SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 1448

SPONSOR: Criminal Justice Committee and Senator Mitchell, Sullivan and others

SUBJECT: Capital Felons/Mentally Retarded

DATE: April 4, 2000 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Gomez	Cannon	CJ	Favorable/CS
2.			FP	
3.				
4.				
5.				

I. Summary:

In Florida, there exists no per-se prohibition against executing a mentally retarded capital felon. 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. However, that case made clear that mental retardation must be allowed to be considered as a mitigating circumstance.

As a "non-statutory" mitigating circumstance, mental retardation is considered along with other factors and it may be "outweighed" by the judge and jury by the existence of sufficient aggravating circumstances. There are reported Florida Supreme Court cases which have both approved and disapproved death sentences of mentally retarded capital felons.

The bill creates s. 921.137, F.S., to bar the execution of the mentally retarded. The bill provides that a death sentence may not be imposed on a person who suffers from mental retardation if the defendant's conduct at the time of the commission of the crime is directly related to the mental retardation. The bill provides that after conviction or adjudication, the court shall conduct a separate proceeding, (before the standard "penalty phase"), to determine whether a capital defendant should be sentenced to life imprisonment because the defendant suffers from mental retardation.

This bill amends ss. 921.141 and 921.142, F.S., to add mental retardation to the list of mitigating circumstances which the jury and judge must weigh when considering whether to impose the death penalty. The definition of mental retardation is linked to the term "retardation" in s. 393.063, F.S.

This bill creates section 921.127 and amends the following sections of the Florida Statutes: 921.141, 921.142.

II. Present Situation:

A. Death Penalty Sentencing Procedures -- Generally

When a defendant is convicted of a capital felony, he or she may be eligible for the death penalty. In Florida, after the guilt phase of a capital trial, a separate proceeding is held to determine whether to impose the death penalty on a capital felon. The separate proceeding, commonly known as the penalty phase, is provided for in ss. 921.141 and 921.142, F.S. *See also* Fla.R.Crim.P. 3.780; (s. 921.142, F.S., applies to capital drug trafficking felonies exclusively, s. 921.141, F.S., applies to all other capital offenses). During the penalty phase, the state and the defense present evidence of an aggravating and mitigating nature to the jury, usually the same jury that rendered the guilty verdict. Because "death is different," the rules of evidence are more relaxed in the penalty phase and the trial judge is authorized to admit "any matter that the court deems relevant to the nature of the crime and the character of the defendant." s. 921.141(1), F.S.

After weighing the mitigating and aggravating circumstances, the penalty phase jury renders an advisory sentence to the judge. s. 921.141(2), F.S. However, the trial judge may override the jury's verdict and must independently weigh the aggravating and mitigating circumstances before imposing a death sentence. The trial judge's death sentence must be set forth in writing and provide: (1) that sufficient aggravating circumstances exist as enumerated in statute; and (2) that there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

Aggravating and mitigating circumstances are listed in the statutes. ss. 921.141 (5) & (6), 921.142 (6) & (7), F.S. The trial judge is limited to the aggravating circumstances set out in the statutes. Some examples of aggravating circumstances include: at the time of the offense the felon was serving a sentence; the offense was committed for pecuniary gain; and the offense was especially heinous, atrocious, or cruel. Some examples of statutory mitigating circumstances include: the defendant has no significant criminal history; the victim took part in the defendant's conduct or consented to the act; and the defendant's age at the time of the crime. The trial judge *is not* limited to the mitigating circumstances set out in statute. The statute provides that the judge is to consider "the existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty."

All death sentences are automatically reviewed by the Florida Supreme Court. When reviewing the death sentence, the Supreme Court engages in proportionality review. The court has stated that proportionality review "guarantees that the reasons [justifying the death penalty] present in one case will reach a similar result to that reached under similar circumstances in another case.... If a defendant is sentenced to die, [the court will] review that case in light of the other decisions and determine whether or not the punishment is too great." *State v. Dixon*, 283 So.2d 1, 10 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

B. The Definition of Mental Retardation

The American Association of Mental Retardation defines mental retardation as significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive functioning and manifest before age 18. *See also* American Psychiatric Association, *Diagnostic*

and Statistical Manual of Mental Disorders, p.39. (4th ed., 1994)(DSM IV) Florida has adopted this definition in ss. 916.106(12) and 393.063(43), F.S. According to the Florida Association of Retarded Citizens, about 3 percent of the population are considered mentally retarded under this definition. *See also* D. Davis, *Executing the Mentally Retarded: The Status of Florida Law*, *The Florida Bar Journal*, Feb. 1991, p.13.

Florida currently defines mental retardation in chapters 916 and 393, F.S. 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(12) & 393.063(43), F.S. The Department of Children and Family Services does not currently have a rule. Instead, the Department has established criteria favoring the nationally recognized Stanford-Binet and Weschler Series tests. In practice, two or more standard deviations from these tests means that the person has an IQ of 70 or less, although it can be extended up to 75. *Id*; DSM IV.

The Florida definition also specifies that "adaptive behavior" means "the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of the individual's age, cultural group, and community." The DSM IV defines this prong as "significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety."

There are four recognized categories of mental retardation based largely on the IQ test performance. American Association on Mental Deficiency [now the American Association on Mental Retardation], *Classification in Mental Retardation* (H. Grossman ed. 1983). The categories are mild (IQ 50-55 to 70), moderate (IQ 35-40 to 50-55), severe (IQ 20-25 to 35-40), and profound (IQ below 20-25). *Id*; DSM IV, p.40.

About 85 to 89 percent of the mentally retarded fall within the mild category. However, the term "mild" mental retardation is often misunderstood. Blume & Bruck, *Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis*, 41 Ark. L. Rev. 725, 731 (1988); DSM IV, p.41. The term mild is a comparative word used to distinguish between the different categories of the mentally retarded and a mildly retarded person is still "substantially disabled." *Id*. The term "mild" retardation should not be confused with "borderline" mental retardation, those with IQ's between 70 and 85, who are not considered to be mentally retarded. *Id*.

The DSM IV describes adult persons with mild mental retardation as follows:

> they usually achieve social and vocational skills adequate for minimum self-support, but may need supervision, guidance, and assistance, especially when under unusual social or economic stress. With appropriate supports, individuals with Mild Mental Retardation can usually live successfully in the community, either independently or in supervised settings.

The DSM IV describes moderate retardation as follows:

> This group constitutes 10 percent of the entire population of people with mental retardation. Most of the individuals at this level of mental retardation acquire communication skills during early childhood years. They profit from vocational training and, with moderate supervision, can attend to their personal care.

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).

C. Executing the Mentally Retarded is Authorized in Florida

In Florida, there exists no per-se prohibition against executing a mentally retarded capital felon. 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."

The mitigating circumstances listed in statutes contain two circumstances which address the defendant's mental state: (1) that the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance; and (2) the defendant's capacity to appreciate the criminality of his or her conduct or to conform his or her conduct to the law was substantially impaired. There is no statutory mitigating circumstance which expressly addresses mental retardation, or low intelligence. As described above, the courts have made clear that such evidence must be considered and weighed as a "non-statutory" mitigating circumstance.

However, as a mitigating circumstance, mental retardation is considered along with other factors and it may be "outweighed" by the existence of sufficient aggravating circumstances. For example, in *Thompson, supra*, the court affirmed a death sentence despite defense evidence establishing that Thompson was mildly retarded with an IQ of 70, and where there was additional evidence of IQ scores between 56 and 63. Likewise in *Taylor v. State*, 630 So.2d 1038 (Fla. 1993), the court affirmed a death sentence where the trial judge found Taylor was "mildly retarded" and the trial judge gave "this one mitigating circumstance slight weight." *Id*. at 1043.

On the other hand, in *Reilly v. State*, 601 So.2d 222 (Fla. 1992), the court reduced a death sentence to life imprisonment where the jury had recommended life; there was evidence that Reilly was "borderline retarded," with an IQ level of 80; and there was expert testimony that Reilly was "brain impaired" with "severe learning disabilities." Further, in *Sinclair v. State*, 657 So. 2d 1138 (Fla. 1995), the court under proportionality review reduced a death sentence to life imprisonment because the sole aggravating circumstance was substantially outweighed by mitigation that included that Sinclair had a "low intelligence level" coupled with "emotional disturbances." *See*

also Phillips v. State, 608 So.2d 778, 783 (Fla. 1992) (reversing for new penalty phase hearing because defendant's original trial counsel failed to elicit mitigation which established defendant was "borderline retarded" with IQ scores from 73 to 75 and emotionally, intellectually, and socially deficient, with lifelong deficits in his adaptive functioning).

Although Florida does not have a per-se prohibition on the execution of the mentally retarded, it does prohibit 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). Further, Florida does not have a statutory age minimum for execution, although the Florida Supreme Court has set the floor at 17, under the Florida Constitution. *Brennan v. State*, 24 Fla. L. Weekly S365 (Fla. July 8, 1999) (death penalty imposed upon 16-year-old for first-degree murder violated state constitutional prohibition of cruel or unusual punishment), *See also Allen v. State*, 636 So.2d 494 (Fla. 1994)(death penalty imposed upon 15-year-old violates state constitutional prohibition of cruel or unusual punishment); *Thompson v. Oklahoma*, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (4 members of the court would hold that eighth amendment prohibits the execution of a person who was under 16 at time of offense).

D. The Federal Government and Some States Ban Execution of the Mentally Retarded

The United States Supreme Court in *Penry, supra*, rejected the argument that there was an emerging national consensus against execution of the mentally retarded which would reflect the "evolving standards of decency that mark the progress of a maturing society." If the court had accepted this argument then it would have found execution of the mentally retarded to violate the eighth amendment's cruel and unusual punishment clause. In making this determination, the court relies "largely on objective evidence such as the judgment of legislatures and juries." *Penry*, at 109 s. Ct. 2955. At the time of the *Penry* decision only the Federal Government and Georgia had enacted a legislative ban against the execution of the mentally retarded. *Id*. Maryland had enacted a statute which took effect soon after *Penry*. *Id*. The court held that "the two state statutes prohibiting the execution of the mentally retarded, even when added to the 14 States that have rejected capital punishment completely, do not provide sufficient evidence *at present* of a national consensus." *Id*. (emphasis supplied) The court also cited to opinion polls, including one from Florida, which found that 71 percent of those surveyed were opposed to the execution of the mentally retarded, while only 12 percent were in favor. *Id*.

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. *Manual on Terminology and Classification.* (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 Gov't	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.[1]

E. Legislative Efforts in Florida to Exempt the Mentally Retarded - Task Force Created

In 1998, the Legislature considered, but ultimately failed to pass, a bill to exempt the mentally retarded from the death penalty. In the January 2000 Special Session, the Florida Senate passed SB 14-A which exempted the mentally retarded from the death penalty and set the threshold IQ level in at 55. The Florida House of Representatives did not take up SB 14-A.

[1]In March, 2000, South Carolina became the 13th state with the death penalty to exempt the mentally retarded.

However, in response to concerns by members of the Legislature, the Governor created a Task Force on Capital Cases to "study evidence of discrimination, if any, in the sentencing of defendants in capital cases, including consideration of race, ethnicity, gender, and the possible mental retardation of the defendant." Executive Order No. 2000-1. The Capital Cases Task Force heard extensive testimony from prosecutors, defense attorneys and representatives of the Association for Retarded Citizens (ARC). In March 2000, the Task Force voted 7-6 against recommending legislation to exempt the mentally retarded from the death penalty. However, the Task Force voted unanimously to recommend legislation which would place mental retardation in the list of statutory mitigating circumstances. The Task Force's Final Report is due on April 10, 2000. Executive Order No. 2000-59.

F. Mentally Retarded and Mentally Ill Defendant Treatment and Incompetency

Chapter 916, F.S., addresses mentally deficient and mentally ill defendants. Section 916.1076, F.S., describes the rights of forensic clients and provides that persons who are mentally ill or mentally retarded and are charged with, or have been convicted of, committing criminal acts shall receive appropriate treatment.

The Florida Criminal Rules outline the procedures for determining a defendant's competency to proceed to trial or sentencing. 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.

A mentally retarded person is not presumed to be incompetent to stand trial. An examination and finding of incompetency by the trial court is required under the rules of procedure. Section 916.13, F.S., authorizes the involuntary civil commitment of defendants who are adjudicated incompetent to stand trial or incompetent for sentencing. Section 916.145, F.S., provides that the charges against any defendant adjudicated incompetent to stand trial due to his mental retardation will be dismissed if the defendant remains incompetent to stand trial 2 years after such adjudication. An exception is provided in cases in which the court specifies reasons for believing that the defendant will become competent to stand trial and the time within which the defendant is expected to regain competency.

III. Effect of Proposed Changes:

A. Provision Barring Execution of the Mentally Retarded

The bill creates s. 921.137, F.S., to bar the execution of the mentally retarded as follows.

1. Definition.

The bill contains a definition of mental retardation which is substantially the same as the existing definition in s. 393.063 and in s. 916.106, F.S. The definition in the bill has three prongs: low intellectual functioning; deficits in adaptive behavior; and, manifestation of conditions by age 18.

The bill does not contain a set IQ level, but rather it provides that low intellectual functioning "means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Department of Children and Family

Services." Although the Department does not currently have a rule specifying the intelligence test, it is anticipated that the Department will adopt the nationally recognized tests. Two standard deviations from these tests is approximately a 70 IQ, although it can be extended up to 75. The effect in practical terms will be that a person that has an IQ of around 70 or less will likely establish an exemption from the death penalty. An IQ score of 70 falls in the category of the "mildly retarded." See "Present Situation."

The bill provides express rule-making authority to the Department of Children and Family Services.

2. *Exemption.*
The bill provides that a death sentence may not be imposed on a person who suffers from mental retardation if the defendant's conduct at the time of the commission of the crime is directly related to the mental retardation.

The effect is to create an exemption from the death penalty for the mentally retarded. Currently, mental retardation is considered in death cases only as a "non-statutory" mitigating circumstance which may be outweighed by aggravating circumstances. *See* "Present Situation." However, the exemption is limited to those cases where the defense is able to prove both that the defendant suffers from mental retardation and that there was a direct relationship between the mental retardation and the defendant's participation in the crime.

3. *Notice required.*
The bill provides that a defendant who intends to raise the defense of mental retardation as a bar to the death penalty must give notice of his or her intention to do so in accordance with the rules of court governing notice of intent to rely on an insanity defense. The rules of court governing the insanity defense requires notice to be provided within 15 days after the arraignment or the filing of a written plea of not guilty. Fla.R.Crim.P. 3.216(c).

4. *Separate hearing held after conviction or adjudication; standard of proof.*
The bill provides that after conviction or adjudication, the court shall conduct a separate proceeding, (before the standard "penalty phase"), to determine whether a capital defendant should be sentenced to life imprisonment because the defendant suffers from mental retardation.

If the court finds by clear and convincing evidence that the defendant suffers from mental retardation, the court shall enter a written order that sets forth with specificity its findings in support of its determination that the defendant suffers from mental retardation.

5. *State appeal authorized; application of this section of the bill*; *Capital Cases Task Force*.
The state is authorized to appeal a determination of mental retardation, pursuant to s. 924.07, F.S.

The bill provides that the provision barring the execution of the mentally retarded does not apply to a capital defendant who was sentenced to death before the effective date of this act.

The Capital Cases Task Force, appointed by the Governor after the 2000 Special Session, voted 7-6 against recommending an outright exemption of the execution of the mentally retarded.

However, the Task Force put forward it suggestions for how the Legislature should enact such a provision and this work product is reflected in this bill, as described above.

B. Statutory Mitigating Circumstance

This bill amends ss. 921.141 and 921.142, F.S., to add mental retardation to the list of mitigating circumstances which the jury and judge must weigh when considering whether to impose the death penalty. The definition of mental retardation is linked to the term "retardation" in s. 393.063, F.S.

This provision codifies the recommendation of the Capital Cases Task Force, appointed by the Governor after the 2000 Special Session. The effect is to elevate what is now considered to be a "non-statutory" mitigating circumstance to the legislatively recognized list of mitigating circumstances, in equal footing with such circumstances as "the age of the defendant at the time of the crime."

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

This bill will have an indeterminate impact on the judicial system (State Court System, State Attorneys, and Public Defenders) in that it will require that trial judges hold a hearing to determine whether a defendant is mentally retarded in every capital case which proceeds to the penalty phase. The fiscal impact will be measured in terms of judicial and attorney workload as well as the costs of any expert witnesses appointed to examine indigent

defendants. Much of this additional cost, however, would be offset by a reduction in the number of penalty proceedings following adjudication of guilt. Only those offenders who have a mental retardation hearing and are found to *not* be mentally retarded would represent a net increase in overall judicial system expenditures because both a mental retardation hearing and sentencing proceeding would be required.

VI. Technical Deficiencies:

The provision barring the death penalty for the mentally retarded requires a showing that the commission of the crime was directly related to the mental retardation. (page 2, line 20) However, this requirement is not referenced in the provision requiring the court to make a finding and enter a written order (page 3, line 2). To avoid confusion, this requirement should be referenced in both locations.

On page 4, line 5, and page 5, line 7: The definition of mental retardation is linked to the term "retardation" in s. 393.063, F.S., for purposes of the statutory mitigating circumstance. The provision barring the death penalty for the mentally retarded created in s. 921.137, F.S., does not refer back to s. 393.063, F.S., but rather it contains a definition which is substantially similar to s. 393.063, F.S. To avoid any confusion, and for consistency in future years should the definition in s. 921.137, F.S., be modified, the definition in the statutory mitigating circumstance should be linked to the definition in the provision barring the death penalty for the mentally retarded contained in s. 921.137, F.S.

VII. Related Issues:

None.

VIII. Amendments:

None.