SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Prepared By: Criminal Justice Committee

BILL:	CS/CS/SB 2010
INTRODUCER:	Criminal Justice Committee, Children and Families Committee, and Senator Baker
SUBJECT:	Forensic Treatment and Training
DATE:	April 4, 2006 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Goltry	Whiddon	CF	**Fav/CS**
2.	Cellon	Cannon	CJ	**Fav/CS**
3.			JU	
4.			HA	
5.				
6.				

I. Summary:

The bill amends ch. 916, F.S., relating to forensic services for persons with mental illnesses and persons with mental retardation or autism. The bill revises definitions and procedures for persons committed to the Department of Children and Family Services (DCF or department) as defendants who are incompetent to stand trial due to a mental illness, mental retardation, or autism. It makes technical changes to conform procedures and criteria to the transfer of programs from DCF to the Agency for Persons with Disabilities (APD or agency). It makes substantive changes which include:

- Updating definitions including "forensic client," deleting commitment criteria from the definition and moving it to the appropriate section, creating a definition for "defendant" to distinguish persons who are not yet clients because they have not been committed.
- Requiring separate housing requirements for forensic clients (conforms to current practice).
- Clarifying provisions relating to defendants who are currently in the custody of the Department of Corrections.
- Allowing the transfer of court jurisdiction for forensic clients.
- Clarifying the distinction between ch. 916, F.S., forensic procedures for involuntary commitment, and ch. 393, F.S., procedures for non-forensic involuntary commitment.
- Deleting the provision in current law (s. 916.1075, F.S.), which requires the inspector general to immediately investigate allegations of sexual misconduct between an employee and a client in a forensic facility, and upon a finding of probable cause, to report it to the local state attorney.

This bill substantially amends the following sections of the Florida Statutes: 916.105, 916.106, 916.107, 916.1075, 916.1081, 916.1085, 916.1091, 916.1093, 916.111, 916.115, 916.12, 916.13, 916.145, 916.15, 916.16, 916.17, 916.301, 916.3012, 916.302, 916.3025, 916.303, 916.304, 921.137, 985.223, 287.057, 408.036, 943.0585, and 942.059.

II. Present Situation:

Chapter 916, F.S., the "Forensic Client Services Act," applies to persons charged with a felony and found to be incompetent to proceed due to mental illness, mental retardation, or autism or who have been acquitted of felonies by reason of insanity. Persons committed under ch. 916, F.S., remain under the jurisdiction of the committing court but are committed to the custody of the department. Chapter 916, F.S., is divided into three parts: Part I, General Provisions; Part II, Forensic Services for Persons Who are Mentally Ill; and, Part III, Forensic Services for Persons Who are Retarded or Autistic. The Florida Rules of Criminal Procedure (FRCP Rules 3.210-3.219) contain court procedures for forensic clients in areas such as the appointment of experts, mental competency examination and report, competence to proceed, hearing and disposition, judgment of not guilty by reason of insanity disposition, and conditional release.

Part I provides legislative intent for DCF to "establish, locate, and maintain separate and secure facilities and programs for the treatment or training of defendants" committed under the provisions of the chapter.[1] This part provides definitions for terminology used in the entire chapter, including definitions of "autism," "forensic client," "mental illness," and "retardation."[2] Part I also includes the rights of forensic clients, which include the right to:

- Individual dignity,
- Treatment,
- Express and informed consent,
- Quality treatment, communication,
- Abuse reporting, and visits,
- To have personal effects and clothing,
- To vote if otherwise eligible,
- Confidentiality of the clinical record, and
- Habeas corpus.[3]

This part also provides prohibitions and penalties for sexual misconduct by an employee with a forensic client, penalties for escape from a forensic program, and penalties for the introduction or removal of certain articles into a forensic facility. It provides general rulemaking authority for the department.

Part II of ch. 916, F.S., relates to forensic services for persons who are mentally ill and describes the criteria and procedures for the examination, involuntary commitment, and

[1] s. 916.105, F.S.
[2] s. 916.106, F.S.
[3] s. 916.107, F.S.

adjudication of persons who are incompetent to proceed due to mental illness or who have been adjudicated not guilty by reason of insanity.

This part also directs DCF to provide either directly or through a contract with accredited institutions standardized criteria and procedures to be used in evaluations and to develop clinical protocol and procedures consistent with the FRCP. In addition, DCF must develop a training plan for community mental health professionals who perform forensic evaluations, provide training for professionals doing evaluations and providing reports to the court and develop a system to evaluate the program's success. Each year DCF is required to provide the court with a list of mental health professionals approved as experts.

Part II authorizes the court to appoint no more than three nor fewer than two experts to evaluate a criminal defendant's mental condition, including competency, insanity, and the need for involuntary hospitalization or placement. The court is required to authorize reasonable fees for expert evaluations and testimony.

Pursuant to this part, an individual is incompetent to proceed if he or she "does not have sufficient present ability to consult with her or his lawyer with a reasonable degree of rational understanding or if the defendant has no rational, as well as factual, understanding of the proceedings against her or him."[4]

In considering the issue of competence to proceed, the statute requires that the examining expert must report to the court regarding the defendant's capacity to appreciate the charges or allegations against him or her, appreciate the range and nature of possible penalties, understand the adversarial nature of the legal process, consult with counsel regarding the facts pertinent to the case, behave appropriately in court, and testify relevantly. The examining expert must include in the report to the court any other information deemed relevant. If the expert finds the defendant incompetent to proceed, they must also report on recommended treatment that will allow the defendant to regain competence. The expert's report to the court must also address the defendant's mental illness, recommended treatments and alternatives and their availability in the community, the likelihood of the defendant's attaining competence under the treatment recommended, an assessment of the probable duration of the treatment, and the probability that the defendant will attain competence to proceed in the foreseeable future.[5]

A defendant may not automatically be deemed incompetent to proceed simply because his or her satisfactory mental functioning is dependent upon psychotropic medication. "Psychotropic medication" is defined for the purposes of ch. 916, F.S., as "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."[6]

[4] s. 916.12, F.S.
[5] s. 916.12, F.S.
[6] s. 916.12 (5), F.S.

Part II of ch. 916, F.S., also provides the criteria for defendants who are adjudicated incompetent to proceed to be involuntarily committed for treatment. The court must find by clear and convincing evidence that the defendant is mentally ill and because of the mental illness:

- The defendant is manifestly incapable of surviving alone or with the help of willing and responsible family or friends, including available alternative services, and, without treatment, the defendant is likely to suffer from neglect or refuse to care for herself or himself and such neglect or refusal poses a real and present threat of substantial harm to the defendant's well-being; and
- There is a substantial likelihood that in the near future the defendant will inflict serious bodily harm on herself or himself or another person, as evidenced by recent behavior causing, attempting, or threatening such harm; and
- All available, less restrictive treatment alternatives, including treatment in community residential facilities or community inpatient or outpatient settings, which would offer an opportunity for improvement of the defendant's condition have been judged to be inappropriate; and
- There is a substantial probability that the mental illness causing the defendant's incompetence will respond to treatment and the defendant will regain competency to proceed in the reasonably foreseeable future.[7]

This part also provides that a defendant who is acquitted of criminal charges because of a finding of not guilty by reason of insanity may be involuntarily committed if he or she is mentally ill and, because of the mental illness, is manifestly dangerous to himself or herself or others.[8]

Persons committed under Part I of ch. 916, F.S., are committed to the custody of DCF and are usually treated at one of the three forensic state mental health treatment facilities at Florida State Hospital in Chattahoochee, North Florida Evaluation and Treatment Center in Gainesville, or South Florida Evaluation and Treatment Center in Miami.

The court may also order conditional release of a defendant who has been found incompetent to proceed or not guilty by reason of insanity. Conditional release must be based on an approved plan for providing appropriate outpatient care. The court may also order conditional release in lieu of an involuntary commitment to a facility. If outpatient treatment is appropriate, a written plan for outpatient treatment, including recommendations from qualified professionals, must be filed with the court.[9]

Part III of ch. 916, F.S., relates to forensic services for persons with retardation or autism and describes the criteria and procedures for the examination, involuntary commitment, and adjudication of persons who are incompetent to proceed due to mental retardation or autism.

[7] s. 916.13, F.S.
[8] s. 916.15, F.S.
[9] s. 916.17, F.S.

Similar to the provisions of Part I, this section directs that the department must provide the courts annually with a list of professionals who are qualified to perform evaluations of defendants alleged to be incompetent to proceed due to retardation or autism. The courts may use professionals from this list when ordering evaluations for defendants suspected of being retarded or autistic, but one of the experts appointed by the court must be the "developmental services program of the department," and the department is directed to "select a psychologist who is licensed or authorized by law to practice in this state, with experience in evaluating persons suspected of having retardation or autism and a social service professional with experience in working with persons with retardation or autism to evaluate the defendant."[10]

The court must find by clear and convincing evidence that:

- The defendant is retarded or autistic,
- There is a substantial likelihood that in the near future he or she will inflict serious bodily harm on himself or herself or another person, as evidenced by recent behavior causing, attempting, or threatening such harm,
- There is no less restrictive treatment available, and
- There is a substantial probability that the retardation or autism causing the defendant's incompetence will respond to training and he or she will regain competency to proceed in the reasonably foreseeable future.[11]

A defendant who is found to be incompetent to proceed and meets the above criteria is committed to the department. No later than six months after admission, at the end of any period of extended commitment, or at any time the administrator determines that the defendant has regained competency to proceed or no longer meets the criteria for continued commitment, the administrator must file a report with the court.[12]

If a defendant remains incompetent to proceed within a reasonable time after such determination, not to exceed two years, the charges against him or her are to be dropped. The only exception is if the court specifies in its order the reasons for expecting that the defendant will become competent to proceed within the foreseeable future and specifies the time within which that is expected to occur. The charges against the defendant are dismissed without prejudice to the state to refile the charges should the defendant be declared competent to proceed in the future.[13] The individual may then apply for services from the agency.

If the defendant requires involuntary residential services under s. 393.11, F.S., and there is a substantial likelihood that he or she will injure another person or continues to present a danger of escape, and all available less restrictive alternatives, including services in community residential facilities or other community settings are inappropriate, then the defendant's placement in a secure facility or program may be continued. An individual involuntarily placed under this provision must have an annual review of his or her status by the court at a hearing. The annual review and hearing are to determine whether the individual

[10] s. 916.301, F.S
[11] s. 916.302, F.S
[12] Ibid.
[13] s. 916.303, F.S.

continues to meet the criteria for involuntary residential services and, if so, if placement in a secure facility is still required because the court finds that the individual is likely to physically injure others. However, in no circumstance may a defendant's placement in a secure facility or program exceed the maximum sentence for the crime for which the defendant was charged.[14]

Forensic programs for persons with developmental disabilities are the Mentally Retarded Defendant Programs, which are located at Sunland in Marianna, Florida State Hospital in Chattahoochee, and Taccachale in Gainesville.

The Developmental Disability program in DCF was transferred by the Legislature to the newly created APD in 2004. As part of that transition, institutions housing clients with developmental disabilities were also transferred to APD. This included institutions housing forensic clients diagnosed with mental retardation or autism who have been charged with a felony offense and found incompetent to proceed. However, ch. 916, F.S., still reflects the commitment of individuals with developmental disabilities to DCF, although the department is no longer responsible for the treatment and training of defendants who have solely mental retardation or autism. Chapter 916, F.S., does not currently clearly distinguish DCF's responsibility from the responsibilities of the APD which has created some confusion regarding commitment procedures. Individuals with mental retardation or autism are sometimes inappropriately committed to DCF. Commitment packets are then sent to the Forensic Admissions Office in the Mental Health Program Office at DCF instead of APD. Because individuals can have both mental retardation and mental illness, it is sometimes difficult to determine whether the court intended to commit the individual due to mental illness or mental retardation. This uncertainty requires staff time to obtain clarification from the court and may require the courts to issue new orders and require new evaluations. The individual may have to move from the DCF waiting list to the APD waiting list, which ultimately delays admission and access to treatment.

Use of Restraint and Seclusion

According to the Advocacy Center for Persons with Disabilities (Advocacy Center), based on data from the federal Centers for Medicare and Medicaid Services (CMS), Florida had the highest per-capita restraint/seclusion related death rate of any state during 2004 and 2005.[15] Of these deaths, 14 of the 16 suspicious deaths that came to the attention of the Advocacy Center involved the use of restraint and/or seclusion.

[14] s. 916.303, F.S.

[15] Advocacy Center for Persons with Disabilities, Inc. personal communication, March 20, 2006, which states: "According to CMS, the states that reported the most restraint/seclusion-related deaths in 2004 were California with 4 and New York with 3. When the population of California and Florida psychiatric facilities is considered, Florida led the nation in the per capita rate of restraint/seclusion-related deaths in 2004. This holds true historically. When CMS first required reporting nationally, CMS received 20 death reports between August 1999 and March 2000. Of those 20 deaths, 7 were in Florida. A memorandum to P&A Executive Directors from Curt Decker and Gary Gross dated March 30, 2000, and containing this information is on file at the Advocacy Center. States are not required to report deaths in developmental disabilities facilities to CMS."

Both the agency and DCF have some statutory provisions in place regarding the use of restraint and seclusion. Section 393.13(4)(i), F.S., states, "Clients shall have the right to be free from unnecessary physical, chemical, or mechanical restraint. Restraints shall be employed only in emergencies or to protect the client from imminent injury to himself or herself or others. Restraints shall not be employed as punishment, for the convenience of staff, or as a substitute for a habilitative plan. Restraints shall impose the least possible restrictions consistent with their purpose and shall be removed when the emergency ends. Restraints shall not cause physical injury to the client and shall be designed to allow the greatest possible comfort."

Similarly, s. 394.459(4)(b), F.S., provides that "(c)lients shall have the right to be free from unnecessary physical, chemical, or mechanical restraint. Restraints shall be employed only in emergencies or to protect the client from imminent injury to himself or herself or others. Restraints shall not be employed as punishment, for the convenience of staff, or as a substitute for a habilitative plan. Restraints shall impose the least possible restrictions consistent with their purpose and shall be removed when the emergency ends. Restraints shall not cause physical injury to the client and shall be designed to allow the greatest possible comfort."

Pursuant to federal law, CMS must report Florida restraint or seclusion related deaths to the Advocacy Center. Hospitals receiving federal funds must report to CMS any deaths that occur while an individual is restrained or in seclusion or where it is reasonable to assume that an individual's death is a result of restraint and seclusion.[16]

III. Effect of Proposed Changes:

Section 1 amends s. 916.105, F.S., relating to legislative intent, making technical and grammatical revisions, adding references to the agency where appropriate, and adding intent relating to reducing the use of restraint and seclusion for forensic clients.

Section 2 amends s. 916.106, F.S., relating to definitions, making changes to:

- Provide a definition of APD and describe the jurisdiction of APD relative to forensic clients with mental retardation and autism.
- Cross-reference definitions of autism and retardation to ch. 393, F.S.
- Provide a definition of an APD civil facility to include intermediate care facilities, group homes, or supported living facilities for persons who do not require a civil facility.
- Provide a definition of "defendant" to distinguish persons who have not yet been committed and become "clients."
- Define "forensic client" as an individual committed under the act and reference the criteria for each type of commitment.
- Add APD facilities to the definition of "forensic facility" and delete obsolete language.
- Add a definition of "restraint" to include physical, mechanical, and chemical restraint.

[16] 42 CFR Sec 482.13(7)

- Add a definition of "seclusion" to include physical segregation of any kind except for medical reasons or in case of emergency situations involving a serious breach of security.

Section 3 amends s. 916.107, F.S., relating to the rights of forensic clients, adding references to APD; changes the term "defendant" to "client" because once individuals are admitted to APD or DCF facilities they are "clients;" requiring orders for emergency treatment be reviewed every 48 hours; requiring any time limit on a restriction on communication to be included in the notice; specifying that the release of confidential information comply with state and federal law; providing that clients have the right to be free from unnecessary restraint and seclusion; and updating language and references.

Section 4 amends s. 916.1075, F.S., relating to sexual misconduct between an employee ("covered person") and a forensic client, requiring direct reporting of sexual misconduct to the agency or department inspector general or a supervisor or program director who shall provide the information to the agency's inspector general.

This section deletes current law that requires the inspector general to immediately investigate the allegations and, if probable cause is found, to advise the local state attorney.

Section 5 amends s. 916.1081, F.S., relating to penalties for escaping from a forensic facility, distinguishing individuals who are forensic clients in the custody of the department or agency from those in custody of the Department of Corrections (DOC) for the purpose of referencing the correct statutory penalty.

Section 6 amends s. 916.1085. F.S., relating to the introduction and removal of certain articles that are prohibited on the grounds or in a forensic facility by adding references to APD.

Section 7 amends s. 916.1091, F.S., relating to security personnel, adding references to APD.

Section 8 amends s. 916.1093, F.S., relating to administration and rules, adding references to APD and requiring the department to adopt rules governing the use of seclusion and restraint that reflect best practices and assure resident and staff safety, as well as providing for documentation in the client's facility record.

Section 9 amends s. 916.111, F.S., relating to training of mental health experts, making technical revisions.

Section 10 amends s. 916.115, F.S., relating to appointment of experts, authorizing experts to evaluate an individual in a DOC facility, requiring DCF to maintain and provide to the courts a list of trained mental health professionals; deleting a provision authorizing fees to expert witnesses appointed by the court to evaluate a forensic client because this authorization is provided elsewhere in this section.

Section 11 amends s. 916.12, F.S., relating to mental competence to proceed, clarifying that this section applies only to mental health.

Section 12 amends s. 916.13, F.S., relating to involuntary commitment, clarifying that incompetence to proceed is due to mental illness and that commitment to the department is involuntary. This section also amends the criteria for involuntary commitment of persons who are adjudicated incompetent to proceed. Current law requires that an individual meet both of the following criteria for involuntary commitment:

- They are "manifestly incapable of surviving alone or with the help of willing and responsible family or friends, including available alternative services, and, without treatment, the defendant is likely to suffer from neglect or refuse to care for herself or himself and such neglect or refusal poses a real and present threat of substantial harm to the defendant's well-being; and

- There is a substantial likelihood that in the near future the defendant will inflict serious bodily harm on herself or himself or another person, as evidenced by recent behavior causing, attempting, or threatening such harm."[17]

The bill changes the "and" to "or" meaning that the individual would need to meet only one of these two criteria to be committed. This change will make these criteria the same as that for involuntary inpatient placement under ch. 394, F.S. According to DCF, the "and" is a drafting error. There is no indication as to whether this wording has had an impact on commitments.

Section 13 amends s. 916.145, F.S., relating to dismissal of charges, amending the catch line of the section and deleting a repetitive title.

Section 14 amends s. 916.15, F.S., relating to involuntary commitment and adjudication of not guilty by reason of insanity, stating that the determination of not guilty by reason of insanity is determined in accordance with FRCP.

Section 15 amends s. 916.16, F.S., relating to jurisdiction of the committing court, making editorial changes to clarify and update language in this section.

Section 16 amends s. 916.17, F.S., relating to conditional release, to clarify that conditional release does not apply to prison inmates and that conditional release requires an approved plan for providing appropriate outpatient care.

Section 17 amends s. 916.301, F.S., relating to the appointment of experts, moving a reference that evaluations under this part must be conducted by qualified experts with experience evaluating retardation or autism; requiring the court to appoint experts to evaluate a defendant and clarifying the persons to be selected; allowing evaluation to take place in DOC facilities; and correcting references changing DCF to APD.

Section 18 amends s. 916.3012, F.S., relating to competence to proceed, making editorial changes to clarify and update language in this section.

[17] s. 916.13, F.S.

Section 19 amends s. 916.302, F.S., relating to involuntary commitment, making editorial changes to clarify and update language in this section relating to retardation, autism, and duties of APD; and requiring the submission of an evaluation by DCF and APD for dually diagnosed defendants.

Section 20 amends s. 916.3025, F.S., relating to jurisdiction of committing court, providing that an administrative hearing officer does not have jurisdiction to determine issues of continuing commitment or release of persons with retardation or autism, permitting the court to transfer jurisdiction to a court in the circuit where the defendant resides, and making editorial changes to clarify and update language.

Section 21 amends s. 916.303, F.S., relating to determination of incompetency, clarifying the difference between grounds for involuntary commitments under ch. 393, F.S., and the requirement for continued secure placement under ch. 916, F.S., and making editorial changes to update language and references to the agency.

Section 22 amends s. 916.304, F.S., relating to conditional release, exempting inmates of DOC from this section, clarifying the difference between involuntary placements pursuant to ch. 393, F.S., and forensic commitments, and making editorial changes to update language and references to the agency.

Section 23 amends s. 921.137, F.S., relating to imposition of the death sentence on retarded defendants, making editorial changes to update language and changing references from DCF to APD.

Section 24 amends s. 985.223, F.S., relating to incompetency in juvenile delinquency cases, adding "autism" as a cause for evaluation, requiring DCF to consult APD in developing a training plan for restoration of competency; making editorial changes to update language to include references to "autism," training, and treatment and persons who have these conditions, and changing references from DCF to APD.

Section 25 amends s. 287.057, F.S., updating cross references.

Section 26 amends s. 408.036, F.S., updating cross-references.

Section 27 amends s. 943.0585, F.S., updating cross-references.

Section 28 amends s. 943.059, F.S., updating cross-references.

Section 29 provides that the bill will take effect upon becoming a law.

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:

The agency and the department report that this bill will have no fiscal impact.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.