

By: Keel, Gallego, Ellis, Talton, Gattis,  
et al.

H.B. No. 614

A BILL TO BE ENTITLED

AN ACT

1  
2 relating to the applicability of the death penalty to a capital  
3 offense committed by a person with mental retardation.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

5 SECTION 1. Section 2(a)(1), Article 37.071, Code of  
6 Criminal Procedure, is amended to read as follows:

7 (1) If a defendant is tried for a capital offense in  
8 which the state seeks the death penalty, on a finding that the  
9 defendant is guilty of a capital offense, the court shall conduct a  
10 separate sentencing proceeding to determine whether the defendant  
11 shall be sentenced to death or life imprisonment. The proceeding  
12 shall be conducted in the trial court and, except as provided by  
13 Article 44.29(c) [~~of this code~~], before the trial jury as soon as  
14 practicable. In the proceeding, evidence may be presented by the  
15 state and the defendant or the defendant's counsel as to any matter  
16 that the court deems relevant to the sentence, including evidence  
17 as to whether the defendant is a person with mental retardation, as  
18 defined by Article 37.072, and including evidence of the  
19 defendant's background or character or the circumstances of the  
20 offense that mitigates against the imposition of the death penalty.  
21 Evidence regarding mental retardation may include evidence of the  
22 circumstances of the offense or other crimes, wrongs, or acts. This  
23 subdivision shall not be construed to authorize the introduction of  
24 any evidence secured in violation of the Constitution of the United

1 States or of the State of Texas. The state and the defendant or the  
2 defendant's counsel shall be permitted to present argument for or  
3 against a sentence of death. The court, the attorney representing  
4 the state, the defendant, or the defendant's counsel may not inform  
5 a juror or a prospective juror of the effect of a failure of a jury  
6 to agree on issues submitted under Subsection (b) [~~(c)~~] or (e) [~~of~~  
7 ~~this article~~].

8 SECTION 2. Section 2(e), Article 37.071, Code of Criminal  
9 Procedure, is amended to read as follows:

10 (e)(1) If the defendant has filed timely notice under  
11 Article 37.072 and if the issue of mental retardation has been  
12 raised by evidence admitted before the jury, on the written request  
13 of the attorney representing the defendant, the court shall  
14 instruct the jury that if the jury returns an affirmative finding to  
15 each issue submitted under Subsection (b), the jury shall answer  
16 the following issue:

17 Whether the defendant is a person with mental retardation.

18 (2) The court shall instruct the jury that if the jury  
19 returns an affirmative finding to each issue submitted under  
20 Subsection (b) and, if the issue is submitted, a negative finding on  
21 an issue submitted under Subdivision (1) [~~of this article~~], it  
22 shall answer the following issue:

23 Whether, taking into consideration all of the evidence,  
24 including the circumstances of the offense, the defendant's  
25 character and background, and the personal moral culpability of the  
26 defendant, there is a sufficient mitigating circumstance or  
27 circumstances to warrant that a sentence of life imprisonment

1 rather than a death sentence be imposed.

2 (3) [~~(2)~~] The court, on the written request of the  
3 attorney representing the defendant, shall:

4 (A) instruct the jury that if the jury answers  
5 that the defendant is a person with mental retardation or answers  
6 that a circumstance or circumstances warrant that a sentence of  
7 life imprisonment rather than a death sentence be imposed, the  
8 court will sentence the defendant to imprisonment in the  
9 institutional division of the Texas Department of Criminal Justice  
10 for life; and

11 (B) charge the jury in writing as follows:

12 "Under the law applicable in this case, if the defendant is  
13 sentenced to imprisonment in the institutional division of the  
14 Texas Department of Criminal Justice for life, the defendant will  
15 become eligible for release on parole, but not until the actual time  
16 served by the defendant equals 40 years, without consideration of  
17 any good conduct time. It cannot accurately be predicted how the  
18 parole laws might be applied to this defendant if the defendant is  
19 sentenced to a term of imprisonment for life because the  
20 application of those laws will depend on decisions made by prison  
21 and parole authorities, but eligibility for parole does not  
22 guarantee that parole will be granted."

23 SECTION 3. Section 2(f), Article 37.071, Code of Criminal  
24 Procedure, is amended to read as follows:

25 (f) (1) The court shall charge the jury that in answering an  
26 [~~the~~] issue submitted under Subsection (e) [~~of this article~~], the  
27 jury:

1           (A) [~~(1)~~] shall answer the issue "yes" or "no";

2           (B) [~~(2)~~] may not answer the issue "no" unless it  
3 agrees unanimously and may not answer the issue "yes" unless 10 or  
4 more jurors agree;

5           (C) [~~(3)~~] need not agree on what particular  
6 evidence supports an affirmative finding on the issue; and

7           (D) [~~(4)~~] in respect to the issue submitted under  
8 Subsection (e)(2), shall consider mitigating evidence to be  
9 evidence that a juror might regard as reducing the defendant's  
10 moral blameworthiness.

11           (2) In respect to an issue submitted under Subsection  
12 (e)(1), the court shall charge the jury that the defendant must  
13 prove the issue by a preponderance of the evidence.

14           SECTION 4. Section 2(g), Article 37.071, Code of Criminal  
15 Procedure, is amended to read as follows:

16           (g) If the jury returns an affirmative finding on each issue  
17 submitted under Subsection (b) [~~of this article~~] and a negative  
18 finding on each [~~an~~] issue submitted under Subsection (e) [~~of this~~  
19 ~~article~~], the court shall sentence the defendant to death. If the  
20 jury returns a negative finding on any issue submitted under  
21 Subsection (b) [~~of this article~~] or an affirmative finding on any  
22 [~~an~~] issue submitted under Subsection (e) [~~of this article~~] or is  
23 unable to answer any issue submitted under Subsection (b) or (e) [~~of~~  
24 ~~this article~~], the court shall sentence the defendant to  
25 imprisonment [~~confinement~~] in the institutional division of the  
26 Texas Department of Criminal Justice for life.

27           SECTION 5. Chapter 37, Code of Criminal Procedure, is

1 amended by adding Article 37.072 to read as follows:

2 Art. 37.072. PROCEDURE IN CAPITAL CASE: EFFECT OF MENTAL  
3 RETARDATION

4 Sec. 1. DEFINITIONS. In this article:

5 (1) "Adaptive behavior" means the effectiveness with  
6 or degree to which a person meets generally recognized standards of  
7 personal independence and social responsibility.

8 (2) "Mental retardation" means significantly  
9 subaverage general intellectual functioning that is concurrent  
10 with significant deficits in adaptive behavior, if those  
11 characteristics originate during the developmental period.

12 (3) "Person with mental retardation" means a person  
13 with significantly subaverage general intellectual functioning  
14 that is concurrent with significant deficits in adaptive behavior  
15 if those characteristics originated during the person's  
16 developmental period.

17 (4) "Subaverage general intellectual functioning"  
18 refers to measured intelligence on standardized psychometric  
19 instruments of two or more standard deviations below the age-group  
20 mean for the tests used.

21 Sec. 2. RESTRICTION ON DEATH PENALTY; PRIOR DETERMINATION.

22 (a) Notwithstanding Section 19.03, Penal Code, a defendant  
23 convicted of a capital offense who is determined by a jury to be a  
24 person with mental retardation under Article 37.071 may not be  
25 sentenced to death.

26 (b) A previous determination regarding whether a defendant  
27 is a person with mental retardation, as defined by the law of this

1 state or any other state, is admissible in a proceeding under  
2 Article 37.071, but the previous determination regarding mental  
3 retardation does not create an evidentiary presumption or otherwise  
4 alter the burdens of production and proof required by this article  
5 and Article 37.071.

6 Sec. 3. NOTICE. (a) A defendant charged with a capital  
7 offense in which the state seeks the death penalty may request the  
8 submission of a special issue under Section 2(e)(1), Article  
9 37.071, only if in the form and manner required by Subsections (b)  
10 and (c) the attorney representing the defendant files with the  
11 court and the attorney representing the state a written notice of  
12 intent to request the submission of that issue.

13 (b) Notice under this section must be accompanied by  
14 objective evidence indicating that the defendant may be a person  
15 with mental retardation. If necessary for an indigent defendant to  
16 meet the burden of production under this subsection, the court  
17 shall appoint an expert experienced and qualified in the field of  
18 diagnosing mental retardation to determine whether the indigent  
19 defendant is a person with mental retardation.

20 (c) Notice accompanied by objective evidence under this  
21 section must be submitted not later than the 60th day before the  
22 date the voir dire examination of prospective jurors begins. If  
23 notice is not timely filed in accordance with this subsection, the  
24 court may not permit the submission of a special issue under Section  
25 2(e)(1), Article 37.071, unless the court finds that good cause  
26 existed for failure to give timely notice.

27 Sec. 4. EXAMINATIONS. (a) For purposes of this article, the

1 court shall order the defendant to submit to examinations by  
2 experts experienced and qualified in the field of diagnosing mental  
3 retardation and retained by the defense and the attorney  
4 representing the state, or appointed for an indigent defendant, if  
5 the court receives:

6 (1) objective evidence from any source indicating that  
7 the defendant may be a person with mental retardation; and

8 (2) for evidence regarding mental retardation  
9 submitted by the defense or the attorney representing the state, a  
10 written request for an expert examination submitted by the attorney  
11 representing the defendant or the attorney representing the state.

12 (b) If the defendant fails or refuses to submit to, or fully  
13 cooperate in, examination by experts for a party under Subsection  
14 (a), the court may not permit the submission of a special issue  
15 under Section 2(e)(1), Article 37.071.

16 SECTION 6. The change in law made by this Act applies only  
17 to a sentencing proceeding that commences on or after the effective  
18 date of this Act. A sentencing proceeding that commences before the  
19 effective date of this Act is covered by the law in effect when the  
20 proceeding commenced, and the former law is continued in effect for  
21 that purpose.

22 SECTION 7. This Act takes effect September 1, 2003.