The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Criminal Justice Committee

BILL:	SB 834
INTRODUCER:	Senator Wise
SUBJECT:	Mentally Deficient and Mentally Ill Defendants
DATE:	March 30, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	**Pre-meeting**
2.			JU	
3.			BC	
4.				
5.				
6.				

I. Summary:

Senate Bill 834 changes the definition of mental illness for purposes of ch. 916, F.S., which pertains to mentally deficient and mentally ill defendants in the criminal justice system. These are defendants who are found incompetent to proceed or, perhaps, not guilty by reason of insanity. The bill includes traumatic brain injury, as defined by the bill, in the existing definition of mental illness.

The defendants in the criminal justice system who suffer with a traumatic brain injury, and therefore under the amended definition, a mental illness, and who are found incompetent to proceed are likely to be ordered to undergo treatment with the Department of Children and Family Services.

This bill substantially amends section 916.106 of the Florida Statutes.

II. Present Situation:

Section 916.105, F.S., sets forth the intent of the Legislature regarding the responsibility of the Department of Children and Family Services (Department) and the Agency for Persons with Disabilities (Agency) as it relates to felony defendants who are found incompetent to proceed.

> (1) It is the intent of the Legislature that the Department of Children and Family Services and the Agency for Persons with Disabilities, as appropriate, establish, locate, and maintain separate and secure forensic facilities and programs for the treatment or training of defendants who have been charged with a felony and who have been found to be incompetent to proceed due to

> their mental illness, mental retardation, or autism, or who have been acquitted of a felony by reason of insanity, and who, while still under the jurisdiction of the committing court, are committed to the department or agency under the provisions of this chapter. Such facilities shall be sufficient to accommodate the number of defendants committed under the conditions noted above. Except for those defendants found by the department or agency to be appropriate for treatment or training in a civil facility or program pursuant to subsection (3), forensic facilities shall be designed and administered so that ingress and egress, together with other requirements of this chapter, may be strictly controlled by staff responsible for security in order to protect the defendant, facility personnel, other clients, and citizens in adjacent communities. …
>
> (3) It is the intent of the Legislature that evaluation and services to defendants who have mental illness, mental retardation, or autism be provided in community settings, in community residential facilities, or in civil facilities, whenever this is a feasible alternative to treatment or training in a state forensic facility.[1]

The definitions contained in s. 916.106, F.S., delineate the Agency as being responsible for training forensic clients who are developmentally disabled "due to mental retardation or autism and have been determined incompetent to proceed."[2] The Department "is responsible for the treatment of forensic clients who have been determined incompetent to proceed due to *mental illness* or who have been acquitted of a felony by reason of insanity."[3] Therefore, it is clear that any change in the definition of "mental illness" will result in a client increase or decrease, depending upon the content of the change.

Forensic clients with mental illness who are charged with committing felonies must receive appropriate treatment or training. Section 916.107(4)(a) requires that:

> Each forensic client shall receive treatment or training suited to the client's needs, which shall be administered skillfully, safely, and humanely with full respect for the client's dignity and personal integrity. Each client shall receive such medical, vocational, social, educational, and rehabilitative services as the client's condition requires to bring about a return to court for disposition of charges or a return to the community. In order to achieve this goal, the department and the agency shall coordinate their services with each other, the Department of Corrections, and other appropriate state agencies.

Mental illness is currently defined as "an impairment of the emotional processes that exercise conscious control of one's actions, or of the ability to perceive or understand reality, which impairment substantially interferes with a defendant's ability to meet the ordinary demands of living. For the purposes of this chapter, the term does not apply to defendants with only mental

[1] s. 916.105, F.S.
[2] s. 916.106(1), F.S.
[3] s. 916.106(7), F.S.

retardation or autism and does not include intoxication or conditions manifested only by antisocial behavior or substance abuse impairment."[4]

The definition of incompetent to proceed is set forth in subsection (11) of s. 916.106, F.S.[5] Section 916.12, F.S., states that a defendant 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."[6]

If mental health experts appointed by the court first determine that a defendant has a mental illness, then the experts are required to consider the following factors in determining whether the defendant is competent to proceed by considering the defendant's capacity to:

- Appreciate the charges or allegations against the defendant.
- Appreciate the range and nature of possible penalties, if applicable, that may be imposed in the proceedings against the defendant.
- Understand the adversarial nature of the legal process.
- Disclose to counsel facts pertinent to the proceedings at issue.
- Manifest appropriate courtroom behavior.
- Testify relevantly.

The experts shall consider any other factor deemed relevant by the expert.[7]

If an expert finds the defendant incompetent to proceed, the expert's report is required to include any *recommended treatment for the defendant to attain competency*. Specifically, the report shall include:

- The mental illness causing the incompetence;
- The treatment or treatments appropriate for the mental illness of the defendant and an explanation of each of the possible treatment alternatives in order of choices;
- The availability of acceptable treatment and, if treatment is available in the community, the expert shall so state in the report; and
- The *likelihood* of the defendant's attaining competence under the treatment recommended, an assessment of the *probable duration of the treatment* required to restore competence, and the *probability* that the defendant will attain competence to proceed in the *foreseeable future*.[8]

A felony defendant may be involuntarily committed by the court for treatment if the court finds by clear and convincing evidence that there is a substantial probability that the mental illness

[4] s. 916.106(13), F.S.
[5] "Incompetent to proceed" means unable to proceed at any material stage of a criminal proceeding, which shall include trial of the case, pretrial hearings involving questions of fact on which the defendant might be expected to testify, entry of a plea, proceedings for violation of probation or violation of community control, sentencing, and hearings on issues regarding a defendant's failure to comply with court orders or conditions or other matters in which the mental competence of the defendant is necessary for a just resolution of the issues being considered.
[6] s. 916.12(1), F.S.
[7] s. 916.12(3), F.S.; see also Rule 3.211, Florida Rules of Criminal Procedure.
[8] s. 916.12(4), F.S.

causing the defendant's incompetence will respond to treatment and the defendant will regain competency to proceed in the reasonably foreseeable future, among other findings.[9] Should five years lapse and the defendant remains incompetent to proceed, the charges may be dismissed without prejudice for the state to refile the case should the defendant later be declared competent.[10]

Traumatic brain injury (TBI) occurs when a sudden trauma such as a blow or a jolt causes damage to the brain. The damage can be just to one area of the brain, called a focal injury, or located in more than one area of the brain, called a diffuse injury.[11]

TBI can result from a penetrating head injury or a closed head injury. A penetrating injury occurs when an object goes through the skull and enters the brain. A closed injury can occur from any trauma that causes the brain to be violently shaken inside of the skull. A common type of closed head injury suffered in combat is known as a blast injury.[12]

Brain injuries can occur when the head strikes an object such as a windshield or the ground at a fast rate of speed, or when a flying or falling object strikes the head. Injury to the brain also can occur without a direct blow to the head, for example in cases of severe "whiplash." The trauma can cause nerve cells in the brain to stretch, tear, or pull apart, making it difficult or impossible for the cells to send messages from one part of the brain to another, and to the rest of the body.[13]

TBI can interfere with how the brain works, including thinking, remembering, seeing, and controlling movements. Traumatic brain injury can range from mild to very severe depending on many things including the force of the trauma, previous brain injuries and how quickly emergency medical treatment is given.[14]

It is estimated that each year, 1.7 million people sustain a TBI. About 75 percent of those are concussions or other mild TBI's. Children up to 4 years, adolescents between 15-19 years and adults 65 and over are most likely to sustain TBI.[15] According to the Brain Injury Association of Florida, there are over 210,000 people in Florida who have TBI.

Repeated mild TBI's that occur over an extended period of time (months, years) can result in cumulative neurological and cognitive deficits. Those that occur over a shorter period of time (hours, days or weeks) can be catastrophic or fatal.[16] It is estimated that over 5 million Americans are living with longstanding disability from TBI including cognitive, physical, psychosocial, occupational and emotional difficulties.[17]

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[9] s. 916.13(1), F.S.
[10] s. 916.145, F.S.
[11] www.traumaticbraininjuryatoz.org , last visited March 31, 2011.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] Centers for Disease Control and Prevention, www.cdc.gov/TraumaticBrainInjury/statistics.html , last visited March 31, 2011.
[16] *Id.*
[17] www.archives-pmr.org/article/S0003-9993(08)01485-8/fulltext , last visited March 31, 2011.

Active duty and reserve service members are at increased risk for sustaining a TBI compared to their civilian peers. This is a result of several factors, including the specific demographics of the military; in general, young men between the ages of 18 to 24 are at greatest risk for TBI. Many operational and training activities which are routine in the military are physically demanding and even potentially dangerous. Military service members are increasingly deployed to areas where they are at risk for experiencing blast exposures from improvised explosive devices (IEDs), suicide bombers, land mines, mortar rounds, rocket-propelled grenades, etc. These and other combat related activities put our military service members at increased risk for sustaining a TBI.[18]

The long-term symptoms of TBI can be divided into several categories, including physical changes, cognitive effects, sensory effects, perceptual effects, social/emotional changes and others. The symptoms and effects will vary greatly from one patient to another, depending on the severity of the TBI.

PHYSICAL
Physical Changes:

- Sleep disorders
- Loss of stamina
- Appetite changes
- Physical paralysis/spasticity
- Chronic pain
- Control of bowel and bladder
- Seizures
- Difficulty regulating body temperature
- Hormonal challenges

COGNITIVE
Cognitive Difficulties relating to:

- Attention
- Concentration
- Distractibility
- Memory
- Speed of Processing
- Confusion
- Perseveration, the abnormal persistent repetition of a word gesture or act.
- Impulsiveness
- Language Processing
- Executive functions – which are involved in brain processes such as planning, cognitive flexibility, abstract thinking, rule acquisition, initiating appropriate actions and inhibiting inappropriate actions, and selecting relevant sensory information.

[18] www.cemm.org , last visited March 31, 2011.

SPEECH and LANGUAGE

Speech and Language Effects:

- Receptive Aphasia – which involves difficulty understanding the spoken word
- Expressive Aphasia - in which the patient knows what he wishes to say but is unable to get the words out. In some cases, the patient is able to perceive and comprehend both spoken and written language but is unable to repeat what he sees or hears.
- Slurred speech
- Speaking very fast or very slow
- Problems reading
- Problems writing

SENSORY

Sensory Difficulties relating to the interpretation of:

- Touch
- Temperature
- Movement
- Limb position
- Fine discrimination

Perceptual Effects:

- Difficulty integrating and understanding information gained through the five senses

  Vision:
  - Partial or total loss of vision
  - Weakness of eye muscles and double vision (diplopia)
  - Blurred vision
  - Problems judging distance
  - Involuntary eye movements (nystagmus)
  - Intolerance of light (photophobia)

  Hearing:
  - Decrease or loss of hearing
  - Ringing in the ears (tinnitus)
  - Increased sensitivity to sounds

  Smell:
  - Loss or diminished sense of smell (anosmia)

  Taste:
  - Loss or diminished sense of taste

SOCIAL EMOTIONAL

Social-Emotional Effects:

- Dependent behaviors
- Fluctuating emotions
- Lack of motivation
- Irritability
- Aggression
- Depression
- Lack of inhibition

- Denial/lack of awareness[19]

III. Effect of Proposed Changes:

Senate Bill 834 amends the definition of mental illness in ch. 916, F.S, relating to mentally deficient and mentally ill defendants. The bill includes traumatic brain injury as a mental illness and defines traumatic brain injury as a form of acquired brain injury that occurs when a sudden trauma causes damage to the brain and a severe change in emotional, behavioral, and cognitive functions.

The change of the definition is likely to lead to an increase in forensic clients for the Department of Children and Family Services, the department responsible for restoring defendants to competency to proceed with their criminal cases. The particular difficulties faced by this population is unfamiliar to the Department. While it is impossible to quantify, the special needs that clients with TBI would have will likely result in the need for a different treatment and training protocol than the department is currently utilizing with its forensic clients.

Other Potential Implications:

The Department states that it does not have the present capacity nor expertise to provide the necessary and appropriate services to individuals with TBI. The department could be subject to potential litigation due to the inability to serve this population. Past examples of similar litigation include a Broward county case in 1998, which the Department of Risk Management settled for $17.5 million.[20]

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

[19] www.traumaticbraininjuryatoz.org , last visited March 31, 2011.
[20] Department of Children and Family Services Staff Analysis and Impact Statement, February 8, 2011.

B. Private Sector Impact:

None.

C. Government Sector Impact:

According to the Department, to provide such specialized inpatient treatment, the cost for these individuals would significantly exceed the current average of $333 per day in a forensic facility, facilities would need to provide: 1) Additional services, such as occupational and speech therapy, neurobehavioral specialists, neurologists, 2) Increased staffing levels, and 3) Specialized units. There are a limited number of residential programs in Florida that treat individuals with traumatic brain injuries. While the majority of programs that serve individuals with TBI are acute, rehab focused programs, there are four facilities, operated by two different companies, that provide longer-term care, or transitional living. These programs cost significantly more than forensic facilities and would include the aforementioned specialized services and staffing levels. As a cost comparison, the department obtained cost information for three of the four transitional living facilities:

Neurorestorative Florida (Orlando and Lutz locations); $1,115/day
Florida Institute of Neurological Rehabilitation: $900/day

However, computing the actual cost associated with the bill is not possible because the additional number of forensic clients that would result from the bill cannot be accurately predicted.[21]

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

[21] *Id.*