (a) No person having a cognitive disability at the time  
23 of the commission of a capital murder pursuant to K.S.A. 21-3439, and  
24 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, 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 a 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 a 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 comes to the attention of counsel  
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 possi-  
37 ble 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 a 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 a cognitive disability, the trial may pro-

1 proceed as a capital murder trial, and, if convicted, the defendant may be  
2 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 a 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 a 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 whether the  
12 defendant had a cognitive disability at the time of the commission of the  
13 capital murder. The special verdict shall ask the jury to answer the ques-  
14 tion: "Do you unanimously find, beyond a reasonable doubt, that the  
15 defendant did not have a cognitive disability at the time of the commission  
16 of the capital murder?" If the jury answers "yes," the case shall proceed  
17 to a penalty phase under K.S.A. 21-4624, and amendments thereto. If the  
18 jury answers the question "no," the defendant may be sentenced to any  
19 penalty available under state law, other than death.

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

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

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

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

33 Sec. 6. K.S.A. 2006 Supp. 21-4624 is hereby amended to read as  
34 follows: 21-4624. (a) If a defendant is charged with capital murder, the  
35 county or district attorney shall file written notice if such attorney intends,  
36 upon conviction of the defendant, to request a separate sentencing pro-  
37 ceeding to determine whether the defendant should be sentenced to  
38 death. Such notice shall be filed with the court and served on the de-  
39 fendant or the defendant's attorney not later than five days after the time  
40 of arraignment. If such notice is not filed and served as required by this  
41 subsection, the county or district attorney may not request such a sen-  
42 tencing proceeding and the defendant, if convicted of capital murder,  
43 shall be sentenced to life without the possibility of parole, and no sentence

1 of death shall be imposed hereunder.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

37 Sec. 8. K.S.A. 2006 Supp. 21-4635 is hereby amended to read as  
38 follows: 21-4635. (a) Except as provided in K.S.A. 21-4622, ~~21-4623~~ and  
39 21-4634 and amendments thereto, if a defendant is convicted of the crime  
40 of capital murder and a sentence of death is not imposed pursuant to  
41 subsection (e) of K.S.A. 21-4624, and amendments thereto, or requested  
42 pursuant to subsection (a) or (b) of K.S.A. 21-4624, and amendments  
43 thereto, the defendant shall be sentenced to life without the possibility

1 of parole.

2 (b) If a defendant is convicted of murder in the first degree based  
3 upon the finding of premeditated murder, the court shall determine  
4 whether the defendant shall be required to serve a mandatory term of  
5 imprisonment of 40 years or for crimes committed on and after July 1,  
6 1999, a mandatory term of imprisonment of 50 years or sentenced as  
7 otherwise provided by law.

8 (c) In order to make such determination, the court may be presented  
9 evidence concerning any matter that the court deems relevant to the  
10 question of sentence and shall include matters relating to any of the ag-  
11 gravating circumstances enumerated in K.S.A. 21-4636 and amendments  
12 thereto and any mitigating circumstances. Any such evidence which the  
13 court deems to have probative value may be received regardless of its  
14 admissibility under the rules of evidence, provided that the defendant is  
15 accorded a fair opportunity to rebut any hearsay statements. Only such  
16 evidence of aggravating circumstances as the state has made known to  
17 the defendant prior to the sentencing shall be admissible and no evidence  
18 secured in violation of the constitution of the United States or of the state  
19 of Kansas shall be admissible. No testimony by the defendant at the time  
20 of sentencing shall be admissible against the defendant at any subsequent  
21 criminal proceeding. At the conclusion of the evidentiary presentation,  
22 the court shall allow the parties a reasonable period of time in which to  
23 present oral argument.

24 (d) If the court finds that one or more of the aggravating circum-  
25 stances enumerated in K.S.A. 21-4636 and amendments thereto exist and,  
26 further, that the existence of such aggravating circumstances is not out-  
27 weighed by any mitigating circumstances which are found to exist, the  
28 defendant shall be sentenced pursuant to K.S.A. 21-4638 and amend-  
29 ments thereto; otherwise, the defendant shall be sentenced as provided  
30 by law. The court shall designate, in writing, the statutory aggravating  
31 circumstances which it found. The court may make the findings required  
32 by this subsection for the purpose of determining whether to sentence a  
33 defendant pursuant to K.S.A. 21-4638 and amendments thereto notwith-  
34 standing contrary findings made by the jury or court pursuant to subsec-  
35 tion (e) of K.S.A. 21-4624 and amendments thereto for the purpose of  
36 determining whether to sentence such defendant to death.

37 Sec. 9. K.S.A. 21-4634 and K.S.A. 2006 Supp. 21-4623, 21-4624 and  
38 21-4635 are hereby repealed.

39 Sec. 10. This act shall take effect and be in force from and after its  
40 publication in the statute book.