

THE STATE SENATE
Monday, February 20, 2006

Committee Substitute for
Senate Bill No. 1807

COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 1807 - By: LAMB of the Senate and SULLIVAN of the House.

[criminal procedure - post-conviction relief - codification
- effective date -
emergency]

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 701.10b of Title 21, unless there is created a duplication in numbering, reads as follows:

A. For purposes of this section:

1. "Mental retardation" or "mentally retarded" means significantly subaverage general intellectual functioning, existing concurrently with significant limitations in adaptive functioning;

2. "Significant limitations in adaptive functioning" means significant limitations in two or more of the following adaptive skill areas; communication, self-care, home living, social skills, community use, self-direction, health, safety, functional academics, leisure skills and work skills; and

3. "Significantly subaverage general intellectual functioning" means an intelligence quotient of seventy (70) or below.

1 B. Regardless of any provision of law to the contrary, no
2 defendant who is mentally retarded shall be sentenced to death;
3 provided, however, the onset of the mental retardation must have
4 been manifested before the defendant attained the age of eighteen
5 (18) years.

6 C. The defendant has the burden of production and persuasion to
7 demonstrate mental retardation by showing significantly subaverage
8 general intellectual functioning, significant limitations in
9 adaptive functioning, and that the onset of the mental retardation
10 was manifested before the age of eighteen (18) years. An
11 intelligence quotient of seventy (70) or below on an individually
12 administered, scientifically recognized standardized intelligence
13 quotient test administered by a licensed psychiatrist or
14 psychologist is evidence of significantly subaverage general
15 intellectual functioning; however, it is not sufficient without
16 evidence of significant limitations in adaptive functioning and
17 without evidence of manifestation before the age of eighteen (18)
18 years. In determining the intelligence quotient, the standard
19 measurement of error for the test administered shall be taken into
20 account.

21 However, in no event shall a defendant who has received an
22 intelligence quotient of seventy-six (76) or above on any
23 individually administered, scientifically recognized, standardized

1 intelligence quotient test administered by a licensed psychiatrist
2 or psychologist, be considered mentally retarded and, thus, shall
3 not be subject to any proceedings under this section.

4 D. A defendant charged with capital murder who intends to raise
5 mental retardation as a bar to the death sentence shall provide to
6 the state notice of such intention at least ninety (90) days after
7 formal arraignment or within ninety (90) days after the filing of a
8 bill of particulars, whichever is later. The notice shall include a
9 brief but detailed statement specifying the witnesses, nature and
10 type of evidence sought to be introduced. The notice must
11 demonstrate sufficient facts that demonstrate a good-faith belief as
12 to the mental retardation of the defendant.

13 E. The district court shall conduct an evidentiary hearing to
14 determine whether the defendant is mentally retarded. If the court
15 determines, by clear and convincing evidence, that the defendant is
16 mentally retarded, the defendant, if convicted, shall be sentenced
17 to life imprisonment or life without parole. If the district court
18 determines that the defendant is not mentally retarded, the capital
19 trial of the offense may proceed. A request for a hearing under
20 this section shall not waive entitlement by the defendant to submit
21 the issue of mental retardation to a jury during the sentencing
22 phase in a capital trial if convicted of an offense punishable by

1 death. The court's determination on the issue of mental retardation
2 shall not be the subject of an interlocutory appeal.

3 F. The court shall submit a special issue to the jury as to
4 whether the defendant is mentally retarded. This special issue
5 shall be considered and answered by the jury during the sentencing
6 stage and prior to the determination of sentence. If the jury
7 unanimously determines that the defendant is mentally retarded, the
8 defendant may only be sentenced to life imprisonment or life without
9 parole. The defendant has the burden of production and persuasion
10 to demonstrate mental retardation to the jury by a preponderance of
11 the evidence.

12 G. If the jury determines that the defendant is not mentally
13 retarded or is unable to reach a unanimous decision, the jury shall
14 proceed to determine the existence of aggravating and mitigating
15 factors in determining whether the sentence of death shall be
16 imposed. In those deliberations, the jury may consider any evidence
17 of mental retardation as a mitigating factor in sentencing the
18 defendant.

19 H. If the jury determines that the defendant is not mentally
20 retarded and imposes a death sentence, the trial court shall make
21 findings of fact and conclusions of law relating to the issue of
22 whether the determination on the issue of mental retardation was
23 made under the influence of passion, prejudice, or any other

1 arbitrary factor. The findings shall be attached as an exhibit to
2 the report of the trial judge required under Section 701.13 of Title
3 21 of the Oklahoma Statutes. If the trial court finds that the
4 determination of mental retardation was not supported by the
5 evidence, the issue may be raised on appeal to the Oklahoma Court of
6 Criminal Appeals for consideration as part of its mandatory sentence
7 review.

8 I. The standard of review for a trier of fact mental
9 retardation determination shall be whether, after reviewing the
10 evidence in the light most favorable to the state, any rational
11 trier of fact could have found the defendant not mentally retarded
12 as defined by this section, giving full deference to the findings of
13 the trier of fact.

14 J. The court shall give appropriate instructions in those cases
15 in which evidence of the mental retardation of the defendant
16 requires the consideration by the jury of the provisions of this
17 section.

18 SECTION 2. AMENDATORY 22 O.S. 2001, Section 1089, as
19 amended by Section 2, Chapter 164, O.S.L. 2004 (22 O.S. Supp. 2005,
20 Section 1089), is amended to read as follows:

21 Section 1089. A. The application for post-conviction relief of
22 a defendant who is under the sentence of death in one or more counts
23 and whose death sentence has been affirmed or is being reviewed by

1 the Court of Criminal Appeals in accordance with the provisions of
2 Section 701.13 of Title 21 of the Oklahoma Statutes shall be
3 expedited as provided in this section. The provisions of this
4 section also apply to noncapital sentences in a case in which the
5 defendant has received one or more sentences of death.

6 B. The Oklahoma Indigent Defense System shall represent all
7 indigent defendants in capital cases seeking post-conviction relief
8 upon appointment by the appropriate district court after a hearing
9 determining the indigency of any such defendant. When the Oklahoma
10 Indigent Defense System or another attorney has been appointed to
11 represent an indigent defendant in an application for post-
12 conviction relief, the Clerk of the Court of Criminal Appeals shall
13 include in its notice to the district court clerk, as required by
14 Section 1054 of this title, that an additional certified copy of the
15 appeal record is to be transmitted to the Oklahoma Indigent Defense
16 System or the other attorney.

17 C. The only issues that may be raised in an application for
18 post-conviction relief are those that:

19 1. Were not and could not have been raised in a direct appeal;
20 and

21 2. Support a conclusion either that the outcome of the trial
22 would have been different but for the errors or that the defendant
23 is factually innocent.

1 The applicant shall state in the application specific facts
2 explaining as to each claim why it was not or could not have been
3 raised in a direct appeal and how it supports a conclusion that the
4 outcome of the trial would have been different but for the errors or
5 that the defendant is factually innocent.

6 D. 1. The application for post-conviction relief shall be
7 filed in the Court of Criminal Appeals within ninety (90) days from
8 the date the appellee's brief on direct appeal is filed or, if a
9 reply brief is filed, ninety (90) days from the filing of that reply
10 brief with the Court of Criminal Appeals on the direct appeal.
11 Where the appellant's original brief on direct appeal has been filed
12 prior to November 1, 1995, and no application for post-conviction
13 relief has been filed, any application for post-conviction relief
14 must be filed in the Court of Criminal Appeals within one hundred
15 eighty (180) days of November 1, 1995. The Court of Criminal
16 Appeals may issue orders establishing briefing schedules or enter
17 any other orders necessary to extend the time limits under this
18 section in cases where the original brief on direct appeal has been
19 filed prior to November 1, 1995.

20 2. All grounds for relief that were available to the applicant
21 before the last date on which an application could be timely filed
22 not included in a timely application shall be deemed waived.

1 No application may be amended or supplemented after the time
2 specified under this section. Any amended or supplemental
3 application filed after the time specified under this section shall
4 be treated by the Court of Criminal Appeals as a subsequent
5 application.

6 3. Subject to the specific limitations of this section, the
7 Court of Criminal Appeals may issue any orders as to discovery or
8 any other orders necessary to facilitate post-conviction review.

9 4. a. The Court of Criminal Appeals shall review the
10 application to determine:

11 (1) whether controverted, previously unresolved
12 factual issues material to the legality of the
13 applicant's confinement exist,

14 (2) whether the applicant's grounds were or could
15 have been previously raised, and

16 (3) whether relief may be granted under this act.

17 b. For purposes of this subsection, a ground could not
18 have been previously raised if:

19 (1) it is a claim of ineffective assistance of trial
20 counsel involving a factual basis that was not
21 ascertainable through the exercise of reasonable
22 diligence on or before the time of the direct
23 appeal, or

1 (2) it is a claim contained in an original timely
2 application for post-conviction relief relating
3 to ineffective assistance of appellate counsel.
4 All claims of ineffective assistance of counsel shall be governed by
5 clearly established law as determined by the United States Supreme
6 Court.

7 If the Court of Criminal Appeals determines that controverted,
8 previously unresolved factual issues material to the legality of the
9 applicant's confinement do not exist, or that the claims were or
10 could have been previously raised, or that relief may not be granted
11 under this act and enters an order to that effect, the Court shall
12 make findings of fact and conclusions of law or may order the
13 parties to file proposed findings of fact and conclusions of law for
14 the Court to consider on or before a date set by the Court that is
15 not later than thirty (30) days after the date the order is issued.
16 The Court of Criminal Appeals shall make appropriate written
17 findings of fact and conclusions of law not later than fifteen (15)
18 days after the date the parties filed proposed findings.

19 5. If the Court of Criminal Appeals determines that
20 controverted, previously unresolved factual issues material to the
21 legality of the applicant's confinement do exist, and that the
22 application meets the other requirements of paragraph 4 of this
23 subsection, the Court shall enter an order to the district court

1 that imposed the sentence designating the issues of fact to be
2 resolved and the method by which the issues shall be resolved.

3 The district court shall not permit any amendments or
4 supplements to the issues remanded by the Court of Criminal Appeals
5 except upon motion to and order of the Court of Criminal Appeals
6 subject to the limitations of this section.

7 The Court of Criminal Appeals shall retain jurisdiction of all
8 cases remanded pursuant to this act.

9 6. The district attorney's office shall have twenty (20) days
10 after the issues are remanded to the district court within which to
11 file a response. The district court may grant one extension of
12 twenty (20) days for good cause shown and may issue any orders
13 necessary to facilitate post-conviction review pursuant to the
14 remand order of the Court of Criminal Appeals. Any applications for
15 extension beyond the twenty (20) days shall be presented to the
16 Court of Criminal Appeals. If the district court determines that an
17 evidentiary hearing should be held, that hearing shall be held
18 within thirty (30) days from the date that the state filed its
19 response. The district court shall file its decision together with
20 findings of fact and conclusions of law with the Court of Criminal
21 Appeals within forty-five (45) days from the date that the state
22 filed its response or within forty-five (45) days from the date of
23 the conclusion of the evidentiary hearing.

1 7. Either party may seek review by the Court of Criminal
2 Appeals of the district court's determination of the issues remanded
3 by the Court of Criminal Appeals within ten (10) days from the entry
4 of judgment. Such party shall file a notice of intent to seek
5 review and a designation of record in the district court within ten
6 (10) days from the entry of judgment. A copy of the notice of
7 intent to seek review and the designation of the record shall be
8 served on the court reporter, the petitioner, the district attorney,
9 and the Attorney General, and shall be filed with the Court of
10 Criminal Appeals. A petition in error shall be filed with the Court
11 of Criminal Appeals by the party seeking review within thirty (30)
12 days from the entry of judgment. If an evidentiary hearing was
13 held, the court reporter shall prepare and file all transcripts
14 necessary for the appeal within sixty (60) days from the date the
15 notice and designation of record are filed. The petitioner's brief-
16 in-chief shall be filed within forty-five (45) days from the date
17 the transcript is filed in the Court of Criminal Appeals or, if no
18 evidentiary hearing was held, within forty-five (45) days from the
19 date of the filing of the notice. The respondent shall have twenty
20 (20) days thereafter to file a response brief. The district court
21 clerk shall file the records on appeal with the Court of Criminal
22 Appeals on or before the date the petitioner's brief-in-chief is
23 due. The Court of Criminal Appeals shall issue an opinion in the

1 case within one hundred twenty (120) days of the filing of the
2 response brief or at the time the direct appeal is decided. If no
3 review is sought within the time specified in this section, the
4 Court of Criminal Appeals may adopt the findings of the district
5 court and enter an order within fifteen (15) days of the time
6 specified for seeking review or may order additional briefing by the
7 parties. In no event shall the Court of Criminal Appeals grant
8 post-conviction relief before giving the state an opportunity to
9 respond to any and all claims raised to the Court.

10 8. If an original application for post-conviction relief is
11 untimely or if a subsequent application for post-conviction relief
12 is filed after filing an original application, the Court of Criminal
13 Appeals may not consider the merits of or grant relief based on the
14 subsequent or untimely original application unless:

15 a. the application contains claims and issues that have
16 not been and could not have been presented previously
17 in a timely original application or in a previously
18 considered application filed under this section,
19 because the legal basis for the claim was unavailable,
20 or

21 b. (1) the application contains sufficient specific
22 facts establishing that the current claims and
23 issues have not and could not have been presented

1 previously in a timely original application or in
2 a previously considered application filed under
3 this section, because the factual basis for the
4 claim was unavailable as it was not ascertainable
5 through the exercise of reasonable diligence on
6 or before that date, and

7 (2) the facts underlying the claim, if proven and
8 viewed in light of the evidence as a whole, would
9 be sufficient to establish by clear and
10 convincing evidence that, but for the alleged
11 error, no reasonable fact finder would have found
12 the applicant guilty of the underlying offense or
13 would have rendered the penalty of death.

14 9. For purposes of this act, a legal basis of a claim is
15 unavailable on or before a date described by this subsection if the
16 legal basis:

- 17 a. was not recognized by or could not have been
18 reasonably formulated from a final decision of the
19 United States Supreme Court, a court of appeals of the
20 United States, or a court of appellate jurisdiction of
21 this state on or before that date, or
22 b. is a new rule of constitutional law that was given
23 retroactive effect by the United States Supreme Court

1 or a court of appellate jurisdiction of this state and
2 had not been announced on or before that date.

3 E. All matters not specifically governed by the provisions of
4 this section shall be subject to the provisions of the Post-
5 Conviction Procedure Act. If the provisions of this act conflict
6 with the provisions of the Post-Conviction Procedure Act, the
7 provisions of this act shall govern.

8 SECTION 3. This act shall become effective July 1, 2006.

9 SECTION 4. It being immediately necessary for the preservation
10 of the public peace, health and safety, an emergency is hereby
11 declared to exist, by reason whereof this act shall take effect and
12 be in full force from and after its passage and approval.

13 COMMITTEE REPORT BY: COMMITTEE ON JUDICIARY, dated 2-14-06 - DO
14 PASS, As Amended and Coauthored.