

House Bill 768

By: Representatives Hilton of the 95th, Dreyer of the 59th, Harrell of the 106th, Turner of the 21st, and Holcomb of the 81st

A BILL TO BE ENTITLED
AN ACT

1 To amend Title 17 of the Official Code of Georgia Annotated, relating to criminal procedure,
2 so as to provide for pretrial proceedings in connection with an accused's claim of intellectual
3 disability in criminal cases involving a capital offense in which the death penalty is sought;
4 to provide for postconviction, presentence proceedings in connection with an accused's claim
5 of intellectual disability in criminal cases involving a capital offense in which the death
6 penalty is sought; to provide for procedure and definitions; to change provisions relating to
7 verdicts and jury charges in such cases; to provide for conforming cross-references in
8 connection to speedy trial demands and the Supreme Court's review of pretrial proceedings
9 in death penalty cases; to correct a cross-reference; to provide for related matters; to repeal
10 conflicting laws; and for other purposes.

11 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

12 **PART I**
13 **SECTION 1-1.**

14 Title 17 of the Official Code of Georgia Annotated, relating to criminal procedure, is
15 amended in Part 2 of Article 6 of Chapter 7, relating to insanity and mental incompetency,
16 by adding two new Code sections to read as follows:

17 "17-7-127.

18 (a) As used in this Code section, the term 'intellectually disabled' shall have the same
19 meaning as set forth in Code Section 17-7-131.

20 (b) In criminal cases involving a capital offense for which the death penalty is sought, the
21 accused may file a pretrial notice of intent to raise a claim of intellectual disability. Such
22 notice shall state that the accused is intellectually disabled.

23 (c) The court shall conduct a pretrial hearing to determine if the accused is intellectually
24 disabled. If the court finds by clear and convincing evidence that the accused is
25 intellectually disabled, the court shall bar the state from seeking the death penalty. If the

26 court does not find that the accused is intellectually disabled, the accused may raise the
 27 issue of his or her alleged intellectual disability as set forth in Code Section 17-7-128. A
 28 court's pretrial determination finding that the accused is not intellectually disabled shall not
 29 preclude the accused from raising such issue in further proceedings.

30 17-7-128.

31 (a) As used in this Code section, the term 'intellectually disabled' shall have the same
 32 meaning as set forth in Code Section 17-7-131.

33 (b) When the death penalty is sought and a court has not found in pretrial proceedings that
 34 the accused is intellectually disabled, the accused may raise the issue of his or her alleged
 35 intellectual disability in the case-in-chief. When the accused raises such issue, the court
 36 shall trifurcate the trial so that:

37 (1) The trier of fact will first determine the issue of guilt;

38 (2) If a guilty verdict is returned, the trier of fact shall allow the parties to introduce
 39 evidence as to the accused's alleged intellectual disability, and if the trier of fact
 40 determines by a preponderance of the evidence that the accused is intellectually disabled,
 41 the court shall impose a sentence of imprisonment for life; and

42 (3) If the trier of fact determines that the accused is not intellectually disabled, the trial
 43 shall resume with the presentation of aggravating and mitigating circumstances and the
 44 accused may present evidence of his or her alleged intellectual disability as a mitigating
 45 circumstance."

46 **SECTION 1-2.**

47 Said title is further amended by revising paragraph (2) of subsection (a) and subsections (b),
 48 (c), (g), (h), (i), and (j) of Code Section 17-7-131, relating to proceedings upon plea of
 49 insanity or mental incompetency at the time of the crime, as follows:

50 "(2) ~~'Intellectual disability'~~ 'Intellectually disabled' means having significantly subaverage
 51 general intellectual functioning resulting in or associated with impairments in adaptive
 52 behavior which manifested during the developmental period."

53 "(b)(1) In all cases in which the defense of insanity, mental illness, or intellectual
 54 disability is interposed, the jury, or the court if tried by it, shall find whether the
 55 defendant is:

56 (A) Guilty;

57 (B) Not guilty;

58 (C) Not guilty by reason of insanity at the time of the crime;

59 (D) Guilty but mentally ill at the time of the crime, but the finding of guilty but
 60 mentally ill shall be made only in felony cases; or

61 (E) Guilty but ~~with intellectual disability~~ intellectually disabled, but the finding of
 62 ~~intellectual disability~~ guilty but intellectually disabled shall be made only in felony
 63 cases wherein the death penalty is not sought.

64 (2) A plea of guilty but mentally ill at the time of the crime or a plea of guilty but ~~with~~
 65 ~~intellectual disability~~ intellectually disabled shall not be accepted until the defendant has
 66 undergone examination by a licensed psychologist or psychiatrist and the court has
 67 examined the psychological or psychiatric reports, held a hearing on the issue of the
 68 defendant's mental condition, and is satisfied that there is a factual basis that the
 69 defendant was mentally ill at the time of the offense or ~~has intellectual disability~~ is
 70 intellectually disabled to which the plea is entered. In criminal cases involving a capital
 71 offense for which the death penalty is sought and a pretrial notice of intent to raise a
 72 claim of intellectual disability has been filed, the procedure set forth in Code Section
 73 17-7-127 shall be utilized.

74 ~~(2.1)~~(3) A plea of not guilty by reason of insanity at the time of the crime shall not be
 75 accepted and the defendant adjudicated not guilty by reason of insanity by the court
 76 without a jury until the defendant has undergone examination by a licensed psychologist
 77 or psychiatrist and the court has examined the psychological or psychiatric reports, has
 78 held a hearing on the issue of the defendant's mental condition, and the court is satisfied
 79 that the defendant was insane at the time of the crime according to the criteria of Code
 80 Section 16-3-2 or 16-3-3.

81 ~~(3)~~(4) In all cases applicable criminal trials in which the defense of insanity, mental
 82 illness, or intellectual disability is interposed, the trial judge shall charge the jury, in
 83 addition to other appropriate charges, the following:

84 (A) I charge you that should you find the defendant not guilty by reason of insanity at
 85 the time of the crime, the defendant will be committed to a state mental health facility
 86 until such time, if ever, that the court is satisfied that he or she should be released
 87 pursuant to law.

88 (B) I charge you that should you find the defendant guilty but mentally ill at the time
 89 of the crime, the defendant will be placed in the custody of the Department of
 90 Corrections which will have responsibility for the evaluation and treatment of the
 91 mental health needs of the defendant, which may include, at the discretion of the
 92 Department of Corrections, referral for temporary hospitalization at a facility operated
 93 by the Department of Behavioral Health and Developmental Disabilities.

94 (C) I charge you that should you find the defendant guilty but ~~with intellectual~~
 95 ~~disability~~ intellectually disabled, the defendant will be placed in the custody of the
 96 Department of Corrections, which will have responsibility for the evaluation and
 97 treatment of the mental health needs of the defendant, which may include, at the

98 discretion of the Department of Corrections, referral for temporary hospitalization at
 99 a facility operated by the Department of Behavioral Health and Developmental
 100 Disabilities.

101 (c)(1) Except as provided in paragraph (2) of this subsection, in ~~In~~ all criminal trials in
 102 any of the courts of this state wherein an accused shall contend that he or she was insane;
 103 or mentally ill,~~or intellectually disabled~~ at the time the act or acts charged against him
 104 or her were committed or is intellectually disabled, the trial judge shall instruct the jury
 105 that they may consider, in addition to verdicts of 'guilty' and 'not guilty,' the additional
 106 verdicts of 'not guilty by reason of insanity at the time of the crime,' 'guilty but mentally
 107 ill at the time of the crime,' and 'guilty but ~~with intellectual disability~~ intellectually
 108 disabled.'

109 ~~(1)~~(A) The defendant may be found 'not guilty by reason of insanity at the time of the
 110 crime' if he or she meets the criteria of Code Section 16-3-2 or 16-3-3 at the time of the
 111 commission of the crime. If the court or jury should make such finding, it shall so
 112 specify in its verdict.

113 ~~(2)~~(B) The defendant may be found 'guilty but mentally ill at the time of the crime' if
 114 the jury, or court acting as trier of facts, finds beyond a reasonable doubt that the
 115 defendant is guilty of the crime charged and was mentally ill at the time of the
 116 commission of the crime. If the court or jury should make such finding, it shall so
 117 specify in its verdict.

118 ~~(3)~~(C) The defendant may be found 'guilty but ~~with intellectual disability~~ intellectually
 119 disabled' if the jury, or court acting as trier of facts, finds beyond a reasonable doubt
 120 that the defendant is guilty of the crime charged and is ~~with intellectual disability~~
 121 intellectually disabled. If the court or jury should make such finding, it shall so specify
 122 in its verdict.

123 (2) When the death penalty has been sought and the defendant contends he or she is
 124 intellectually disabled, the court shall instruct the jury that it shall first consider whether
 125 it finds beyond a reasonable doubt that the defendant is guilty of the crime charged. If
 126 the jury convicts the defendant of such capital crime, after presentation of evidence
 127 regarding the defendant's intellectual disability as provided in paragraph (2) of
 128 subsection (b) of Code Section 17-7-128, the court shall instruct the jury that if the jury
 129 finds by a preponderance of the evidence that the defendant is intellectually disabled, it
 130 shall return a verdict of 'guilty but intellectually disabled' and so specify in its verdict.
 131 If the jury does not find by a preponderance of the evidence that the defendant is
 132 intellectually disabled, it shall return a verdict of 'guilty' and so specify in its verdict."

133 "(g)(1) Whenever a defendant is found guilty but mentally ill at the time of a felony or
 134 guilty but ~~has intellectual disability~~ intellectually disabled, or enters a plea to that effect

135 that is accepted by the court, the court shall sentence him or her in the same manner as
 136 a defendant found guilty of the offense, except as otherwise provided in subsection (j) of
 137 this Code section. A defendant who is found guilty but mentally ill at the time of the
 138 felony or guilty but ~~has intellectual disability~~ intellectually disabled shall be committed
 139 to an appropriate penal facility and shall be evaluated then treated, if indicated, within the
 140 limits of state funds appropriated therefor, in such manner as is psychiatrically indicated
 141 for his or her mental illness or intellectual disability.

142 (2) If at any time following the defendant's conviction as a guilty but mentally ill or
 143 guilty but ~~with intellectual disability~~ intellectually disabled offender it is determined that
 144 a temporary transfer to the Department of Behavioral Health and Developmental
 145 Disabilities is clinically indicated for his or her mental illness or intellectual disability,
 146 then the defendant shall be transferred to the Department of Behavioral Health and
 147 Developmental Disabilities pursuant to procedures set forth in regulations of the
 148 Department of Corrections and the Department of Behavioral Health and Developmental
 149 Disabilities. In all such cases, the legal custody of the defendant shall be retained by the
 150 Department of Corrections. Upon notification from the Department of Behavioral Health
 151 and Developmental Disabilities to the Department of Corrections that hospitalization at
 152 a Department of Behavioral Health and Developmental Disabilities facility is no longer
 153 clinically indicated for his or her mental illness or intellectual disability, the Department
 154 of Corrections shall transfer the defendant back to its physical custody and shall place
 155 such individual in an appropriate penal institution.

156 (h) If a defendant who is found guilty but mentally ill at the time of a felony or guilty but
 157 ~~with intellectual disability~~ intellectually disabled is placed on probation under the
 158 'State-wide Probation Act,' Article 2 of Chapter 8 of Title 42, the court may require that the
 159 defendant undergo available outpatient medical or psychiatric treatment or seek similar
 160 available voluntary inpatient treatment as a condition of probation. Persons required to
 161 receive such services may be charged fees by the provider of the services.

162 (i) In any case in which the defense of insanity is interposed or a plea of guilty but
 163 mentally ill at the time of the felony or a plea of guilty but ~~with intellectual disability~~
 164 intellectually disabled is made and an examination is made of the defendant pursuant to
 165 Code Section 17-7-130.1 or paragraph (2) of subsection (b) of this Code section, upon the
 166 defendant's being found guilty or guilty but mentally ill at the time of the crime or guilty
 167 but ~~with intellectual disability~~ intellectually disabled, a copy of any such examination
 168 report shall be forwarded to the Department of Corrections with the official sentencing
 169 document. The Department of Behavioral Health and Developmental Disabilities shall
 170 forward, in addition to its examination report, any records maintained by such department
 171 that it deems appropriate pursuant to an agreement with the Department of Corrections,

172 within ten business days of receipt by the Department of Behavioral Health and
 173 Developmental Disabilities of the official sentencing document from the Department of
 174 Corrections.

175 (j)(1) In the trial of any case in which the death penalty is sought which commences on
 176 or after July 1, 1988, should the judge find in accepting a plea of guilty but mentally
 177 retarded, or the jury or court find in its verdict that the defendant is guilty of the crime
 178 charged but mentally retarded, the death penalty shall not be imposed and the court shall
 179 sentence the defendant to imprisonment for life.

180 (2) In the trial of any case in which the death penalty is sought which commences on or
 181 after July 1, 2017, should the judge find in accepting a plea of guilty but ~~with intellectual~~
 182 ~~disability~~ intellectually disabled, or the jury or court find in its verdict that the defendant
 183 is guilty of the crime charged but ~~with intellectual disability~~ intellectually disabled, the
 184 death penalty shall not be imposed and the court shall sentence the defendant to
 185 imprisonment for life."

186 **SECTION 1-3.**

187 Said title is further amended by revising subsection (d) of Code Section 17-7-171, relating
 188 to the time for a demand for speedy trial in capital cases, as follows:

189 "(d) If a defendant files a pretrial notice of intent to raise a claim of intellectual disability
 190 pursuant to Code Section 17-7-127, a special plea of incompetency to stand trial pursuant
 191 to Code Section 17-7-130, or if the court, pursuant to Code Section 17-7-129, conducts a
 192 trial on the competency of the defendant, the period of time during which such matter is
 193 pending shall not be included in the computation of determining whether a demand for
 194 speedy trial has been satisfied."

195 **SECTION 1-4.**

196 Said title is further amended by revising subsection (b) of Code Section 17-10-35.1, relating
 197 to the review of pretrial proceedings when the death penalty is sought, as follows:

198 "(b) The reports of the trial judge, ~~prosecutor~~ prosecuting attorney, and defendant under
 199 subsection (a) of this Code section shall be in the form of standard questionnaires prepared
 200 and supplied by the Supreme Court. Such questionnaires shall be designed to determine
 201 whether there is arguably any existence of reversible error with respect to any of the
 202 following matters:

- 203 (1) Any proceedings with respect to change of venue;
- 204 (2) Any proceedings with respect to recusal of the trial judge;
- 205 (3) Any challenge to the jury array;
- 206 (4) Any motion to suppress evidence;

207 (5) Any motion for psychiatric or other medical evaluation; ~~and~~
 208 (6) Any proceedings with respect to a pretrial determination of an intellectual disability;
 209 and
 210 ~~(6)~~(7) Any other matter deemed appropriate by the Supreme Court."

211 **PART II**

212 **SECTION 2-1.**

213 Said title is further amended by revising subsection (b) of Code Section 17-2-4, relating to
 214 defendant arrested, held, or present in county other than that in which indictment or
 215 accusation is pending, as follows:

216 "(b) A defendant arrested, held, or present in a county other than the county in which a
 217 complaint or arrest warrant is pending against that defendant may state in writing a wish
 218 to plead guilty, guilty but mentally ill, guilty but ~~with intellectual disability~~ intellectually
 219 disabled, or nolo contendere; to waive venue and trial in the county in which the complaint
 220 or warrant was issued; and to consent to disposition of the case in the county in which the
 221 defendant was arrested, held, or present, subject to the approval of the prosecuting attorney
 222 for each county. Upon receipt of the defendant's statement and the written approval of the
 223 prosecuting attorney for each county, the clerk of the court in which the complaint or arrest
 224 warrant is pending shall transmit the papers in the proceeding or certified copies thereof
 225 to the clerk of the court for the county in which the defendant was arrested, held, or
 226 present, and the prosecution shall continue in that county."

227 **PART III**

228 **SECTION 3-1.**

229 All laws and parts of laws in conflict with this Act are repealed.