SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: SB 14-A

SPONSOR: Senator Mitchell & others

SUBJECT: Executing the Mentally Retarded

DATE: January 6, 2000 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Gomez	Cannon	CJ	Withdrawn
2.				
3.				
4.				
5.				

I. Summary:

In Florida, there exists no per-se prohibition against executing a mentally retarded capital felon. In 1989, the United States Supreme Court held that the eighth amendment's cruel and unusual punishment clause does not prohibit the execution of a mentally retarded capital felon. However, that case made clear that mental retardation must be allowed to be considered as a mitigating circumstance.

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

This bill amends ss. 921.141 and 921.142, F.S., by providing that the court shall conduct a separate proceeding upon conviction or upon a defense pretrial motion to determine whether a capital defendant should be sentenced to life imprisonment because the defendant suffers from mental retardation.

The bill defines mental retardation for purposes of ss. 921.141 and 921.142, F.S. The bill sets a 55 IQ as the minimum score which establishes the low intellectual functioning prong of the mental retardation definition. The effect in practical terms is that a person that has an IQ of 55 or less will likely establish an exemption from the death penalty. A score of 55 describes the lower end of the "mildly retarded" and the starting point for those labeled "moderately retarded."

This bill substantially amends the following sections of the Florida Statutes: 921.141, 921.142, and 924.07.

II. Present Situation:

A. Death Penalty Sentencing Procedures -- Generally

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

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

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

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

B. The Definition of Mental Retardation

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

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

Florida currently defines mental retardation in chapters 916 and 393. The Florida definition specifies that "significantly subaverage general intellectual functioning" means "performance which is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the department." ss. 916.106(12) & 393.063(43), F.S. In practice, this means that the person has an IQ of 70 or less, although it can be extended up to 75. *Id*; DSM IV. The Florida definition also specifies that "adaptive behavior" means "the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of the individual's age, cultural group, and community." The DSM IV defines this prong as "significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety."

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

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

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

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

The DSM IV describes moderate retardation as follows:

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

Mental retardation should be contrasted with mental illness, the main difference being that mental retardation is not an illness. "Mentally ill people encounter disturbances in their thought processes and emotions; mentally retarded people have limited abilities to learn." Ellis & Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414, 424 (1985).

C. Executing the Mentally Retarded is authorized in Florida

In Florida, there exists no per-se prohibition against executing a mentally retarded capital felon. In 1989, the United States Supreme Court held that the eighth amendment's cruel and unusual punishment clause does not prohibit the execution of a mentally retarded capital felon. *Penry v. Lynaugh*, 492 U.S. 302, 340, 109 S.Ct. 2934, 2958, 106 L.Ed.2d 256 (1989). The Florida Supreme Court has followed *Penry*, and rejected an argument that there should be "a minimum IQ score below which an execution would violate the Florida Constitution." *Thompson v. State*, 648 So.2d 692, 697 (Fla. 1994). However, *Penry* made clear that mental retardation must be allowed to be considered as a mitigating circumstance. The Florida Supreme Court treats "low intelligence as a significant mitigating factor with the lower scores indicating the greater mitigating influence." *Thompson*, *supra*. Further, *Penry* stated that execution of a person who was severely or profoundly mentally retarded "may indeed be 'cruel and unusual' punishment."

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

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

On the other hand, in *Reilly v. State*, 601 So.2d 222 (Fla. 1992), the court reduced a death sentence to life imprisonment where the jury had recommended life; there was evidence that Reilly was "borderline retarded," with an IQ level of 80; and there was expert testimony that Reilly was "brain impaired" with "severe learning disabilities." Further, in *Sinclair v. State*, 657 So. 2d 1138 (Fla. 1995), the court under proportionality review reduced a death sentence to life imprisonment because the sole aggravating circumstance was substantially outweighed by mitigation that included that Sinclair had a "low intelligence level" coupled with "emotional disturbances." *See also Phillips v. State*, 608 So.2d 778, 783 (Fla. 1992) (reversing for new penalty phase hearing because defendant's original trial counsel failed to elicit mitigation which established defendant was "borderline retarded" with IQ scores from 73 to 75 and emotionally, intellectually, and socially deficient, with lifelong deficits in his adaptive functioning).

Although Florida does not have a per-se prohibition on the execution of the mentally retarded, it does prohibit an insane person from being executed, upon a showing that he or she is insane at the time of execution. s. 922.07, F.S.; Fla.R.Crim.P. 3.811 & 3.812; *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986)(8th Amendment prohibits execution of an insane person). Further, Florida does not have a statutory age minimum for execution, although the Florida Supreme Court has set the floor at 15, under the Florida Constitution. *Allen v. State*, 636 So.2d 494 (Fla. 1994)(death penalty imposed upon 15-year-old for first-degree murder violated state constitutional prohibition of cruel or unusual punishment); *See also Thompson v. Oklahoma*, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (4 members of the court would hold that eighth amendment prohibits the execution of a person who was under 16 at time of offense).

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

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

Since *Penry*, a number of other state legislatures have enacted statutes which prohibit the execution of the mentally retarded. The following chart lists all states currently exempting the mentally retarded and the statutory definition:

State Statutes Prohibiting the Death Penalty for People w/Mental Retardation			
State	**Statute Citation**	**Definition of MR**	**Qualified Examiners**
Arkansas	Ark. Code Ann. s. 5-4-618 (1993)	Significantly subaverage general intellectual functioning accompanied by significant deficits or impairments in adaptive functioning, and manifested in the developmental period. The age of onset is 18. There is a rebuttable presumption of mental retardation when the defendant has an IQ of 65 or below.	There is no information on this aspect in the statute.
Colorado	Colo. Rev. Stat. s. 16-9-401-403.	Any defendant with significantly subaverage general intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested and documented during the developmental period. The requirements for documentation may be excused by the court upon a finding that extraordinary circumstances exist. The court does not define extraordinary circumstances. The law does not give a numerical IQ level.	There is no information on this aspect in the statute.
Georgia	Ga. Code Ann. s.17-7-131(j)	"...Significantly subaverage intellectual functioning resulting in or associated with impairments in adaptive behavior which manifests during the developmental period." (AAMR 1983 definition; see Grossman, H. *Manual on Terminology and Classification.* (8th ed.) AAMR 1983)	Court-appointed licensed psychologists or psychiatrists, or physicians or licensed clinical psychologists chosen and paid for by the defendant.
Indiana	Ind. Code s.35-36-9-1 et seq.	An individual before becoming 22 years of age, manifests: (1) significantly subaverage intellectual functioning; and (2) substantial impairment of adaptive behavior that is documented in a court-ordered evaluative report.	Statute does not specify if the court can appoint psychologists or psychiatrists. Attorneys should probably obtain this information from trial court at pre-trial.

State Statutes Prohibiting the Death Penalty for People w/Mental Retardation			
State	**Statute Citation**	**Definition of MR**	**Qualified Examiners**
Kansas	Kan. Stat. Ann. s.21-4623	An individual having significantly subaverage general intellectual functioning to an extent that substantially impairs one's capacity to appreciate the criminality of one's conduct or conform one's conduct to the requirements of law. The statute does not define adaptive behavior or the age of onset. However, Kan. Stat. Ann. s.76-12b01 defines these terms. Adaptive behavior refers to the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of that person's age, cultural group and community. The age of onset must be prior to 18 years old.	There is no information on this aspect in the statute.
Kentucky	Ky. Rev. Stat. s.532.130-140	A significant subaverage intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested during the developmental period. The age of onset is 18 years old. Significantly subaverage general intellectual functioning is defined as an IQ of 70 or below. (See Grossman, H. Manual on Terminology and Classification. (8th ed.) AAMR (1983)	There is no information on this aspect in the statute.
Maryland	Md. Code Ann. art. 27 s.412	An individual who has significantly subaverage intellectual functioning as evidenced by an IQ of 70 or below on an individually administered IQ test, and impairment in adaptive behavior. The age of onset is before the age of 22.	There is no information on this aspect in the statute.
New Mexico	N.M. Stat. Ann. s.31-20A-2.1 (1978)	Mental retardation refers to significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior. An IQ of 70 or below on a reliably administered IQ test shall be presumptive evidence of mental retardation.	There is no information on this aspect in the statute.
New York	N.Y. Crim. Proc. s.400.27(12)	The statute uses the most recent American Association on Mental Retardation definition (1992). N.Y. Statute does not list specific levels of intelligence, nor does it go into detail regarding adaptive skills.	No specifics noted--"psychiatrist, psychologist or other trained individual"

State Statutes Prohibiting the Death Penalty for People w/Mental Retardation			
State	**Statute Citation**	**Definition of MR**	**Qualified Examiners**
Tennessee	Tenn. Code Ann., tit. 39, ch. 13, pt. 2 s.39-13-203	(1) Significantly subaverage general intellectual functioning as evidenced by a functional IQ of 70 or below; (2) deficits in adaptive behavior; and (3) the mental retardation must have been manifested during the developmental period or by age 18. The statute does not define "deficits in adaptive behavior." The statute clearly provides that adaptive behavior and intellectual functioning are independent criteria.	There is no information on this aspect in the statute.
Washington	Was. Rev. Code Ann. s.10.95.030 (West)	The individual has (1) significantly subaverage general intellectual functioning; (2) existing concurrently with deficits in adaptive behavior; and (3) both significantly subaverage general intellectual functioning and deficits in adaptive behavior were manifested during the developmental period. The age of onset is 18 years of age. The required IQ level is 70 or below (see Grossman, 1983).	A court-appointed licensed psychiatrist or psychologist experienced in the diagnosis and evaluation of mental retardation. This leaves open the issue of whether or not the defendant may hire his own expert.
Federal Gov't	18 U.S.C.A. s3597[c] (Federal Crime Bill of 1994)	In 1994, Congress unanimously adopted legislation to ban the execution of individuals with mental retardation. The statute states that a sentence of death shall not be carried out upon a person who has mental retardation. The statute does not define mental retardation, or discuss at what stage in the criminal proceedings the determination of mental retardation must be made. Earlier, Congress had also provided a form of an exemption for this issue in the Anti-Drug Abuse Act of 1988 (Pub. L. No. 100-690).	

Source: "Mental Retardation and the Death Penalty: Current Status of Exemption Legislation," *Mental and Physical Disabilities Law Reporter,* September - October 1997, p.687.

E. Mentally Retarded and Mentally Ill Defendant Treatment and Incompetency

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

The Florida Criminal Rules outline the procedures for determining a defendant's competency to proceed to trial or sentencing. Fla.R.Crim.P. 3.210, 3.211, 3.212, 3.213. Among the relevant

factors which appointed experts must consider in making a competency determination is the defendant's capacity to appreciate the charges and the nature of the possible penalties.

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

III. Effect of Proposed Changes:

This bill amends ss. 921.141 and 921.142, F.S., by providing that the court shall conduct a separate proceeding upon conviction, or upon a defense pretrial motion, to determine whether a capital defendant should be sentenced to life imprisonment because the defendant suffers from mental retardation.

The bill provides that the court *shall* sentence the defendant to life imprisonment if it finds by a preponderance of the evidence that the defendant suffers from mental retardation as defined in the bill. The effect is to create an exemption from the death penalty for the mentally retarded. Currently, mental retardation is considered in death cases only as a mitigating circumstance which may be outweighed by aggravating circumstances. *See* "Present Situation."

The bill defines mental retardation for purposes of ss. 921.141 and 921.142, F.S. The definition is substantially similar to the mental retardation definition in s. 916.106, F.S. The definition in the bill has three prongs: low intellectual functioning; deficits in adaptive behavior; and, manifestation of conditions by age 18. Unlike the s. 916.106, F.S., definition, the low intellectual functioning prong of the bill contains a set IQ level, at 55. The effect in practical terms is that a person that has an IQ of 55 or less will likely establish an exemption from the death penalty. A score of 55 describes the lower end of the "mildly retarded" and the starting point for those labeled "moderately retarded." See "Present Situation."

A trial court's determination that a defendant is not mentally retarded should not preclude the defense from introducing such evidence to the jury in a subsequent penalty phase as the case law makes clear that any evidence of mitigation must be admitted. However, the bill does not specify whether a ruling adverse to the defendant precludes presentation of the evidence to the jury.

The bill provides that the court shall hold a hearing on the defendant's mental retardation, "upon conviction or adjudication of guilt of a defendant of a capital felony, or upon a pretrial motion by the defendant." This means that unless the defendant waives the right to a hearing on mental retardation, the court is to have such a hearing in every case before the penally phase.

The court is required to enter a written order that outlines its findings of fact and conclusions of law. The bill provides that a mental retardation determination is not an adjudication of incompetence or a dismissal of any criminal charge or conviction.

The state is authorized to appeal a determination of mental retardation, pursuant to s. 924.07, F.S. This would allow the state to appeal a trial court's pretrial ruling before the case was tried, as well as post trial. No provision is made for a defense appeal, which means that the defense would appeal an adversary ruling in the normal course of a direct appeal and not immediately after a pretrial ruling.

This bill shall take effect upon becoming law. It does not specify whether its provisions are to apply to future cases only, or whether it is to apply to pending cases. Defendants who committed crimes before the bill's effective date will argue that it would be fundamentally unfair not to afford them the exemption created by the bill.

It seems that the bill would apply at least to those cases that have not proceeded to a penalty phase by the bill's effective date. However, article X, section 9 of the Florida Constitution provides that "[r]epeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed." This constitutional provision will allow the state to argue that the bill can only apply to those who commit crimes after the bill's effective date. *See e.g.*, *Castle v. State*, 305 So. 2d 794 (Fla. 4th DCA 1974), *approved*, 330 So. 2d 10 (Fla. 1976) (Article X, section 9, Florida Constitution prohibits sentencing judge from reducing defendant's 10 year sentence for arson because amendment to arson statute, which established maximum sentence at 5 years, became effective after defendant committed arson).

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

This bill will have an indeterminate impact on the judicial system (State Court System, State Attorneys, and Public Defenders) in that it will require that trial judges hold a hearing to determine whether a defendant is mentally retarded in every capital case which proceeds to the penalty phase. The fiscal impact will be measured in terms of judicial and attorney workload as well as the costs of any expert witnesses appointed to examine indigent defendants. Much of this additional cost, however, would be offset by a reduction in the number of penalty proceedings following adjudication of guilt. Only those offenders who have a mental retardation hearing and are found to not be mentally retarded would represent a net increase in overall judicial system expenditures because both a mental retardation hearing and sentencing proceeding would be required.

According to the Department of Corrections (DOC), the bill will not have a significant impact on the department. The department states "[a] cost analysis of this particular issue will be difficult due to our inability to project how many such cases will occur. Further, we cannot predict the impact that this bill would have on state attorneys' charging decisions."

According to DOC, in its judgment only one current death row inmate meets the mental retardation definition under s. 916.106, F.S.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.