

STORAGE NAME: h4005s1.cp

DATE: April 2, 1998

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
CRIME AND PUNISHMENT
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: CS/HB 4005

RELATING TO: Sentencing Of Capital Felons

SPONSOR(S): Crime and Punishment and Rep. Roberts-Burke

COMPANION BILL(S): SB 914 (Similar)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) CRIME AND PUNISHMENT YEAS 6 NAYS 1
- (2) CIVIL JUSTICE AND CLAIMS
- (3) CRIMINAL JUSTICE APPROPRIATIONS
- (4)
- (5)

I. SUMMARY:

The committee substitute provides for a separate proceeding for a defendant charged with a crime for which the death sentence might be imposed to determine whether the defendant is mentally retarded. If the court finds the defendant mentally retarded, the defendant shall not be executed and will be sentenced to life in prison, instead.

The committee substitute provides that the state may appeal a court order which determines that a defendant may not be sentenced to death because the defendant is mentally retarded.

“Mentally retarded” means an intelligence quotient of 55 or less on a standardized intelligence test.

The committee substitute provides the act shall take effect July 1 of the year in which enacted.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

Execution Of the Insane Is Prohibited

Florida prohibits an insane person from being executed, upon a showing that he or she is insane at the time of execution. s. 922.07, F.S.; Fla.R.Crim.P. 3.811 & 3.812; *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986)(8th Amendment prohibits execution of an insane person). Mental retardation should be contrasted with mental illness, the main difference being that mental retardation is not an illness. "Mentally ill people encounter disturbances in their thought processes and emotions; mentally retarded people have limited abilities to learn." Ellis & Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414, 424 (1985).

Execution Of the Mentally Retarded Is Not Prohibited

Florida currently defines mental retardation in chapters 916 and 393. The Florida definition specifies that "significantly subaverage general intellectual functioning" means "performance which is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the department." ss. 916.106(8) & 393.063(43), F.S. In practice, this means that the person has an IQ of 70 or less, although it can be extended up to 75. *Id*; DSM IV.

The Florida Criminal Rules outline the procedures for determining a defendant's competency to proceed to trial or sentencing. See, Fla.R.Crim.P. 3.210, 3.211, 3.212, 3.213. Among the relevant factors which appointed experts must consider in making a competency determination is the defendant's capacity to appreciate the charges and the nature of the possible penalties.

In Florida, there exists no per-se prohibition against executing a mentally retarded person. In 1989, the United States Supreme Court held that the eighth amendment's cruel and unusual punishment clause does not prohibit the execution of a mentally retarded capital felon. *Penry v. Lynaugh*, 492 U.S. 302, 340, 109 S.Ct. 2934, 2958, 106 L.Ed.2d 256 (1989). The Florida Supreme Court has followed *Penry*, and rejected an argument that there should be "a minimum IQ score below which an execution would violate the Florida Constitution." *Thompson v. State*, 648 So.2d 692, 697 (Fla. 1994). However, *Penry* made clear that mental retardation must be allowed to be considered as a mitigating circumstance. The Florida Supreme Court treats "low intelligence as a significant mitigating factor with the lower scores indicating the greater mitigating influence." *Thompson, supra*. Further, *Penry* stated that execution of a person who was severely or profoundly mentally retarded "may indeed be 'cruel and unusual' punishment."

Some States Prohibit Execution Of the Mentally Retarded

Since *Penry*, a number of other state legislatures have enacted statutes which prohibit the execution of the mentally retarded. The following chart lists all states currently exempting the mentally retarded and the statutory definition:

State Statutes Prohibiting the Death Penalty for People w/Mental Retardation			
State	Statute Citation	Definition of MR	Qualified Examiners
Arkansas	Ark. Code Ann. s. 5-4-618 (1993)	Significantly subaverage general intellectual functioning accompanied by significant deficits or impairments in adaptive functioning, and manifested in the developmental period. The age of onset is 18. There is a rebuttable presumption of mental retardation when the defendant has an IQ of 65 or below.	There is no information on this aspect in the statute.
Colorado	Colo. Rev. Stat. s. 16-9-401-403.	Any defendant with significantly subaverage general intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested and documented during the developmental period. The requirements for documentation may be excused by the court upon a finding that extraordinary circumstances exist. The court does not define extraordinary circumstances. The law does not give a numerical IQ level.	There is no information on this aspect in the statute.
Georgia	Ga. Code Ann. s.17-7-131(j)	"...Significantly subaverage intellectual functioning resulting in or associated with impairments in adaptive behavior which manifests during the developmental period." (AAMR 1983 definition; see Grossman, H. <i>Manual on Terminology and Classification</i> . (8th ed.) AAMR 1983)	Court-appointed licensed psychologists or psychiatrists, or physicians or licensed clinical psychologists chosen and paid for by the defendant.
Indiana	Ind. Code s.35-36-9-1 et seq.	An individual before becoming 22 years of age, manifests: (1) significantly subaverage intellectual functioning; and (2) substantial impairment of adaptive behavior that is documented in a court-ordered evaluative report.	Statute does not specify if the court can appoint psychologists or psychiatrists. Attorneys should probably obtain this information from trial court at pre-trial.

State Statutes Prohibiting the Death Penalty for People w/Mental Retardation			
State	Statute Citation	Definition of MR	Qualified Examiners
Kansas	Kan. Stat. Ann. s.21-4623	An individual having significantly subaverage general intellectual functioning to an extent that substantially impairs one's capacity to appreciate the criminality of one's conduct or conform one's conduct to the requirements of law. The statute does not define adaptive behavior or the age of onset. However, Kan. Stat. Ann. s.76-12b01 defines these terms. Adaptive behavior refers to the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of that person's age, cultural group and community. The age of onset must be prior to 18 years old.	There is no information on this aspect in the statute.
Kentucky	Ky. Rev. Stat. s.532.130-140	A significant subaverage intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested during the developmental period. The age of onset is 18 years old. Significantly subaverage general intellectual functioning is defined as an IQ of 70 or below. (See Grossman, H. Manual on Terminology and Classification. (8th ed.) AAMR (1983)	There is no information on this aspect in the statute.
Maryland	Md. Code Ann. art. 27 s.412	An individual who has significantly subaverage intellectual functioning as evidenced by an IQ of 70 or below on an individually administered IQ test, and impairment in adaptive behavior. The age of onset is before the age of 22.	There is no information on this aspect in the statute.
New Mexico	N.M. Stat. Ann. s.31-20A-2.1 (1978)	Mental retardation refers to significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior. An IQ of 70 or below on a reliably administered IQ test shall be presumptive evidence of mental retardation.	There is no information on this aspect in the statute.
New York	N.Y. Crim. Proc. s.400.27(12)	The statute uses the most recent American Association on Mental Retardation definition (1992). N.Y. Statute does not list specific levels of intelligence, nor does it go into detail regarding adaptive skills.	No specifics noted-- "psychiatrist, psychologist or other trained individual"

State Statutes Prohibiting the Death Penalty for People w/Mental Retardation			
State	Statute Citation	Definition of MR	Qualified Examiners
Tennessee	Tenn. Code Ann., tit. 39, ch. 13, pt. 2 s.39-13-203	(1) Significantly subaverage general intellectual functioning as evidenced by a functional IQ of 70 or below; (2) deficits in adaptive behavior; and (3) the mental retardation must have been manifested during the developmental period or by age 18. The statute does not define "deficits in adaptive behavior." The statute clearly provides that adaptive behavior and intellectual functioning are independent criteria.	There is no information on this aspect in the statute.
Washington	Was. Rev. Code Ann. s.10.95.030 (West)	The individual has (1) significantly subaverage general intellectual functioning; (2) existing concurrently with deficits in adaptive behavior; and (3) both significantly subaverage general intellectual functioning and deficits in adaptive behavior were manifested during the developmental period. The age of onset is 18 years of age. The required IQ level is 70 or below (see Grossman, 1983).	A court-appointed licensed psychiatrist or psychologist experienced in the diagnosis and evaluation of mental retardation. This leaves open the issue of whether or not the defendant may hire his own expert.
Federal	18 U.S.C.A. s3597[c] (Federal Crime Bill of 1994)	In 1994, Congress unanimously adopted legislation to ban the execution of individuals with mental retardation. The statute states that a sentence of death shall not be carried out upon a person who has mental retardation. The statute does not define mental retardation, or discuss at what stage in the criminal proceedings the determination of mental retardation must be made. Earlier, Congress had also provided a form of an exemption for this issue in the Anti-Drug Abuse Act of 1988 (Pub. L. No. 100-690).	

Source: "Mental Retardation and the Death Penalty: Current Status of Exemption Legislation," *Mental and Physical Disabilities Law Reporter*, September - October 1997, p.687.

Florida's Death Sentence Proceedings

Sections 921.141 and 921.142, F.S., provide for a separate proceeding, after conviction, to determine whether the defendant should be sentenced to death, or life imprisonment. During this penalty phase, the state and the defense present evidence of an aggravating and mitigating nature to the jury. After weighing the aggravating and mitigating circumstances, the jury renders an advisory sentence to the judge. The trial judge may override the jury's verdict and must independently weigh the aggravating and mitigating circumstances before imposing a death sentence. All death sentences are automatically reviewed by the Florida Supreme Court.

A. EFFECT OF PROPOSED CHANGES:

New Proceeding For Determination Of Mental Retardation

Currently, a defendant is entitled to a hearing to determine whether she or he is competent to stand trial, or to be executed. **The committee substitute authorizes a separate hearing to determine whether a defendant is mentally retarded without regard to whether she or he is incompetent.** The committee substitute amends ss. 921.141 and 921.142, F.S., to provide for the hearing which may be held prior to trial, or upon conviction, and may be waived by the defendant.

Execution Of the Mentally Retarded Is Prohibited

Currently, a mentally retarded defendant may be executed. **The committee substitute prohibits the execution of defendants who are found mentally retarded.** The finding of mental retardation will be made by the court (not the jury), by a preponderance of the evidence, and will be appealable by the state.

The committee substitute further provides that no finding of mental retardation constitutes a finding of incompetence or a dismissal of any criminal charge or conviction.

“Mentally Retarded” Defined

The committee substitute defines “mentally retarded” as an intelligence quotient of 55 or less on a standardized intelligence test.

Effective Date

The act is effective on July 1 of the year in which enacted.

B. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

- (2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

Yes. State courts will be required to provide an additional proceeding to those defendants accuse of a crime for which death could be imposed to determine whether they are mentally retarded.

- (3) any entitlement to a government service or benefit?

No.

- b. If an agency or program is eliminated or reduced:

- (1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

- (2) what is the cost of such responsibility at the new level/agency?

N/A

- (3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

- a. Does the bill increase anyone's taxes?

No.

- b. Does the bill require or authorize an increase in any fees?

No.

- c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

No.

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

No.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

C. STATUTE(S) AFFECTED:

ss. 921.141; 921.142; 924.07, F.S.

D. SECTION-BY-SECTION RESEARCH:

Section 1: Amends s. 921.141, F.S., to provide for a separate proceeding to determine whether capital felony defendants are mentally retarded.

Section 2: Amends s. 921.142, F.S., to provide for a separate proceeding to determine whether capital drug trafficking defendants are mentally retarded.

Section 3: Amends s. 924.07, F.S. to provide that the state may appeal from a court order finding any capital felony or capital drug trafficking defendants mentally retarded.

Section 4: defines "mental retardation".

Section 5: Provides an effective date.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

See, Fiscal Comments.

2. Recurring Effects:

See, Fiscal Comments.

3. Long Run Effects Other Than Normal Growth:

See, Fiscal Comments.

4. Total Revenues and Expenditures:

See, Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

See, Fiscal Comments.

2. Recurring Effects:

See, Fiscal Comments.

3. Long Run Effects Other Than Normal Growth:

See, Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

See, Fiscal Comments.

2. Direct Private Sector Benefits:

See, Fiscal Comments.

3. Effects on Competition, Private Enterprise and Employment Markets:

See, Fiscal Comments.

D. FISCAL COMMENTS:

The Criminal Justice Estimating Conference has not met to consider the bill, but offers a tentative estimate of **no fiscal impact**.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

The committee substitute is exempt from Article VII, Section 18 because it concerns a criminal statute.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The committee substitute does not reduce anyone's revenue raising authority.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

The committee substitute does not reduce the state tax shared with counties and municipalities.

V. COMMENTS:

Although the committee substitute does not address whether the defendant could appeal a court's order finding the defendant not mentally retarded, presumably, the order could be appealed as part of the judgement of conviction, pursuant to s. 924.06, F.S., were the defendant ultimately convicted and sentenced to death.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The bill passed the Committee on Crime and Punishment on April 9, 1998, with a new strike everything amendment which provided a definition of mentally retarded. The bill was made into a committee substitute.

STORAGE NAME: h4005s1.cp

DATE: April 2, 1998

PAGE 13

VII. SIGNATURES:

COMMITTEE ON CRIME AND PUNISHMENT:

Prepared by:

Legislative Research Director:

Jamie Spivey

J. Willis Renuart