

SUBJECT: Creating pre-trial determination of intellectual disability in capital cases

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 6 ayes — Collier, K. Bell, J. González, Hunter, Moody, Pacheco

1 nay — Murr

2 absent — Zedler, P. King

WITNESSES: For — Ollie Seay, American Association on Intellectual and Developmental Disabilities-Texas Chapter; Philip Kazen, Bexar County Criminal District Attorney's Office; Brian Middleton, Fort Bend County District Attorney; Patrick McCann, Harris County Criminal Defense Lawyers' Association; Edward Keith, Regional Public Defender for Capital Cases; Bobby Mims, Texas Criminal Defense Lawyers Association; Elsa Alcala, Texas Defender Service; Jason Vaughn, Texas Young Republicans; Alex Cogan, The Arc of Texas; James Patton; (*Registered, but did not testify*: Nicholas Hudson, American Civil Liberties Union of Texas; Dennis Borel, Coalition of Texans with Disabilities; Jeff Miller, Disability Rights Texas; Lisa Flores, Easter Seals Central Texas; Kathleen Mitchell, Just Liberty; Christine Yanas, Methodist Healthcare Ministries of South Texas, Inc.; Eric Kunish, National Alliance on Mental Illness-Austin; Will Francis, National Association of Social Workers-Texas Chapter; Michael Barba, Texas Catholic Conference of Bishops; Alycia Speasmaker, Texas Criminal Justice Coalition; Emily Gerrick, Texas Fair Defense Project; Texas NAACP; Kevin Stewart, Texas Psychological Association; Chris Harris; Zoe Russell)

Against — Vincent Giardino, Tarrant County Criminal District Attorney's Office; (*Registered, but did not testify*: Frederick Frazier, Dallas Police Association and state Fraternal Order of Police)

On — Raoul Schonemann

DIGEST:

CSHB 1139 would statutorily prohibit the death penalty for defendants who were persons with intellectual disabilities and would establish pre-trial procedures for determining if a defendant met that standard.

Pre-trial hearing. In a death penalty case, a defendant's attorney would have until 180 days before the trial to request that the judge hold a hearing to determine if the defendant was a person with an intellectual disability. A request would have to be accompanied by evidence from a credible source indicating that the defendant was a person with an intellectual disability.

If a request were filed within the deadline and the judge determined the evidence met this standard, the judge would be required to hold a hearing within at least 120 days before the trial date.

A judge could hold a hearing on the issue outside the presence of the jury if the defendant's attorney showed good cause for not filing a request within the time limit or presented evidence after the deadline that the defendant was a person with an intellectual disability. It would be considered good cause if the attorney had represented the defendant for fewer than six months or had used reasonable diligence to obtain evidence but was unable to do so due to reasons beyond the attorney's control.

The burden at a hearing would be on the defendant to prove by a preponderance of the evidence that the defendant was a person with an intellectual disability. The state would be able to offer evidence to rebut evidence offered by the defendant and would be entitled to an appeal.

Examinations. On the request of either party or on their own motion, judges would be required to appoint a disinterested expert to examine the defendant and determine whether the defendant was a person with an intellectual disability. Judges could order the defendant to submit to an examination by an expert which would have to be narrowly tailored to determine whether the defendant had an intellectual disability.

Prevailing medical standards. Evidence offered in the hearing would

have to be consistent with prevailing medical standards for the diagnosis of intellectual disabilities. The bill would establish definitions related to the determination.

Judicial determination. Within 30 days after a hearing, the judge would be required to determine whether the defendant was a person with an intellectual disability. If the judge did not determine that the defendant was a person with an intellectual disability, the trial would have to be conducted as if a hearing had not been held. At the trial, the jury could not be informed that the judge had held a pre-trial hearing, and the defendant could present evidence of intellectual disability as otherwise permitted by law.

The bill would take effect September 1, 2019, and would apply to trials that began on or after that date, regardless of when the offense occurred.

**SUPPORTERS
SAY:**

CSHB 1139 would give needed direction to Texas courts on how to determine whether an individual was intellectually disabled and therefore ineligible for the death penalty. The bill would respond to court rulings and establish a statewide process so that individual courts did not have to develop their own standards to make such determinations.

Since the 2002 ruling by the U.S. Supreme Court that it was unconstitutional to execute individuals with intellectual disabilities, the states have been left to determine who met that standard. Texas does not have a statutory standard so courts have used various factors, including ones identified by the Texas Court of Criminal Appeals to evaluate individuals. That method has proved imperfect, and courts criticizing the standards have sent death penalty cases back to lower courts for new punishment hearings. In 2017 and in 2019, the U.S. Supreme Court stopped a Texas execution based on the standards applied by Texas courts.

CSHB 1139 would establish a fair pre-trial process in which both sides could present evidence to determine whether a defendant was intellectually disabled, reducing any abuse of the system. The bill would set appropriate timelines for hearing requests, holding the hearings, and

decisions to ensure that determinations were made well before the trial date. If a judge did not determine that a defendant was a person with an intellectual disability, a trial would occur as if the hearing had not been held.

The bill would help courts comply with court rulings. It would ensure courts applied an appropriate standard by requiring evidence to be consistent with prevailing medical standards for the diagnosis of intellectual disabilities. The bill also would establish necessary definitions and require an expert to examine the defendant and make a determination.

Holding a hearing pre-trial would save time and money in numerous ways. There could be fewer trials, and jury selection and trials themselves could take less time. Evidence testing could be reduced and appeals streamlined. It also would help victims and the accused to know before the trial how the case would proceed.

Pre-trial hearings before judges would be the best place to make these determinations that should be based on medical standards. In capital cases, jurors should focus on deciding guilt or innocence and then, if there is a punishment phase, answering specific questions put to them.

Under CSHB 1139, individuals who met the standards in the bill would not go unpunished but would receive life without parole if convicted.

**OPPONENTS
SAY:**

The decision about intellectual disability should continue to be made during the punishment phase of a trial and not by a judge before the guilt or innocence phase. The pre-trial process that would be established by the bill could be abused if requests for hearings become routine, resulting in an increase in the number of defendants who raise intellectual disability as an issue and increasing costs.

It would be better for the timelines for holding a hearing to run from indictment, rather than from the trial date. Indictment dates are fixed, and trial dates can be set far in advance and can change. Making the decision earlier in the process by pegging it to the indictment would allow the pre-

trial procedures to focus on guilt or innocence and to avoid some of the costs of preparing for a death penalty trial.