STORAGE NAME: h1095s1.sa.doc
DATE: March 27, 2001

HOUSE OF REPRESENTATIVES
COMMITTEE ON
STATE ADMINISTRATION
ANALYSIS

BILL #: CS/HB 1095

RELATING TO: Death Penalty/Mental Retardation

SPONSOR(S): Committee on State Administration, Representative(s) Green and others

TIED BILL(S): None

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

(1) STATE ADMINISTRATION YEAS 5 NAYS 0
(2) CRIME PREVENTION, CORRECTIONS & SAFETY
(3) FISCAL POLICY & RESOURCES
(4) COUNCIL FOR SMARTER GOVERNMENT
(5)

I. SUMMARY:

Florida law does not exempt mentally retarded persons convicted of capital felony from receiving a death sentence. Current law requires that a court conduct a separate sentencing proceeding to determine whether a defendant should be sentenced to death or life imprisonment for committing a capital felony. An advisory jury must consider whether mitigating circumstances outweigh aggravating circumstances, and based on these considerations make a recommendation to the court. The trial judge may override the jury's recommendation and must independently weigh the aggravating and mitigating circumstances before imposing either a sentence of death or life imprisonment. Although mental retardation is not specifically listed as a statutory mitigating circumstance, it can be considered as a mitigating factor by the court in determining whether to impose a sentence of death or life imprisonment.

CS/HB 1095 prohibits a death sentence for a defendant convicted of a capital felony, if such defendant is found to be mentally retarded. A defendant is required to give notice of his or her intention to raise mental retardation as a bar to the death penalty. The court must then appoint two experts in the field of mental retardation to evaluate the defendant. The state and the defendant may present the testimony of additional experts. This hearing is conducted without a jury.

CS/HB 1095 defines mental retardation and gives express rule-making authority to the Department of Children and Family Services to specify the standardized tests to be used when determining mental retardation.

If the defendant waives his or her right to an advisory jury, this bill allows the defendant to file a motion with the court specifying his or her intent to raise mental retardation as a bar to the death penalty.

This bill provides that if any advisory jury recommends a life sentence, and the state intends to request the court to order a death sentence, the defendant may file a motion requesting the court to consider mental retardation as a bar to the death sentence.

This bill further allows the state to appeal a determination of mental retardation.

This bill does not appear to have a fiscal impact on local governments; however, this bill may have an impact on state government. See "Fiscal Impact & Economic Impact" section for explanation.

See "Other Comments" section for concerns.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1.	Less Government	Yes []	No []	N/A [X]
2.	Lower Taxes	Yes []	No []	N/A [X]
3.	Individual Freedom	Yes []	No []	N/A [X]
4.	Personal Responsibility	Yes []	No []	N/A [X]
5.	Family Empowerment	Yes []	No []	N/A [X]

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Florida Law

Florida law does not exempt mentally retarded persons convicted of capital murder from receiving a death sentence. Section 775.082(1), F.S., states: "A person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole."[1]

Section 921.141, F.S., requires that a court conduct a separate sentencing proceeding to determine whether a defendant should be sentenced to death or life imprisonment for committing a capital felony. A jury must consider whether mitigating circumstances[2] outweigh aggravating circumstances[3], and based on those considerations a jury must render an "advisory sentence to the court." The trial judge may override the jury's recommendation 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.[4]

Section 921.141(5), F.S., restricts *aggravating circumstances* to the following factors:

a) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.

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[1] Section 775.082(1), F.S.

[2] Black Law's Dictionary, 6th ed. P. 1002, defines mitigating circumstances as, "such as do not constitute a justification or excue for the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability."

[3] *Id.* at 65, defines aggravation as, "any circumstance attending the commission of a crime or tort which increases its guilt or enormity or adds to its injurious consequences, but which is above and beyond the essential constituents of the crime or tort itself."

[4] Section 921.141(3)(b), F.S.

b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

c) The defendant knowingly created a great risk of death to many persons.

d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb.

e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

f) The capital felony was committed for pecuniary gain.

g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

h) The capital felony was especially heinous, atrocious, or cruel.

i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

j) The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.

k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.

l) The victim of the capital felony was a person less than 12 years of age.

m) The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.

Section 921.141(6), F.S., provides the following statutory *mitigating circumstances*:

a) The defendant has no significant history of prior criminal activity.

b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

c) The victim was a participant in the defendant's conduct or consented to the act.

d) The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.

e) The defendant acted under extreme duress or under the substantial domination of another person.

f) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.

g) The age of the defendant at the time of the crime.

h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

Although mental retardation is not specifically listed as a statutory mitigating circumstance under s. 921.141(6), F.S., it can be considered as a mitigating factor by the court in determining whether to impose a sentence of death or life imprisonment. [5]

The Florida Supreme Court automatically reviews all death sentences. 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." [6]

In *Reilly v. State*, [7] the Florida Supreme Court reduced a death sentence to life imprisonment. There was evidence that the defendant was "borderline retarded" with an IQ of 80, and there was expert testimony that the defendant was "brain impaired" with "severe learning disabilities." Accordingly, in *Sinclair v. State,* [8] the Florida Supreme Court, under proportionality review, reduced a death sentence to life imprisonment. The Court held that the sole aggravating circumstance was substantially outweighed by the mitigating circumstances. The defendant had a "low intelligence level" coupled with "emotional disturbances." Additionally, in *Phillips v. State*, [9] the Florida Supreme Court reversed the decision and called for a new penalty phase hearing. The Court held that the defendant's original trial counsel failed to provide mitigating circumstances which established the defendant was "borderline retarded" with IQ scores from 73 to 75, and emotionally, intellectually, and socially deficient, with lifelong deficits in his adaptive functioning.[10]

However, considering evidence of mental retardation at the penalty phase does not guarantee that the court will conclude that it is a significant mitigating factor. For example, in *Kight v. State*,[11] the Florida Supreme Court upheld the sentencing court's rejection of mental retardation as a mitigating factor when the evidence indicated that the defendant was borderline mentally retarded with an I.Q. of 69. The Court held that there was substantial evidence to support the trial court's rejection of these mitigating circumstances. Accordingly, the Court found no error in the trial court's failure to find Kight's low IQ and history of abusive childhood as non-statutory mitigating factors.[12]

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

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[5] *Hitchcock v. Dugger*, 481 U.S. 393 (1987), the Supreme Court held that "advisory jury had been improperly instructed to consider only statutory mitigating factors and sentencing judge had improperly refused to consider nonstatutory mitigating circumstances."

[6] CS/SB 238 Senate Analysis and Economic Impact Statement, Criminal Justice Committee, February 14, 2001.

[7] *Reilly v. State*, 601 So.2d 222 (Fla. 1992)

[8] *Sinclair v. State*, 657 So.2d 1138 (Fla. 1995)

[9] *Phillips v. State*, 608 So.2d 778, 783 (Fla. 1992)

[10] CS/SB 238 Senate Analysis and Economic Impact Statement, Criminal Justice Committee, February 14, 2001.

[11] *Kight v. State*, 512 So.2d 922 (Fla. 1987)

[12] HB 901, House of Representatives Committee on Crime and Punishment Analysis, March 10, 2000.

time of execution. Section 922.07(3), F.S., states that if "the Governor decides that the convicted person does not have the mental capacity to understand the nature of the death penalty and why it was imposed on him or her, the Governor shall have the convicted person committed to the Department of Corrections mental health treatment facility."

Mental Retardation

The American Association of Mental Retardation (AAMR) defines mental retardation as, "significantly subaverage intellectual functioning, existing concurrently with; related limitations in one or more of the following applicable adaptive skill areas: communication, home living, community use, health and safety, leisure, self-care, social skills, self-direction, functional academics, [and] work." According to the AAMR, mental retardation manifests before the age of 18.[13]

Florida currently defines mental retardation, in Chapters 916 and 393, F.S., as

> "Retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. "Significantly subaverage general intellectual functioning," for the purpose of this definition, 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. "Adaptive behavior," for the purpose of this definition, 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.[14]

The Department of Children and Family Services does not currently have a rule specifying an exact test from which to determine a person's IQ. Instead, the department has established criteria favoring the nationally recognized Stanford-Binet and Weschler Series tests for determining IQ. In practice, two or more standard deviations from the mean score on these tests means that the person has an IQ of 70 or less, although it can be extended up to 75.[15]

There are four recognized categories of mental retardation based largely on the IQ test performance. 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). About 85 to 89 percent of the mentally retarded fall within the mild category. 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.[16]

Legislative Efforts in Florida to Exempt the Mentally Retarded from the Death Penalty

In 1998, the Legislature considered, but ultimately failed to pass, a bill to exempt the mentally retarded from the death penalty. In the January 2000 Special Session, the Florida Senate passed SB 14-A which exempted the mentally retarded from the death penalty and set the threshold IQ level at 55. The Florida House of Representatives did not take up SB 14-A.

However, in response to concerns by members of the Legislature, the Governor created a Task Force on Capital Cases to "study evidence of discrimination, if any, in the sentencing of defendants

[13] American Association of Mental Retardation, retrieved on-line at http:// www.aamr.org
[14] Sections 916.106(12) and 393.063(42), F.S.
[15] CS/SB 238 Senate Analysis and Economic Impact Statement, Criminal Justice Committee, February 14, 2001.
[16] *Id*.

in capital cases, including consideration of race, ethnicity, gender, and the possible mental retardation of the defendant."[17] The Capital Cases Task Force heard extensive testimony from prosecutors, defense attorneys and representatives of the Association for Retarded Citizens (ARC). In March 2000, the Task Force voted 7-6 against recommending legislation to exempt the mentally retarded from the death penalty. However, the Task Force voted unanimously to recommend legislation which would place mental retardation in the list of statutory mitigating circumstances.[18]

Federal Law

Article VIII of the U.S. Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The United States Supreme Court ruled in *Penry v. Lynaugh* that the Eighth Amendment did not prohibit the execution of mentally retarded people convicted of capital offenses.[19] In a 5-4 decision, the Court held that executing persons with mental retardation was not a violation of the Eighth Amendment. Mental retardation should instead be a mitigating factor to be considered by the jury during sentencing. Writing for the majority, Justice Sandra Day O'Connor said that a "national consensus" had not developed against executing those with mental retardation. At the time, only two states, Maryland and Georgia, prohibited such executions. Since then, 11 more states have enacted laws prohibiting the execution of the mentally retarded.[20] The federal death penalty statute also forbids such executions, and legislation regarding the mentally retarded is pending in many other states. According to the Death Penalty Information Center, since the reinstatement of the death penalty in 1976, 35 people with mental retardation have been executed.[21]

C. EFFECT OF PROPOSED CHANGES:

CS/HB 1095 creates s. 921.137, F.S., prohibiting the sentence of death upon a defendant convicted of a capital felony, if such defendant is determined to be mentally retarded.

This bill utilizes the same definition of mental retardation as currently specified in Florida Statutes. The definition has three main components: low intellectual functioning, deficits in adaptive behavior, and manifestation of such conditions by age 18.

This bill does not contain a set IQ level, but rather it provides that low intellectual functioning "means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Department of Children and Family Services." Although the department does not currently have a rule specifying the intelligence test, it is anticipated that the department will adopt the nationally recognized tests. Two standard deviations from the mean score on these tests is approximately a 70 IQ, although it can be extended up to 75. The effect in practical terms will be that a person that has an IQ of around 70 or less will likely establish an exemption from the death penalty. An IQ score of 70 falls in the category of the "mildly retarded."[22]

This bill provides express rule-making authority to the Department of Children and Family Services to specify the standardized intelligence tests to be used when determining mental retardation.

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[17] *Id.*
[18] *Id.*
[19] *Penry v. Lynaugh*, 109 S.Ct.2934, 492 U.S. 302, (U.S. Tex. 1989).
[20] Arizona, Colorado, Georgia, Indiana, Kansas, Kentucky, Maryland, Nebraska, New Mexico, New York (except for murder by a prisoner, South Dakota, Tennessee, and Washington. Retrieved on-line at www.deathpenaltyinfo.org
[21] http://www.deathpenaltyinfo.org/dpicmr.html
[22] CS/SB 238 Senate Analysis and Economic Impact Statement, Criminal Justice Committee, February 14, 2001.

The current rules of court specify that the presentation of mental health mitigation through expert testimony requires the notice to be provided not less than 20 days before trial.[23] This bill requires that a defendant who intends to raise mental retardation as a bar to the death penalty is required to give notice of such intention. This notice must be in accordance with the current rules of court.

This bill provides that if the defendant gives notice of his or her intention to raise mental retardation as a bar to the death penalty, the court must appoint two experts in the field of mental retardation to evaluate the defendant and report their findings to the court and all interested parties prior to the final sentencing hearing. The state and the defendant may present the testimony of additional experts on the issue of whether the defendant suffers from mental retardation.[24] The final sentencing hearing is conducted without a jury. If the court finds by clear and convincing evidence that the defendant suffers from mental retardation, the court will enter a written order specifically stating its findings in support of its determination that the defendant suffers from mental retardation.

Current law allows an advisory jury to be waived by the defendant. This bill requires that a defendant, after waiving his or her right to an advisory jury, must file a motion with the court specifying his or her intent to raise mental retardation as a bar to the death penalty. Following this motion, the court must conduct a separate proceeding to determine whether the capital defendant should be sentenced to death or life imprisonment. The bill does not specify the time period in which the defendant must file the motion.

Current law states that an advisory jury must "render an advisory sentence to the court," based upon both aggravating and mitigating circumstances. This bill provides that if an advisory jury returns a recommendation of a life sentence, and the state intends to request the court to order the defendant sentenced to death, the state must inform the defendant of such intention. The defendant, after receipt of notice from the state, may file a motion requesting the court to consider mental retardation as a bar to the death penalty. Again, the bill does not specify the time period in which the defendant must file the motion.

The bill allows the state to appeal a determination of mental retardation, pursuant to s. 924.07, F.S.

D. SECTION-BY-SECTION ANALYSIS:

See "Effect of Proposed Changes."

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

[23] Rule 3.202(c), Florida Rules of Criminal Procedure

[24] Section 916.301, F.S., provides that the Department of Children and Family Services must annually provide the courts with a list of retardation and autism professionals qualified to perform evaluations of defendants. If the defendant's mental condition is a factor in a trial where the defendant is charged with a felony, the court must appoint two experts to determine whether the defendant is competent to proceed with the proceedings. At the request of either party involved in the trial, the court may appoint one additional expert to evaluate the defendant. All evaluations ordered by the court must be from qualified experts with experience in evaluating persons with retardation or autism.

2. Expenditures:

This bill will have an indeterminate fiscal impact on the judicial system (State Court System, State Attorneys, and Public Defenders). If a defendant files a motion to raise mental retardation as a bar to the death penalty, a trial judge must hold a hearing to determine whether a defendant is mentally retarded. 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 defendants. However, only those defendants 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. If a defendant is found to be mentally retarded at this initial hearing, a sentencing proceeding would not occur.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

IV. 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 action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that counties or municipalities 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.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

This bill provides express rule-making authority to the Department of Children and Family Services to specify the standardized intelligence tests to be used when determining mental retardation.

C. OTHER COMMENTS:

Section (5) of this bill contains language which lacks clarity and creates confusion. The Senate has amended that language in the companion bill, CS/SB 238, to add clarity.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On March 27, 2001, the Committee on State Administration heard HB 1095 and adopted one amendment. This amendment conforms subsection (5) to the Senate version by making grammatical and sentence structure changes. This bill, as amended, was reported favorably as a committee substitute.

VII. SIGNATURES:

COMMITTEE ON STATE ADMINISTRATION:

Prepared by:	Staff Director:
Lauren Cyran	J. Marleen Ahearn, Ph.D., J.D.