

STORAGE NAME: h3247z.ltc

DATE: June 25, 1998

****FINAL ACTION****

****SEE FINAL ACTION STATUS SECTION****

**HOUSE OF REPRESENTATIVES
REVISED BY THE COMMITTEE ON
Elder Affairs & Long Term Care
FINAL BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: CS/CS/HB 3247 (Passed as CS/CS/SB 442)

RELATING TO: Forensic Client Services

SPONSOR(S): Committee on Family Law and Children; Committee on Elder Affairs & Long Term Care and Representative Argenziano

COMPANION BILL(S): CS/CS/SB 442

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

- (1) Elder Affairs & Long Term Care YEAS 7 NAYS 0
- (2) Family Law and Children YEAS 8 NAYS 0
- (3) Crime & Punishment YEAS 8 NAYS 0
- (4) Health & Human Services Appropriations W/D
- (5)

I. FINAL ACTION STATUS:

Passed the Legislature as CS/CS/SB 442. Chapter 98-92, L.O.F.

II. SUMMARY:

The bill reorganizes chapter 916 relating to forensic services into three Parts:

- Part I General Provisions
- Part II Persons who are Mentally Ill
- Part III Persons who are Retarded or Autistic

It includes autism with mental retardation as a condition which could be cause for a person to be determined incompetent to proceed. The factors which experts must consider when determining incompetence are provided. It authorizes the court to order specialized residential or outpatient placement for persons with mental retardation or autism.

It also revises provisions related to the estimated pay for jurors and witnesses to make a technical correction to a reference.

No significant fiscal impact is projected.

III. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

Currently, persons who commit a felony criminal offense are subject to the provisions of chapter 916, F.S., which provides that the intent of the Legislature is to offer facilities and services for persons who have been judged to be mentally retarded or mentally ill and either unable to participate in the criminal justice process (incompetent) or found not guilty by reason of insanity. The existing statute does not delineate explicit and separate requirements for the two groups: mentally ill and mentally retarded. The statute also does not recognize autism as a condition which would qualify the defendant for involuntary commitment when found incompetent.

Associations for Retarded Citizens across the country have expressed concern that as more people with mental retardation move out of institutions and into the community, their susceptibility to becoming involved in the criminal justice system as a victim, witness or suspect of a crime may increase sharply. The Florida Commission on Long Term Care estimated that there were approximately 63,000 persons in Florida who are developmentally disabled. This bill would only address the subset of that population who are mentally retarded or autistic and who have been charged with a felony.

Leigh Ann Reynolds in her article "People with Mental Retardation in the Criminal Justice System" (October, 1995) wrote that persons with developmental disabilities often have a strong need to be accepted and liked. Since persons with developmental disabilities find that they are often being corrected for being "wrong", a coping strategy known as "*accommodation*" becomes common. Asked a question, the disabled person attempts to give the desired or "right" answer. This "*accommodation*" increases their vulnerability to arrest, incarceration and possibly execution, even if they committed no crime (Perske, 1991). Some common responses from those with mental retardation that may affect their ability to meaningfully participate in a criminal investigation include the following. The person may:

- not want their disability to be recognized (and try to cover it up)
- not understand their rights (but pretend to understand)
- not understand commands
- be overwhelmed by police presence
- act upset at being detained and/or try to run away
- say what he or she thinks others want to hear
- have difficulty describing facts or details of offense
- be the first to leave the scene of the crime, and the first to get caught
- be confused about who is responsible for the crime and "confess" even though innocent (Reynolds 1995)

Persons with mental retardation are more likely to be arrested, convicted, sentenced to prison and victimized in prison (Santamour, 1986). Once in the criminal justice system, these individuals are less likely to receive probation or parole and tend to serve longer sentences due to an inability to understand or adapt to prison rules.

"Autism" is defined in F.S. 393.063(2) as a pervasive, neurologically based developmental disability of extended duration which causes severe learning, communication, and behavior disorders with age of onset during infancy or childhood.

Individuals with autism exhibit impairment in reciprocal social interaction, impairment in verbal and nonverbal communication and imaginative ability, and a markedly restricted repertoire of activities and interests.

“Retardation” is defined in F.S. 393.063(43) as significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18.

The Florida Rules of Criminal Procedure govern legal procedures regarding incompetence to proceed, and judgments of not guilty by reason of insanity.

B. EFFECT OF PROPOSED CHANGES:

The bill separates mental illness into a section separate from the one dealing with mental retardation and autism. This will have the effect of clearly identifying the needs of both populations. For example, persons with mental illness require treatment. Persons with mental retardation or autism require *training*. It will provide a time certain for charges to be dropped against mentally ill, mentally retarded, and autistic persons who do not and, seemingly can not, regain competence.

A new section provides standards for allowing a mentally retarded or autistic defendant to be ordered into “conditional release.” Further, the bill anticipates the use of community-based residential services and care as an alternative to placement in a residential facility. It recognizes the possibility of **secure involuntary placements being community sites**.

It provides technical changes to update language referring to “clients” instead of “patients”. It also adds definitions to this chapter to reduce the need to consult other parts of the statutes. It directs the courts to pay only for those reports from experts which address specifically all of the factors the court is required to consider. Experts would not be reimbursed for incomplete reports. Further, it will reduce from twice to once per year the duty of the Department of Children & Family Services (DC&FS) to submit a list of qualified persons to the court for their consideration as mental health experts. The bill would require the department to submit annually the list of retardation and autism experts.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

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

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

No.

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

No.

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

No.

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

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

N/A

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

N/A

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

N/A

2. Lower Taxes:

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

The bill does not increase taxes.

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

No.

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

No.

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

No.

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

No.

3. Personal Responsibility:

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

No.

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

N/A.

4. Individual Freedom:

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

The bill affects only persons charged with a felony violation of criminal law.

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

No.

5. Family Empowerment:

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

- (1) Who evaluates the family's needs?

The bill does not purport to provide services to families or children.

- (2) Who makes the decisions?

N/A

- (3) Are private alternatives permitted?

N/A

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

N/A

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

N/A

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

N/A

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

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

Chapters 40, 393, 394, 916, F.S.

E. SECTION-BY-SECTION RESEARCH:

Section 1. This section makes a technical reference correction to chapter 40.

Section 2. This section amends s. 393.11, F.S., Involuntary admission to residential services which governs state programs and services related to persons with certain developmental disabilities. It adds autism as a condition, in addition to mental retardation, that may subject a person to involuntary commitment to residential services under this section.

It specifies that a petition for involuntary admission to residential services that arises because of criminal justice system involvement (ch. 916) may be filed by the Department of Children & Family Services (DCFS), the state attorney of the circuit from which the defendant was committed, or the defendant's attorney in addition to the petitioning commission.

For notice of the filing of a petition, this section changes the term "parent or parents" to "legal guardian". Further, this section provides that notice of the filing of the petition

must be given to the person's defense attorney, and the state attorney of the committing circuit, in addition to the department and the person's counsel requires that the petition also state the factual basis on which the petitioner seeks an order of involuntary commitment to residential services.

It adds the state attorney and the defendant's defense counsel to those who must receive a copy of an order of involuntary admission entered by a court. It specifies that a court order is required to release a person from involuntary commitment. This section adds the person's legal guardian to those who must receive notice. The petitioner is required to state the factual basis on which the involuntary commitment is sought.

Section 3. This section amends s. 394.467, F.S., Involuntary Placement to make a technical and conforming change by reenacting section 394.467(7)(a), Procedure for Continued Involuntary Placement.

Section 4. This section creates Part I of chapter 916, F.S., which is entitled General Provisions.

Section 5. This section amends s. 916.105 Legislative intent to make a technical correction to the department's name and provides that the department will make arrangements for the **training** of persons charged with a felony who have been found "incompetent to proceed" because of their autism or mental retardation.

Section 6. This section amends s.916.106, Definitions to include definitions of: autism, civil facility, express and informed consent, and forensic client. The definition of "forensic client" specifies that it includes any defendant who is:

- ▶ mentally ill, mentally retarded, or autistic,
- ▶ committed to DC&FS pursuant to 916 for treatment or **training**, and
- ▶ has been found "incompetent to proceed" or "not guilty by reason of insanity" on a felony offense, and
- ▶ is an adult or juvenile prosecuted as an adult.

It provides that Florida State Hospital would no longer be required to maintain separate facilities for mentally retarded or autistic defendants.

It also provides a definition of "incompetent" and makes changes to the definition of "mental illness" to exclude persons who are solely mentally retarded or autistic or suffering from intoxication. It revises the phrase "drug addiction" to "substance abuse impairment". Further, the section provides a definition of social services professional. This section references the definitions of autism and retardation found in chapter 393.

Section 7. This section amends s. 916.107 Rights of Forensic Clients. It provides that mentally ill, mentally retarded, or autistic defendants being held in a jail because of a finding of *not guilty by reason of insanity* (NGI) or of *incompetent to proceed* would receive evaluation, treatment or training.

For persons with autism or mental retardation, the evaluation, treatment, or training would be provided by the developmental services program, the person's physician or psychologist, or any other "appropriate program", until the person is transferred to the

custody of the department. For mental health services, the local public receiving facility would be required to provide services.

This section provides that persons with mental retardation or autism would have the same rights as any other persons committed to civil facilities as described in 393 or 394, F.S. It provides that the department's policy to not deny treatment (mental health) because of a person's inability to pay will apply also to training (retardation or autism).

It provides in Subsection (5) that clients would have the right to contact and receive communication from their attorneys at "any reasonable time." It would require that the institution use a language the client understands to explain how to report abuse.

It revises the confidentiality requirements associated with the clinical record. It would allow clinical records to be released to the person's attorney when needed to provide adequate legal representation and to next of kin. Further, this section expands the obligation of the administrator to authorize release sufficient information to prevent harm, if a client voices an intention to do harm to other persons. The information must be released to the committing court, the state attorney, the client's attorney, and the person threatened with harm.

This section makes a number of technical and conforming changes.

Section 8. This section amends s. 916.175 Escape and renumbers it as s. 916.1081. It also provides technical changes.

Section 9. This section renumbers s. 916.178, Introduction or removal of certain articles unlawful, as s. 916.1085. It makes technical changes in this section which governs the introduction or removal of unlawful articles from a facility under control of the department. It would allow a law enforcement officer in addition to institutional security personnel to enforce the provisions of this section.

Section 10. This section renumbers s. 916.19, Institutional security personnel, as s. 916.1091 and makes a technical change.

Section 11. This section renumbers s. 916.20 as s. 916.1093.

Section 12. This section creates Part II of chapter 916 entitled Forensic Services for Persons Who are Mentally Ill.

Section 13. This section renumbers s. 916.108, Training of mental health experts, as s. 916.111 and makes a technical change.

Section 14. This section renumbers s. 916.11, Appointment of experts, as s. 916.115 and provides that the department shall provide the courts with a list of mental health professionals qualified as experts once a year instead of twice a year. To the extent possible, the expert evaluators should have completed training approved by the department.

It provides that experts can be paid only if their reports and testimony explicitly address each of the factors and follow the procedures set out in chapter 916 and in the Florida Rules of Criminal Procedure.

Section 15. This section amends s. 916.12, Mental competence to proceed, to use the phrase “proceed to trial” instead of “stand” trial. The section provides procedures and criteria for deciding whether or not a defendant is competent to proceed to trial.

Section 16. This section amends s. 916.13, Involuntary Commitment to specify that only a defendant charged with a felony and adjudicated “incompetent to proceed” may be considered for involuntary commitment for treatment. It provides further that a defendant can be committed only if there is substantial probability that the mental illness will respond to treatment and the defendant will regain competency to proceed in the “reasonably foreseeable future.”

This section deletes paragraph (b) of s. 916.13(2) which had provided authority for the department to order a mentally retarded defendant found “incompetent to proceed” to a secure facility, for annual judicial hearings, and for continuation of the commitment if the client was judged likely to physically injure other people. It specified that no one could be committed involuntarily for a period of time longer than the maximum for the sentence for the crime being charged. These provisions have been moved to the new Part III of chapter 916 which includes all matters related to persons with mental retardation or autism.

Section 17. This section provides technical changes to s. 916.14 Statute of Limitations.

Section 18. This section amends s. 916.145 to provide for the dismissal of charges if the defendant remains incompetent **from mental illness** after a reasonable time not to exceed five years unless the court believes that the person will become competent within the foreseeable future. In that case, the court must specify a time frame for regaining competency. At the end of that time, if the defendant is still not competent, the charges would be dismissed without prejudice and the state would be allowed to refile if the defendant became competent in the future. It also removes “mental retardation” from this section of the statute.

Section 19. This section amends s. 916.15 Not guilty by reason of insanity to make technical corrections.

Section 20. This section amends s. 916.16 Jurisdiction of the committing court to clarify that the *criminal* court would retain jurisdiction when a defendant is hospitalized because of a finding of *incompetent to proceed* or *NGI*. It deletes the reference to mentally retarded persons being admitted to residential services. The committing criminal court would retain jurisdiction in cases of conditional release. This section provides that the defendant on conditional release can be released from those requirements only by order of the committing criminal court.

Section 21. This section amends s. 916.17 Conditional release to provide that the committing criminal court may order a conditional release instead of involuntary commitment to a forensic facility. If outpatient treatment is appropriate, this section provides for copies of a written plan filed with the court to be submitted to all parties. It also requires the filing of an affidavit or statement under oath that the defendant fails to comply with the conditions of release in order for the court to hold a hearing to modify the conditions, or appoint experts to determine whether the person meets the criteria for

involuntary treatment and should be returned to the department for involuntary commitment.

Section 22. This section creates Part III of chapter 916 Forensic Services for Persons Who are Mentally Retarded or Autistic.

Section 23. Section 916.301 Appointment of Experts is created to direct the department to provide annually a list of qualified mental retardation and autism professionals who are qualified to evaluate defendants to determine "capacity to proceed". The court may select from that list when appointing an expert.

It also requires the court to appoint two experts one of whom must be the developmental services program of the department, to evaluate whether the defendant meets the definition of retardation or autism and, if so, whether the defendant is competent to proceed.

It also provides that at the request of any party, the court must appoint one additional expert to evaluate the defendant. The expert appointed by the court will evaluate whether the defendant meets the definition of mental retardation or autism and, if so, whether the defendant is competent to proceed. The developmental services program shall select a psychologist who is licensed or authorized by law to practice in this state, with experience in evaluating persons suspected of having mental retardation or autism, and a social service professional with experience in working with persons with mental retardation or autism to evaluate the defendant. The psychologist shall evaluate whether the defendant meets the definition of mental retardation or autism and, if so, whether the defendant is incompetent to proceed due to mental retardation or autism. The social service professional shall provide a social and developmental history of the defendant.

All evaluations ordered by the court must be from qualified experts with experience in evaluating persons with mental retardation or autism and may include, but is not limited to, psychologists, physicians, or psychiatrists licensed or authorized by law to practice in this state. The panel of experts may examine the defendant in jail, in another appropriate local facility, or on an out-patient basis.

Section 24. Section 916.3012 Mental competence to proceed is created to provide that a person with mental retardation or autism is considered "incompetent to proceed" if he or she does not have sufficient **present** ability to consult with the defendant's attorney, or if the person has no rational and factual understanding of the proceedings.

The experts are directed to consider the following:

Does the defendant have capacity to:

- ▶ appreciate the charges or allegation pending,
- ▶ appreciate the range and nature of possible penalties,
- ▶ understand the adversarial process involved,
- ▶ disclose pertinent facts to the counsel,
- ▶ behave appropriately in the courtroom,
- ▶ testify relevantly.

If the experts decide the defendant is incompetent to proceed, they would be required to submit a report to the court advising whether retardation or autism caused the incompetence, recommendations for training and its availability, and the likelihood of the defendant attaining competence.

Section 25. Section 916.302 Involuntary commitment of defendant “incompetent to proceed” due to mental retardation or autism is created. The court may involuntarily commit a person for training upon a finding by the court of clear and convincing evidence that the defendant:

- ▶ is mentally retarded or autistic,
- ▶ is very likely in the near future to harm self or others,
- ▶ requires a secure setting and that all less restrictive settings have been judged inappropriate,
- ▶ is likely to respond to training and regain competency in the “reasonably foreseeable future”.

It provides further detailed criteria and procedures for commitment of a defendant to the department, for placement of a defendant in a facility, and for transfer of a defendant from one secure facility to another. It prohibits the department from transferring a defendant from a secure facility to a nonsecure facility without notifying the court and all parties 30 days before the proposed transfer.

It provides that dually diagnosed defendants (both mentally ill and retarded or autistic) must be evaluated to address which condition is primarily affecting competency to proceed. Transfer of the defendant from one program or facility to another would require an amended order from the committing court.

Section 26. This section creates s. 916.3025 Jurisdiction of the committing court. It provides for the continuing jurisdiction of the committing court in the case of a defendant found “incompetent to proceed” and ordered into a secure facility and of a defendant placed on conditional release. In the case of persons involuntarily committed to residential services after the charges are dismissed, the committing court shall retain jurisdiction.

Section 27. Section 916.303 Determination of incompetency due to mental retardation or autism is created. It provides that, if a defendant found incompetent because of autism or retardation continues to be incompetent after a period of time as allowed, the charges would be dropped without prejudice to the state. The state would be free to refile the charges, if the defendant became competent in the future.

Under certain circumstances, if after the charges are dropped because of continuing incompetency the person remains unable to give consent for services, the state attorney or the defendant’s attorney may request involuntary commitment under the provisions provided in s. 393.11.

If the defendant requires involuntary residential services pursuant to s. 393.11, and there is a substantial likelihood of escape, or of danger to self or others, the petitioning party may petition the committing court for continued placement in a secure facility or program. Less restrictive alternatives must be considered before seeking an order for continued placement in a secure program or facility.

It would also require that a defendant admitted involuntarily pursuant to this paragraph would have his or her status reviewed at least once a year at a hearing. The annual hearing would determine whether the person continues to meet the criteria for involuntary commitment. It provides for notices to affected parties. Further, it provides that in no instance can a defendant be held longer in the secure program or facility than what the maximum sentence for the crime charged would have been.

Section 28. Section 916.304 Conditional Release is created. This section provides that the committing criminal court may order "conditional release" for any defendant found incompetent to proceed. The court would be required to receive an approved plan for community-based training. The plan would be required to contain certain elements including recommendations for placement and supervision and auxiliary services needed. In its order, the court would be required to direct the appropriate agencies or persons to submit periodic reports to the court regarding the defendant's compliance with the plan. These reports would also be sent to all affected parties.

The court would be required to hold a hearing if it received an affidavit or sworn statement that the defendant has failed to comply with the conditions of release, or that the defendant has deteriorated. The court may modify the conditions of release or order the defendant to be returned to involuntary residential commitment. The court is authorized to terminate its jurisdiction and discharge the defendant if after a hearing it is determined that the court-supervised care is no longer necessary.

Section 29. This act shall take effect of October 1 of the year in which it is enacted.

IV. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

The affected agencies have reported no significant effects.

2. Recurring Effects:

The Office of the State Courts Administrator reports an anticipated recurring cost of \$28,757. This cost is based on their estimate of the costs of reimbursing experts appointed by the Court. The Office reports that this cost is not anticipated to require a specific or additional appropriation.

3. Long Run Effects Other Than Normal Growth:

None are anticipated.

4. Total Revenues and Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

No significant effects are anticipated.

2. Recurring Effects:

No significant effects are anticipated.

3. Long Run Effects Other Than Normal Growth:

No significant effects are anticipated.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

No new costs are projected.

2. Direct Private Sector Benefits:

No direct economic private sector benefits are projected.

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

No effects on competition, private enterprise and employment markets are projected.

D. FISCAL COMMENTS:

None of the affected groups, State Attorneys, Public Defenders, DC&FS, or the Office of the State Courts Administrator reported a fiscal impact from these changes.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

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

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

VI. COMMENTS:

The bill proposes that the department provide a list of mental health professionals who have been approved as experts once per year instead of semiannually as is currently required. The Florida Mental Health Institute provides this training year around. It may be of some benefit to the courts to have the list of experts updated more frequently than twice a year in current law instead of reducing the frequency to once per year.

The bill proposes the definition of a "social services professional." It seems that this is to provide an opportunity for the courts to appoint an expert knowledgeable about mental retardation or autism but who is not licensed under any of the social services, health care, or medical licensure statutes. However, the law already prescribes a standard for a judge to use when deciding whether or not a witness can be considered an "expert."

The Public Defender's Association has raised a concern that the person's attorney (whether appointed for civil or criminal representation) should not be permitted to petition the court for involuntary commitment. The Public Defender's Association believes that to do so would be a violation of their ethical obligation to protect the client's liberty interests. This provision appears on page 48, lines 10-13 and lines 23-26 of the bill.

References Cited:

Leigh Ann Reynolds: People with Mental Retardation in the Criminal Justice System, October 1995

R. Perske: Unequal Justice? What Can Happen When Person with Disabilities Encounter the Criminal Justice System. Nashville: Abingdon Press, 1991.

M. Santamour: The offender with mental retardation. The Prison Journal, 66 (7), 1986, Spring-Summer .

VII. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

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VIII. SIGNATURES:

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