

SESSION OF 2004

SUPPLEMENTAL NOTE ON SENATE BILL NO. 355

As Amended by Senate Committee on
Judiciary

Brief*

SB 355 makes changes to the Kansas death penalty procedure to conform with the constitutional requirements set by the U.S. Supreme Court in *Atkins v. Virginia*, 122 S.Ct. 2242 (2002), which held that execution of a person with mental retardation violates the Eighth Amendment prohibition of cruel and unusual punishment.

The bill also implements a policy decision to extend the ban on imposition of death penalty from persons with mental retardation (required by the *Atkins* decision) to include all persons who suffer a cognitive disability *i.e.*, not only those persons who are mentally retarded but also those persons who suffer a brain injury after their 18th birthday. The bill establishes a procedure for the cognitive disability finding to be applied to those already sentenced to death.

The bill allows the issue of cognitive disability to be raised prior to trial or whenever defense counsel gains a good faith belief that the defendant has a cognitive disability. Under current law, the determination of mental retardation is made by the judge following the guilty verdict.

The bill deletes references to defendants who are mentally retarded and replaces the terminology with persons who suffer a "cognitive disability." The bill defines "cognitive disability" as a disability characterized by significant limitations both in intellectual functioning and deficits in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. The term "significant limitations" in intellectual functioning means two or more standard deviations from the norm.

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

If the capital murder trial results in a verdict of guilty, the parties shall be entitled to present evidence to the jury on the issue of whether the defendant had cognitive disability at the time of the commission of the capital murder. The jury shall be asked to render a special verdict on the issue of cognitive disability. If the jury finds beyond a reasonable doubt the defendant had a cognitive disability, the defendant may be sentenced to any penalty available under state law, other than death.

In cases in which a defendant already has been convicted of capital murder, sentenced to death, and is in custody pending execution of the sentence of death, the following procedures apply. The Kansas State Board of Indigents' Defense Services shall arrange to provide counsel to any such person who is unrepresented at the time this act takes effect to determine whether to file a petition for relief from the sentence of death on the grounds that the defendant was an individual having cognitive disability at the time of the commission of the capital offense.

Background

The bill was recommended by the Kansas Judicial Council's Criminal Law Advisory Committee which had been requested to study the issue by the 2003 Legislature. The Advisory Committee relied on the expert advice of a law professor from the University of New Mexico School of Law who expressed concern about the current definition of "mentally retarded" in the criminal code; the Kansas statute is different from other states to the point it could be argued it does not conform to the "national consensus" and that the current law may be subject to a challenge it is unconstitutional on its face to the extent it could be read to require a casual conviction.

The bill was supported by the Kansas Bar Association, the Kansas Association of Criminal Defense Lawyers, the Kansas Advocacy and Protective Services, Inc., and the Kansas Council on Developmental Disabilities.

Opposition was expressed by several prosecutors from the Sedgwick County District Attorney's Office.