HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1831 PCB CRJU 05-03 Inmates under sentence of death
SPONSOR(S): Criminal Justice Committee
TIED BILLS: none **IDEN./SIM. BILLS:** SB 2576

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Criminal Justice Committee		Bond	Kramer
1)			
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

It is unconstitutional to execute an inmate who is insane or mentally retarded at the time of the execution. Florida law does not specifically provide for treatment or training intended to alleviate the infirmity, leaving courts to address the issue on an ad hoc basis.

This bill requires a petition to the Governor alleging that an inmate does not understand the death penalty and the reason it is being imposed must be filed at least 10 days prior to the scheduled execution.

This bill provides for restoring an inmate to competency in order that his or her sentence may be carried out. It transfers responsibility for treatment of mentally ill death row inmates to the Department of Children and Family Services, and transfers responsibility for training of mentally retarded death row inmates to the Agency for Persons with Disabilities, while requiring that such inmates remain in the physical custody of the Department of Corrections. This bill also provides procedures for compelling an inmate under sentence of death to submit to necessary treatment should the inmate refuse treatment.

This bill does not appear to have a fiscal impact on state or local government.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Promote personal responsibility -- This bill affects the process and procedure related to the execution of persons sentenced to death.

B. EFFECT OF PROPOSED CHANGES:

Until 1986, whether an inmate under sentence of death was to be spared execution based on a claim of insanity was considered part of the executive clemency power.[1] Section 922.07, F.S., provided for review of the insanity claim by the Governor, who alone decided whether to honor the claim of insanity after the inmate was examined by a commission appointed by the Governor.

In 1986, the United States Supreme Court ruled that execution of an insane inmate is cruel and unusual punishment. The standard for insanity for these purposes is not whether the inmate suffers from some mental illness. An inmate is sane enough for execution if the inmate "understands the nature and effect of the death penalty and why it is to be imposed upon him or her."[2]

The court then ruled that Florida's reliance on the goodwill of the Governor to commute a sentence of death based on the alleged insanity of an inmate did not provide sufficient due process to the inmate. Thus, the Florida process was ruled unconstitutional.[3] Since 1986, a claim that an inmate under penalty of death is insane may be brought before both the Governor and the courts.

In 2002, the United States Supreme Court ruled that execution of a mentally retarded inmate is cruel and unusual punishment.[4]

Process Before the Governor

Section 922.07, F.S., provides that if the Governor is informed that a death row inmate does not understand the nature of the death penalty and the reasons why it is being imposed, the Governor must issue a stay of execution and appoint a commission of three psychiatrists to examine the inmate. This statute only applies after the Governor has signed the death warrant.[5] In practice, this claim is made in the final hours, and has served to delay an otherwise lawful execution.

The three psychiatrists examine the inmate at the same time, attorneys for the inmate and the state may attend the examination. After receiving the report, the Governor must either:

- Determine that the inmate does not understand the nature of the death penalty and reasons why it is being imposed, continue the stay, and have the inmate transferred to a mental health treatment facility; or
- Lift the stay and set a new date for execution.

---

[1] Article IV, s. 8, Fla.Const.
[2] Section 922.07, F.S.
[3] *Ford v. Wainwright*, 477 U.S. 399 (1986). Alvin Bernard Ford murdered Ft. Lauderdale police officer Walter Ilyankoff during a robbery in 1974. He was sentenced to death in 1975. Governor Graham signed a death warrant in 1981 after following the procedure in s. 922.07, F.S., but a federal court stay stayed the execution. In 1989, three years after the favorable Supreme Court ruling, a federal court ruled Ford sane enough to be executed. Ford died of natural causes before the sentence of death could be carried out.
[4] *Atkins v. Virginia*, 536 U.S. 304 (2002).
[5] *Hall v. Moore*, 792 So.2d 447, 450 (Fla. 2001).

If committed to a mental health facility, upon restoration to sanity sufficient to meet the standard (the inmate understands the nature of the death penalty and the reasons it is being imposed), the administrator of the facility must notify the Governor. The Governor must then again appoint a commission to examine the inmate and must again act on the report.

Process Before the State Courts

Where an inmate has an active death warrant, a representative of the inmate may allege that the inmate does not understand the nature of the death penalty and the reason it is being imposed. The representative must first apply to the Governor under s. 922.07, F.S., and be denied relief, before petitioning the court for relief. Rule 3.811(c). If the court has reasonable grounds to believe that the inmate does not meet the standard for execution, the court must grant a stay of execution. Rule 3.811(e). The court may appoint new mental health experts. Rule 3.812(c)(2). The court may admit any relevant evidence, and is not strictly bound to the rules of evidence. Rule 3.812(d). The inmate must show by clear and convincing evidence that he or she is does not meet the standard for execution. Rule 3.812(e).

Incompetence to proceed in a capital collateral proceeding is governed by the Criminal Procedure Rules. Incompetence to proceed can be brought at any point in during the postconviction proceedings. The effect of a finding that the inmate is incompetent to proceed is the halting of all postconviction proceedings that require the inmate to assist his or her attorney in the defense.

Rule 3.851 in general provides procedural rules relating to all postconviction motions in capital cases. Rule 3.851(g) provides special rules regarding an allegation of incompetence to proceed in capital collateral proceedings.

A death-sentenced prisoner pursuing collateral relief who is found by the court to be mentally incompetent cannot be proceeded against if there are factual matters at issue, the development or resolution of which require the prisoner's input. However, all collateral relief issues that involve only matters of record and claims that do not require the prisoner's input proceed in collateral proceedings notwithstanding the prisoner's incompetency.

Collateral counsel may file a motion for competency determination and an accompanying certificate of counsel that the motion is made in good faith and on reasonable grounds to believe that the death-sentenced prisoner is incompetent to proceed.

If, at any stage of a postconviction proceeding, the court determines that there are reasonable grounds to believe that a death-sentenced prisoner is incompetent to proceed and that factual matters are at issue, the development or resolution of which require the prisoner's input, a judicial determination of incompetency is required.

The motion for competency examination must be in writing and allege with specificity the factual matters at issue and the reason that competent consultation with the prisoner is necessary with respect to each factual matter specified. To the extent that it does not invade the lawyer-client privilege with collateral counsel, the motion must contain a recital of the specific observations of, and conversations with, the death-sentenced prisoner that have formed the basis of the motion.

If the court finds that there are reasonable grounds to believe that a death-sentenced prisoner is incompetent to proceed in a postconviction proceeding in which factual matters are at issue, the development or resolution of which require the prisoner's input, the court must order the prisoner examined by no more than 3, nor fewer than 2, experts before setting the matter for a hearing. The court may seek input from the death-sentenced prisoner's counsel and the state attorney before appointment of the experts.

The order appointing experts must identify the purpose of the evaluation and specify the area of inquiry that should be addressed; specify the legal criteria to be applied; and specify the date by which the report shall be submitted and to whom it must be submitted. Counsel for both the death-sentenced prisoner and the state may be present at the examination, which must be conducted at a date and time convenient for all parties and the Department of Corrections. On appointment by the court, the experts must examine the death-sentenced prisoner with respect to the issue of competence to proceed, as specified by the court in its order appointing the experts to evaluate the prisoner, and must evaluate the prisoner as ordered.

The experts first consider factors related to the issue of whether the death-sentenced prisoner meets the criteria for competence to proceed, that is, whether the prisoner has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and whether the prisoner has a rational as well as factual understanding of the pending collateral proceedings.

In considering the issue of competence to proceed, the experts must consider and include in their report: the prisoner's capacity to understand the adversary nature of the legal process and the collateral proceedings; the prisoner's ability to disclose to collateral counsel facts pertinent to the postconviction proceeding at issue; and any other factors considered relevant by the experts and the court as specified in the order appointing the experts. Any written report submitted by an expert must: identify the specific matters referred for evaluation; describe the evaluative procedures, techniques, and tests used in the examination and the purpose or purposes for each; state the expert's clinical observations, findings, and opinions on each issue referred by the court for evaluation, and indicate specifically those issues, if any, on which the expert could not give an opinion; and identify the sources of information used by the expert and present the factual basis for the expert's clinical findings and opinions.

If the experts find that the death-sentenced prisoner is incompetent to proceed, the experts must report on any recommended treatment for the prisoner to attain competence to proceed. In considering the issues relating to treatment, the experts must report on: the mental illness or mental retardation causing the incompetence; the treatment or treatments appropriate for the mental illness or mental retardation of the prisoner and an explanation of each of the possible treatment alternatives in order of choices; and the likelihood of the prisoner attaining competence under the treatment recommended, an assessment of the probable duration of the treatment required to restore competence, and the probability that the prisoner will attain competence to proceed in the foreseeable future.

Within 30 days after the experts have completed their examinations of the death-sentenced prisoner, the court must schedule a hearing on the issue of the prisoner's competence to proceed. If, after a hearing, the court finds the prisoner competent to proceed, or, after having found the prisoner incompetent, finds that competency has been restored, the court must enter its order so finding and must proceed with the postconviction proceedings. The prisoner has 60 days to amend his or her rule 3.851 motion only as to those issues that the court found required factual consultation with counsel.

If the court does not find the prisoner incompetent, the order must contain: findings of fact relating to the issues of competency; copies of the reports of the examining experts; and copies of any other psychiatric, psychological, or social work reports submitted to the court relative to the mental state of the death-sentenced prisoner.

If the court finds the prisoner incompetent or finds the prisoner competent subject to the continuation of appropriate treatment, the court shall follow the procedures set forth in Rule 3.212(c), except that, to the extent practicable, any treatment shall take place at a custodial facility under the direct supervision of the Department of Corrections.

Rule 3.212(c) provides that, if a court finds a defendant incompetent to proceed, or that the defendant is competent to proceed but that the defendant's competence depends on the continuation of appropriate treatment for a mental illness or mental retardation, the court must consider issues relating

to treatment necessary to restore or maintain the defendant's competence to proceed. The court may order the defendant to undergo treatment if the court finds that the defendant is mentally ill or mentally retarded and is in need of treatment and that treatment appropriate for the defendant's condition is available. If the defendant is incarcerated, the court may order treatment to be administered at the custodial facility or may order the defendant transferred to another facility for treatment or may commit the defendant. A defendant may be committed for treatment to restore a defendant's competence to proceed if the court finds that the defendant meets the criteria for commitment as set forth by statute; there is a substantial probability that the mental illness or mental retardation causing the defendant's incompetence will respond to treatment and that the defendant will regain competency to proceed in the reasonably foreseeable future; treatment appropriate for restoration of the defendant's competence to proceed is available; and no appropriate treatment alternative less restrictive than that involving commitment is available.

If the court commits the defendant, the order of commitment must contain: findings of fact relating to the issues of competency and commitment; copies of the reports of the experts filed with the court pursuant to the order of examination; copies of any other psychiatric, psychological, or social work reports submitted to the court relative to the mental state of the defendant; and copies of the charging instrument and all supporting affidavits or other documents used in the determination of probable cause.

The treatment facility must admit the defendant for hospitalization and treatment and may retain and treat the defendant. No later than 6 months from the date of admission, the administrator of the facility must file with the court a report that addresses the issues and considers the factors set forth in rule, with copies to all parties. If, at any time during the 6-month period or during any period of extended commitment that may be ordered, the administrator of the facility determines that the defendant no longer meets the criteria for commitment or has become competent to proceed, the administrator must notify the court by such a report, with copies to all parties.

If, during the 6-month period of commitment and treatment or during any period of extended commitment that may be ordered pursuant to this rule, counsel for the defendant has reasonable grounds to believe that the defendant is competent to proceed or no longer meets the criteria for commitment, counsel may move for a hearing on the issue of the defendant's competence or commitment. The motion must contain a certificate of counsel that the motion is made in good faith and on reasonable grounds to believe that the defendant is now competent to proceed or no longer meets the criteria for commitment. To the extent that it does not invade the attorney-client privilege, the motion shall contain a recital of the specific observations of and conversations with the defendant that have formed the basis for the motion.

If, upon consideration of a motion filed by counsel for the defendant or the prosecuting attorney and any information offered the court in support thereof, the court has reasonable grounds to believe that the defendant may have regained competence to proceed or no longer meets the criteria for commitment, the court must order the administrator of the facility to report to the court on such issues, with copies to all parties, and must order a hearing to be held on those issues.

The court must hold a hearing within 30 days of the receipt of any such report from the administrator of the facility on the issues raised thereby. If, following the hearing, the court determines that the defendant continues to be incompetent to proceed and that the defendant meets the criteria for continued commitment or treatment, the court must order continued commitment or treatment for a period not to exceed 1 year. When the defendant is retained by the facility, the same procedure is repeated prior to the expiration of each additional 1-year period of extended commitment.

If, at any time after such commitment, the court decides, after hearing, that the defendant is competent to proceed, it must enter its order so finding and proceed with the case.

Watts Decision

In *Florida Dept. of Corrections v. Watts*, 800 So.2d 225 (Fla. 2001), the Florida Supreme Court was faced with an appeal from the Department of Corrections of an adverse lower court ruling regarding Tony Randall Watts, an inmate under sentence of death. The circuit court had determined that Watts was incompetent to proceed in his capital postconviction proceedings. Notwithstanding the longstanding rule that a court cannot order the Department of Corrections to place an inmate in a particular institution or program, the circuit court found that Watts met the criteria under the Baker Act for involuntary commitment to a mental institution and ordered the department to place Watts in a particular mental institution affiliated with the prison system.[6] The Supreme Court affirmed the circuit court decision. The majority opinion noted that it was affirming "in the absence of a contrary statutory directive",[7] and the dissent called upon the Legislature to resolve the issue.

Effect of Bill

Procedure Before the Governor

This bill amends s. 922.07, F.S., regarding the provisions for the Governor to grant a stay of execution based on an allegation that the inmate under sentence of death does not understand the nature of the death penalty or the reasons why it is being imposed. This bill requires that the inmate's petition to the Governor alleging that the prisoner does not understand the nature and effect of the death penalty and why it is to be imposed upon him or her must be filed at least 10 days before the scheduled execution. If the Governor finds that the prisoner does not understand the nature and effect of the death penalty and why it is to be imposed upon him or her, the prisoner is to be transferred to a secure mental health facility for treatment by the Department of Children and Family Services. The treatment team must report the prisoner's mental condition to the Governor every 30 days. Upon restoration of sanity, the treatment team must notify the Governor. If the Governor finds the prisoner meets the standard for execution, the Governor must reset the execution.

Procedure Before the Courts

This bill creates s. 945.50, providing for treatment and training of a death row inmate currently ineligible for execution because of a claim of mental illness or mental retardation. This section applies to a much broader class of inmates under sentence of death than s. 922.07, F.S. It applies before and after a death warrant is signed. It applies not just to the mental illness standard for execution (unable to understand the nature of the death penalty and the reasons it is being imposed), but also applies to an allegation that the inmate is mentally retarded or to an allegation that an inmate's mentally illness means that he or she cannot assist counsel in the postconviction proceedings.

The purpose of the section is to provide treatment and training necessary to make the inmate competent to proceed in capital postconviction proceedings and able to understand the nature of the death penalty and the reasons why it was imposed.

This bill provides that chapters 393, 394, 397 and 916, F.S., do not apply to an inmate under sentence of death. Thus, this bill prohibits a court from involuntarily committing an inmate under sentence of death to a facility for the mentally retarded pursuant to ch. 393, F.S., prohibits a court from involuntarily committing an inmate under sentence of death to a facility for the mentally ill pursuant to ch. 394, F.S. (the "Baker Act"), and prohibits and inmate under sentence of death from being committed to a facility for alcohol or drug treatment pursuant to ch. 397, F.S. (the "Marchman Act"). Thus, this bill has the effect of superseding the holding in *Florida Dept. of Corrections v. Watts*, 800 So.2d 225 (Fla. 2001),by providing that any of the civil law rights and procedures related to involuntary confinement and

[6] The hospital that the court ordered Watts admitted to is not equipped for the special security needs of death row inmates.
[7] *Watts* at 232.

treatment of a person do not apply to an inmate on death row. This bill also provides that the rights of a person charged with a criminal offense who is alleged to be mentally ill, which rights are found in ch. 916, F.S., do not apply to an inmate on death row.

This bill specifies that an inmate who, because of psychotropic medication, is able to understand the nature of the proceedings and assist in the inmate's own defense is not incompetent to proceed in capital postconviction proceedings simply because the inmate's satisfactory mental functioning is dependent upon such medication. An inmate who, because of psychotropic medication, is able to understand the nature of the death penalty and the reasons why it was imposed is not subsequently unable to understand the nature of the death penalty and the reasons why it was imposed simply because the inmate's satisfactory mental functioning is dependent upon such medication. The term "psychotropic medication" is defined by this bill to mean any drug or compound used to treat mental or emotional disorders affecting the mind, behavior, intellectual functions, perception, moods, or emotions and includes antipsychotic, antidepressant, antimanic, and antianxiety drugs.

This bill provides, as to an inmate found incompetent to proceed in capital postconviction proceedings by reason of mental illness, or an inmate found unable to understand the nature of the death penalty and the reasons why it was imposed, that such inmate may be involuntarily committed to the Department of Children and Family Services. An inmate found incompetent to proceed in capital postconviction proceedings by reason of mental retardation may be involuntarily committed to the Agency for Persons with Disabilities.

Regardless of the commitment, the Department of Corrections retains physical custody of the inmate, and may, in its sole discretion, place the inmate in the corrections facility it determines is best equipped to treat or train the inmate and is best suited to the security and custody needs of inmates sentenced to death. Personnel from the Department of Children and Family Services or the Agency for Persons with Disabilities must provide treatment or training at the inmate's facility. Thus, this bill has the effect of superceding the portion of *Florida Dept. of Corrections v. Watts*, 800 So.2d 225 (Fla. 2001), that found a circuit court had the right to determine placement of a inmate in the custody of the department.

The court rules of procedure provide for periodic and special reports that must be provided to the court regarding the mental status of death row inmates subject to these provisions. This bill provides that the personnel from the Department of Children and Family Services or the Agency for Persons with Disabilities are responsible for providing all reports required by court order or court rule. If the court determines that the inmate is competent to proceed, it must enter its order so finding, discharge the involuntary commitment order as to the Department of Children and Family Services or the Agency for Persons with Disabilities, and proceed with the inmate's postconviction proceedings. If the court determines that the inmate understands the nature of the death penalty and the reasons why it was imposed, the court shall enter its order so finding and must notify the Governor.

Inmates who have been found incompetent to proceed in capital postconviction proceedings proceedings, or who have been found to not understand the nature of the death penalty and the reasons why it was imposed, and who are involuntarily committed to the Department of Children and Family Services or the Agency for Persons with Disabilities under this section, must be asked to give express and informed written consent for treatment. If the inmate is unable to, or refuses to, give express and informed written consent for mental health treatment, including psychotropic medications, which the Department of Children and Family Services or the Agency for Persons with Disabilities deem necessary to restoration of the inmate's competency or the safety of the inmate or others, such treatment may be provided under the following circumstances:

- In an emergency situation in which there is immediate danger to the safety of the inmate or others, such treatment may be provided upon the written order of a physician for a period not to exceed 48 hours, excluding weekends and legal holidays. If, after the 48-hour period, the inmate has not given express and informed consent to the treatment, the Department of Children and Family Services must, within 48 hours, excluding weekends and legal holidays,

petition the committing court or other authorized circuit court for an order authorizing the continued treatment of the inmate. In the interim, treatment may be continued without the consent of the inmate upon the continued written order of a physician who has determined that the emergency situation continues to present a danger to the safety of the inmate or others.

- In a situation other than an emergency situation, the Department of Children and Family Services must petition the court for an order authorizing the treatment for the inmate. The order must allow such treatment for a period not to exceed 90 days from the date of the entry of the order. Unless the court is notified in writing that the inmate has provided express and informed consent in writing, the Department of Children and Family Services must, prior to the expiration of the initial 90-day order, petition the court for an order authorizing the continuation of treatment for another 90-day period. This procedure shall be repeated until the inmate provides consent or the involuntary commitment order is discharged.

At a hearing on the issue of whether the court should enter an order authorizing treatment for which an inmate has not given express and informed consent, the court must determine by clear and convincing evidence that the inmate is mentally ill or mentally retarded, and that the proposed treatment is necessary for restoration to competency. In arriving at the decision, the court must consider the following factors:

- The inmate's expressed preference regarding treatment.
- The probability of adverse side effects.
- The prognosis for restoration to competency without treatment.
- The prognosis for restoration to competency with treatment.

If medical treatment is ordered, Department of Corrections medical personnel may assist in providing general medical care and the administering of medication.

Notwithstanding these provisions, the department, or any treating medical provider, may provide emergency medical treatment if such treatment is deemed lifesaving or there is a situation threatening serious bodily harm to the inmate.

C. SECTION DIRECTORY:

Section 1 amends s. 922.07, F.S., regarding an allegation that a death row inmate is unable to understand the nature of the death penalty and why it is being imposed.

Section 2 creates s. 945.50, to create provisions regarding furnishing mental health treatment and training to death row inmates.

Section 3 provides an effective date of upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

   None.

D. FISCAL COMMENTS:

   This bill may shift medical treatment and costs from the Department of Corrections to the Department of Children and Family Services and to the Agency for Persons with Disabilities. There should not be a net effect on General Revenue.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

   None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

   None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

n/a