

RESOLUTION 4-02-03

DIGEST

Death Penalty: Mental Retardation

Adds Penal Code section 1376 to create a procedure for identifying mentally retarded defendants and to prohibit the imposition of the death penalty upon those defendants.

RESOLUTION COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

None known.

Reasons:

This resolution adds Penal Code section 1376 to create a procedure for identifying mentally retarded defendants and to prohibit the imposition of the death penalty upon those defendants. This resolution should be approved in principle because it provides certainty in determining whether a defendant is mentally retarded, and therefore ineligible for the death penalty, in accordance with a recent United States Supreme Court decision.

In *Atkins v. Virginia* (2002) 536 U.S. ____, [122 S.Ct. 2242], the Supreme Court held that execution of mentally retarded criminals is cruel and unusual punishment prohibited by the Eighth Amendment but left to each state the development of appropriate laws to enforce the constitutional restriction. This resolution establishes the procedures to implement the prohibition against executing the mentally retarded. By adjudicating the issue of alleged mental retardation prior to trial, this resolution avoids influencing the jury and, if the defendant is found to be mentally retarded, the expense of a capital trial. It also gives the prosecution the burden of proving the defendant is not mentally retarded, consistent with *Ring v. Arizona* (2002) 536 U.S. 584, which requires the prosecution to prove beyond a reasonable doubt any fact that would result in a significantly greater penalty. Moreover, this resolution uses the existing definition of "mental retardation" in Penal Code section 1001.20, which is consistent with the definition used by the American Association of Mental Retardation and the American Psychiatric Association. This resolution, therefore, seems to provide the type of law contemplated by the Supreme Court.

This resolution is similar to Senate Bill 3, which the Senate passed on June 2, 2003 and, as of this writing, was before the Assembly's Committee on Public Safety.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to add Penal Code section 1376 to read as follows:

- 1 §1376
- 2 (a) As used in this section, "mentally retarded" has the same meaning as provided in Section
- 3 1001.20.
- 4 (b) In any case in which the prosecution seeks the death penalty, the defendant may, at a
- 5 reasonable time prior to the commencement of trial, apply for an order directing that a mental
- 6 retardation hearing be conducted. The court shall conduct a hearing without a jury to determine
- 7 whether the defendant is mentally retarded. At the hearing, the defendant shall present his or her
- 8 evidence of mental retardation. Once this evidence is presented by the defendant, the burden of
- 9 proof shall be on the prosecution to prove beyond a reasonable doubt that the defendant is not

10 mentally retarded. The defendant may present further evidence in response to the prosecution's case.
11 If the court finds that the prosecution has failed to meet its burden of proof, it shall preclude the
12 death penalty and trial thereafter shall be conducted as in any other case in which a sentence of death
13 is not sought by the prosecution. If the defendant is found guilty of murder in the first degree, with a
14 finding that one or more of the special circumstances enumerated in Section 190.2 are true, the trial
15 court shall sentence the defendant to confinement in the state prison for life without the possibility of
16 parole.

17 (c) If a defendant is subjected to an examination for purposes of this section, any statement
18 made by the defendant during the examination shall be inadmissible in evidence against the
19 defendant in any criminal action or proceeding on any issue other than whether the defendant is
20 mentally retarded.

21 (d)(1) A ruling by the court that the death penalty is not precluded under this section shall
22 not restrict the defendant's opportunity to introduce evidence of mental retardation during trial or to
23 argue that the evidence should be given mitigating significance. If the trial is conducted before a
24 jury, the jury shall not be informed of any ruling denying a defendant's motion under this section.

25 (2) If the court determines that the death penalty is not precluded under this section, the
26 defendant may request a special finding from the jury, at a separate phase, following a conviction of
27 murder in the first degree with a finding that one or more of the special circumstances enumerated in
28 Section 190.2 are true, on the question of whether the defendant is mentally retarded as defined by
29 this section. If the defendant requests this special finding, the burden of proof shall be on the
30 prosecution to prove beyond a reasonable doubt, and to a unanimous jury, that the defendant is not
31 mentally retarded. If the jury determines that the defendant is mentally retarded, the court shall
32 sentence the defendant to confinement in the state prison for life without the possibility of parole. If
33 the jury finds that the defendant is not mentally retarded, there shall be further proceedings on the
34 question of penalty.

35 (3) If the matter proceeds to a penalty phase, the jury shall be informed that evidence of low
36 intellectual functioning or deficits in adaptive behavior may be considered as a mitigating factor
37 even though the jurors previously determined that the defendant is not mentally retarded as defined
38 by this section.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Bar Association Of San Francisco

STATEMENT OF REASONS

Existing Law: Provides that the penalty for a defendant who is found guilty of murder in the first degree, where special circumstances exist, is death or imprisonment in the state prison for life. In determining the penalty to be imposed, the trier of fact shall take into account whether, as a result of mental defect, the defendant had the capability to appreciate the criminality of his or her conduct or to conform that conduct to the requirements of the law, if this is relevant.

This Resolution: Provides that the greatest possible penalty for a mentally retarded defendant found guilty of murder in the first degree, with special circumstances, is confinement in the state prison for life without possibility of parole. This resolution also sets forth procedures for the court to determine whether a defendant is mentally retarded.

The Problem: California law does not presently provide a specific definition of mental retardation in connection with a potential death penalty case, nor does it provide any particular procedure for making a determination of mental retardation in such a case. Since it is unconstitutional to execute a mentally retarded person, it is necessary to both define retardation and to provide a procedure for making the

determination.

This resolution is essentially the same as SB 3 (Burton), presently pending in the California Legislature. This resolution provides a definition of the term “mentally retarded” for use in connection with death penalty cases and provides that a defendant in a case in which the prosecution seeks the death penalty may apply for an order that a mental retardation hearing be held. The resolution requires the defendant to present evidence of mental retardation, and once this evidence is presented, the prosecution has the burden of proving beyond a reasonable doubt that the defendant is not mentally retarded. The resolution also provides that if, after a mental retardation hearing, the court rules that the death penalty is not precluded, the defendant may request a special finding from the jury at a separate phase, following conviction, that the defendant is mentally retarded. If the defendant requests this special finding, the burden of proof is on the prosecution to prove beyond a reasonable doubt to a unanimous jury, that the defendant is not mentally retarded. If the jury determines that the defendant is not mentally retarded, the jury shall be informed in the penalty phase that evidence of low intellectual functioning or deficits in adaptive behavior may be considered as a mitigating factor in determining punishment.

IMPACT STATEMENT

This resolution does not affect any other statute, rule or regulation. This resolution has been introduced in the Legislature as SB 3(Burton) 2003.

AUTHOR AND/OR PERMANENT CONTACT: Patrick H. Fabian, Law Office of Patrick H. Fabian
One Embarcadero Center, Suite 500, San Francisco, CA 94111, Telephone: (415) 296-9400, Facsimile:
(510) 525-5517, e-mail phf@phfabian.com

RESPONSIBLE FLOOR DELEGATE: Patrick H. Fabian