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 Committee on Criminal Justice

BILL:	SB 1156
INTRODUCER:	Senator Brandes
SUBJECT:	Serious Mental Illness as Bar to Execution
DATE:	March 29, 2021
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Jones	CJ	**Pre-meeting**
2.			JU	
3.			RC	

I. Summary:

SB 1156 provides that a court may not impose the death penalty upon a person who was seriously mentally ill at the time of the commission of the capital offense if he or she is convicted. The bill defines the term "serious mental illness" as any mental diagnosis, disability, or defect that significantly impairs a person's capacity to do any of the following:

- Appreciate the nature, consequences, or wrongfulness of his or her conduct in the criminal offense;
- Exercise rational judgment in relation to the criminal offense; or
- Conform his or her conduct to the requirements of the law in connection with the criminal offense.

The bill provides the necessary procedures for the court to make a determination of serious mental illness as a bar to execution. The bill also specifies that the defendant must present clear and convincing evidence of serious mental illness at the time of the offense to prevail on the motion and preclude the imposition of the death penalty. If the defendant does prevail on the motion the state has the right to appeal such a ruling. The bill allows for retroactive application for defendants who have completed the state postconviction proceedings.

The bill may have a negative fiscal impact on the state courts. See Section V. Fiscal Impact Statement.

The bill is effective July 1, 2021.

II. Present Situation:

Florida Death Penalty

The death penalty in Florida can be handed down in cases of 1st degree murder and capital drug trafficking felonies.[1] Cases in which the death penalty can be imposed are bifurcated proceedings. If a jury reaches a guilty verdict, a separate proceeding is then held to determine whether the defendant will be sentenced to death or life imprisonment without the possibility of parole. In making such a determination the jury is presented with aggravating and mitigating factors and then makes a sentencing recommendation to the court. For the jury to recommend a death sentence it must unanimously find at least one aggravating factor. The court then weighs any unanimously found aggravated factors and all of the mitigating factors and determines a sentence.[2] Some of the statutory mitigating factors a court can consider include, but are not limited to:

- The defendant has no significant history of prior criminal activity.
- The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- The defendant acted under extreme duress or under the substantial domination of another person.
- 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.
- The age of the defendant at the time of the crime.[3]

Florida Law, Mental Health in the Criminal Justice Context

Serious mental illness (SMI) is defined by the National Institute of Mental Health as a mental, behavioral, or emotional disorder resulting in serious functional impairment, which substantially interferes with or limits one or more major life activities.[4] In 2019, there were an estimated 13.1 million adults aged 18 or older in the United States with SMI. This number represented 5.2 percent of all U.S. adults.[5]

In 2006, the American Bar Association (ABA), American Psychiatric Association, American Psychological Association, and National Alliance on Mental Illness endorsed the principle that a finding of serious mental illness should preclude the death penalty.[6]

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[1] *See* ss. 782.04 and 893.135, F.S.
[2] *See* s. 921.141, F.S.
[3] Section 921.142, F.S.
[4] National Institute of Mental Health, *Mental Illness*, January 2021, available at https://www.nimh.nih.gov/health/statistics/mental-illness.shtml (last visited March 25, 2021).
[5] *Id*.
[6] Richard J. Bonnie, *Mental Illness, Diminished Responsibility, and the Death Penalty: A New Frontier*, January 1, 2017, American Bar Association, available at https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2016-17-vol-42/vol--42--no--2---the-death-penalty--how-far-have-we-come-/mental-illness--diminished-responsibility--and-the-death-penalty/ (last visited March 25, 2021).

Incompetent to Proceed

Under current law a defendant is deemed incompetent to proceed if he or she does not have sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding or if the defendant lacks both a rational and factual understanding of the proceedings against him or her.[7]

If a defendant is suspected of being incompetent, the court, defense counsel, or the State may file a motion to have the defendant's cognitive state assessed.[8] If the motion is granted, court-appointed experts will evaluate the defendant's cognitive state and first determine whether the defendant has a mental illness and, if so, consider the factors related to the issue of whether the defendant meets the criteria for competence to proceed.[9]

The examining experts must consider and specifically include in a report to the court 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; and
- Testify relevantly.[10]

If an expert finds a defendant incompetent to proceed they must include the following in the report:

- The mental illness causing incompetency;
- Explanation of each possible treatment option in the order of recommendation by the expert;
- Availability of acceptable treatment and whether treatment is available in the community;
- The likelihood the defendant will attain competency under the recommended treatment; and
- The probable duration of treatment to restore competency.[11]

The defendant's competency is then determined by the judge in a subsequent hearing.[12] If the defendant is found to be competent, the criminal proceeding resumes.[13] If the defendant is found to be incompetent to proceed, the proceeding may not resume unless competency is restored.[14] A defendant who, because of psychotropic medication, is able to understand the nature of the

[7] Section 916.12(1), F.S.
[8] Rule 3.210, Fla.R.Crim.P.
[9] Section 916.12(2), F.S.; "Not every manifestation of mental illness demonstrates incompetence to stand trial; rather, the evidence must indicate a present inability to assist counsel or understand the charges." *Thompson v. State*, 88 So. 3d 312, 319 (Fla. 4th DCA 2012) (citing *Card v. Singletary*, 981 F. 2d 481, 487–88 (11th Cir. 1992)). "The question is 'whether the defendant has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and whether the defendant has a rational, as well as factual, understanding of the pending proceedings.'" *Id*., (citing Fla. R. Crim. P. 3.211(a)(1)).
[10] Section 916.12(3), F.S.
[11] Section 916.12(4), F.S.
[12] *Id.*
[13] Rule 3.212, Fla.R.Crim.P.
[14] *Id.; See also*, s. 916.13, F.S.

proceedings and assist in the defendant's own defense shall not automatically be deemed incompetent to proceed simply because the defendant's satisfactory mental functioning is dependent upon such medication. In this context "psychotropic medication" means any drug or compound used to treat mental or emotional disorders affecting the mind, behavior, intellectual functions, perception, moods, or emotions and includes antipsychotic, antidepressant, antimanic, and antianxiety drugs.[15]

The court may dismiss the charges against a defendant who has been adjudicated incompetent to proceed due to mental illness at least 3 years after such determination unless the charge is one of the serious crimes listed in s. 916.145, F.S.[16] However, the charges against such a defendant must be dismissed if the defendant remains incompetent to proceed for 5 continuous, uninterrupted years; unless:

- The court in its order specifies its reasons for believing that the defendant will become competent to proceed within the foreseeable future; and
- Specifies the time within which the defendant is expected to become competent to proceed.[17]

The charges against any defendant found to be incompetent to proceed due to intellectual disability or autism must be dismissed without prejudice to the state if the defendant remains incompetent to proceed within a reasonable time after such determination, not to exceed 2 years, unless:

- The court in its order specifies its reasons for believing that the defendant will become competent to proceed within the foreseeable future; and
- Specifies the time within which the defendant is expected to become competent to proceed.[18]

If a defendant is determined to be incompetent to proceed after being found guilty of an offense, but prior to sentencing, the court shall postpone the pronouncement of sentence.[19]

Not Guilty by Reason of Insanity

All persons are presumed to be sane. In Florida it is an *affirmative defense* to a criminal prosecution that, at the time of the commission of the acts constituting the offense, the defendant was insane. The defendant has the burden of proving the defense of insanity by clear and

[15] Section 916.12(5), F.S.
[16] The serious crimes that may not be dismissed by the court are: arson; sexual battery; robbery; kidnapping; aggravated child abuse; aggravated abuse of an elderly person or disabled adult; aggravated assault with a deadly weapon; murder; manslaughter; aggravated manslaughter of an elderly person or disabled adult; aggravated manslaughter of a child; unlawful throwing, projecting, placing, or discharging of a destructive device or bomb; armed burglary; aggravated battery; aggravated stalking; a forcible felony as defined in s. 776.08 and not listed elsewhere in this subsection; an offense where an element of the offense requires the possession, use, or discharge of a firearm; an attempt to commit an offense listed in this subsection; an offense allegedly committed by a defendant who has had a forcible or violent felony conviction within the 5 years immediately preceding the date of arrest for the nonviolent felony sought to be dismissed; an offense allegedly committed by a defendant who, after having been found incompetent and placed under court supervision in a community-based program, is formally charged by a state attorney or the Office of the Statewide Prosecutor with a new felony offense; or an offense for which there is an identifiable victim and such victim has not consented to the dismissal. Section 916.145(1)(a)-(u), F.S.
[17] Section 916.145(1), F.S.
[18] Section 916.303, F.S., *See also*, s. 916.14, F.S.
[19] Rule 3.214, Fla.R.Crim.P.

convincing evidence.[20] The determination of whether a defendant is not guilty by reason of insanity is determined in accordance with Rule 3.217, Florida Rules of Criminal Procedure.

Insanity is established when:

- The defendant had a mental infirmity, disease, or defect; and
- Because of this condition, the defendant:
  - Did not know what he or she was doing or its consequences; or
  - Although the defendant knew what he or she was doing and its consequences, the defendant did not know that what he or she was doing was wrong.[21]

A defendant who is acquitted of criminal charges because of a finding of not guilty by reason of insanity may be involuntarily committed pursuant to such finding if the defendant has a mental illness and, because of the illness, is manifestly dangerous to himself or herself or others.[22]

If insanity is not an issue in a trial and if no notice of intent to rely on the defense of insanity has been filed, the trial court can instruct the jury as follows: "Mental illness, an abnormal mental condition, or diminished mental capacity is not a defense to any crime in this case. Any such evidence may not be taken into consideration to show that the defendant lacked the specific intent or did not have the state of mind essential to proving that he or she committed the crime charged or any lesser crime."[23]

Intellectual Disability

In 2002, the U.S. Supreme Court ruled that the Eighth Amendment of the U.S. Constitution prohibited the execution of a person with an intellectual disability.[24] The *Atkins* court left it to the states to decide how best to implement the court's ruling.[25]

Section 921.137, F.S., provides Florida's statutory scheme for determining whether a defendant is intellectually disabled. Specifically, intellectual disability is defined as significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. Section 921.137(1), F.S, also defines the following terms:

[20] Clear and convincing evidence is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief, without hesitation, about the matter in issue. Fla. Std. Jury Instr. (Crim.) 3.6(a) (2009).
[21] Section 775.027, F.S.
[22] Section 916.15(2), F.S.
[23] Fla. Std. Jury Instr. (Crim.) 3.6(p) (2017); "[D]iminished capacity is not a viable defense in Florida." *Evans v. State*, 946 So. 2d 1, 11 (Fla. 2006); *Lukehart v. State*, 70 So. 3d 503, 515 (Fla. 2011). Evidence of an abnormal mental condition not constituting legal insanity is inadmissible "for the purpose of proving either that the accused could not or did not entertain the specific intent or state of mind essential to proof of the offense, in order to determine whether the crime charged, or a lesser degree thereof, was in fact committed." *Chestnut v. State*, 538 So. 2d 820 (Fla. 1989).
[24] "Construing and applying the Eighth Amendment in the light of our "evolving standards of decency," we therefore conclude that such punishment is excessive and that the Constitution "places a substantive restriction on the State's power to take the life" of a mentally retarded offender. *Atkins v. Virginia,* 536 U.S. 304, 321, (2002).
[25] *Atkins v. Virginia,* 536 U.S. 304, 317 (2002), quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986).

- "Significantly subaverage general 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 Agency for Persons with Disabilities.[26]
- "Adaptive behavior" which means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.[27, 28]

The Florida Rules of Criminal Procedure establish the procedure for raising the defendant's intellectual disability as a bar to execution in all first-degree murder cases where the state attorney has not waived the death penalty.[29] The rule requires that:

- The defendant file a motion raising intellectual disability as a bar to execution not later than 90 days prior to trial or at such time as ordered by the court;
- If the defendant has been tested the experts reports must be attached to the motion;
- The court will appoint an expert for the state attorney if requested;
- If the defendant has not been tested, evaluated, or examined by 1 or more experts, the motion shall state that fact and the court shall appoint 2 experts who shall promptly test, evaluate, or examine the defendant and shall submit a written report of any findings to the parties and the court;
- Attorneys for the state and defendant may be present at the examinations conducted by court-appointed experts;
- If the defendant refuses to be examined or fully cooperate with the court appointed experts or the state's expert, the court may, in the court's discretion:
  - Order the defense to allow the court-appointed experts to review all mental health reports, tests, and evaluations by the defendant's expert;
  - Prohibit the defense experts from testifying concerning any tests, evaluations, or examinations of the defendant regarding the defendant's intellectual disability; or
  - Order such relief as the court determines to be appropriate.
- The court will conduct an evidentiary hearing on the motion, enter a written order prohibiting the death penalty if the defendant is intellectually disabled and order the case to proceed without the death penalty as an issue;
- The state can appeal the order finding the defendant intellectually disabled; and
- A claim authorized under the rule is waived if not filed in accord with the time requirements for filing, unless good cause is shown for the failure to comply with the time requirements.[30]

[26] Rule 65G-4.011, F.A.C., provides that the Stanford-Binet Intelligence Scale and the Wechsler Intelligence Scale must be used in determining whether the defendant has an intellectual disability.
[27] Section 921.137(2), F.S.
[28] The U.S. Supreme Court found s. 921.137, F.S., unconstitutional as applied in *Hall v. Florida*, 572 U.S. 701, 721 (2014). The court found that the Florida Supreme Court "interpreted section 921.137 so narrowly that it precluded sentencing courts from considering substantial evidence that is accepted by the medical community to be probative of intellectual disability." *Hall v. State*, 201 So.3d 628 (Fla. 2016). In response to the *Hall* decision the Florida Supreme found that "courts may continue to abide by section 921.137(1), but may not have a bright-line cutoff IQ test score because '[i]t is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment." *Id.* (citing *Hall v. Florida*, 572 U.S. 701, 723 (2004)).
[29] Rule 3.203, Fla.R.Crim.P.
[30] *Id*.

Other States

Other state legislatures, including Kentucky,[31] and Missouri, have proposed bills to exempt capital defendants with severe mental illness from facing the death penalty.[32] The bill in Kentucky provides that defendants would be ineligible for the death penalty if they had a documented history of schizophrenia, schizoaffective disorder, bipolar disorder, major depressive disorder, or delusional disorder at the time of the offense.[33]

Missouri House Bill 278 would also eliminate a death sentence for a person who is found to have suffered from a serious mental illness at the time of the commission of the offense. The bill specifies that a defendant has a serious mental illness if there has been a diagnosis of:

- Schizophrenia;
- Schizoaffective disorder;
- Bipolar disorder, with psychotic features;
- Major depressive disorder, with psychotic features;
- Delusional disorders;
- Traumatic brain injury; or
- Posttraumatic stress disorder (PTSD).[34]

Ohio recently passed a new law which recognizes the following diagnoses as being a component of severe mental illness:

- Schizophrenia;
- Schizoaffective disorder;
- Bipolar disorder; or
- Delusional disorder.[35]

Constitutional and Statutory Savings Clauses

Until recently, Article X, s. 9, of the State Constitution (Florida's constitutional savings clause) expressly prohibited any repeal or amendment of a criminal statute that affected prosecution or punishment for any crime previously committed, and therefore, the Florida Legislature was "powerless to lessen penalties for past transgressions; to do so would require constitutional revision."[36]

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[31] Death Penalty Information Center News, *With Overwhelming Bipartisan Support, Kentucky House Passes Bill to Ban Death Penalty for Defendants with Serious Mental Illness*, March 3, 2021, available at https://deathpenaltyinfo.org/news/with-overwhelming-bipartisan-support-kentucky-house-passes-bill-to-ban-death-penalty-for-defendants-with-serious-mental-illness (last visited March 26, 2021).

[32] Mental Illness and the Death Penalty, The American Civil Liberties Union, May 5, 2009, available at https://www.aclu.org/files/pdfs/capital/mental_illness_may2009.pdf (last visited March 25, 2021).

[33] *Id*.

[34] Missouri House Bill 278, available at https://house.mo.gov/billtracking/bills211/hlrbillspdf/0911H.01I.pdf (last visited March 26, 2021).

[35] Death Penalty Information Center, Ohio Bars Death Penalty for People with Severe Mental Illness, January 11, 2021, available at https://deathpenaltyinfo.org/news/ohio-passes-bill-to-bar-death-penalty-for-people-with-severe-mental-illness (last visited March 26, 2021).

[36] Comment, *Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation*, 121 U. Pa. L. Rev. 120, 129 (1972).

In 2018, Florida amended Article X, section 9 of the Florida Constitution, and that amendment included removing the prohibition on retroactive application of a repeal or amendment that affects punishment. Accordingly, the Legislature is no longer constitutionally prohibited from retroactively ameliorating punishments.

In 2019, the Legislature created s. 775.022, F.S., a general savings statute for criminal statutes. The statute defines a "criminal statute" as a statute, whether substantive or procedural, dealing in any way with a crime or its punishment, defining a crime or a defense to a crime, or providing for the punishment of a crime.[37] Nothing in the general savings statute precludes the Legislature from providing for a more extensive retroactive application either to legislation in the future or legislation that was enacted prior to the effective date of the general savings statute. This is because the general savings statute specifically provides for a legislative exception to the default position of prospectively. The Legislature only has to "expressly provide" for this retroactive application.[38]

III. Effect of Proposed Changes:

The bill prohibits the imposition of a death sentence upon a defendant who is guilty of committing a capital offense and who had a serious mental illness at the time of the offense. The bill also creates the necessary procedures for a court to make such a determination.

The bill defines the term "serious mental illness" as any mental diagnosis, disability, or defect that significantly impairs a person's capacity to do any of the following:

- Appreciate the nature, consequences, or wrongfulness of his or her conduct in the criminal offense;
- Exercise rational judgment in relation to the criminal offense; or
- Conform his or her conduct to the requirements of the law in connection with the criminal offense.

For purposes of the bill, serious mental illness does not include, by itself, a disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of alcohol or other drugs.

The procedures created in the bill are similar to those governing raising a defendant's intellectual disability as a bar to execution in all first-degree murder cases where the state attorney has not waived the death penalty.[39]

The bill provides that the defendant who intends to raise serious mental illness as a bar to a death sentence must give notice of such intention in accordance with the rules of court governing notices of intent to offer expert testimony regarding mental health mitigation during the penalty phase of a capital trial.

[37] Section 775.022(2), F.S.
[38] Section 775.022(3), F.S.
[39] *See* Rule 3.203, Fla.R.Crim.P.

Additionally, the defendant must file a motion with the court stating the defendant is seriously mentally ill and, if the defendant has been tested, evaluated, or examined by one or more experts, the motion must include the names and addresses of the experts. Copies of reports containing the opinions of any experts named in the motion must be attached to the motion. The motion must be filed no later than 90 days before trial or at such time as is ordered by the court. A claim is waived if the motion is not timely filed unless good cause is shown for the failure to comply.

If the defendant has not been tested, evaluated, or examined by one or more experts, the motion must state that fact and the court must appoint two experts who shall promptly test, evaluate, or examine the defendant and submit a written report of any findings to the parties and the court. If requested, the court must appoint an expert chosen by the state attorney to test, evaluate, or examine the defendant and submit a written report of any findings to the parties and the court.

Attorneys for the state and the defendant may be present at the examinations by the court-appointed experts. If the defendant refuses to be examined or to fully cooperate with the court-appointed experts or the state's expert, the court may:

- Order the defense to allow the court-appointed experts to review all mental health reports, tests, and evaluations by the defendant's expert;
- Prohibit the defense experts from testifying concerning any tests, evaluations, or examinations of the defendant regarding the defendant's serious mental illness; or
- Order such relief as the court determines to be appropriate.

The court must conduct an evidentiary hearing on the motion for a determination of serious mental illness as a bar to execution. The court must consider evidence presented by the experts who examined the defendant and all other evidence on the issue of whether the defendant is seriously mentally ill. If the court finds, by clear and convincing evidence, that the defendant is seriously mentally ill, it must enter an order prohibiting the imposition of the death penalty and setting forth the court's specific findings in support of the determination.

The court must stay the proceedings for 30 days from the date of rendition of the order prohibiting the death penalty or, if a motion for rehearing is filed, for 30 days following the rendition of the order denying rehearing, to allow the state the opportunity to appeal the order according to Rule 9.140(c), Florida Rules of Appellate Procedure.

If the court determines that the defendant has not established that he or she is seriously mentally ill, the court must enter an order setting forth the court's specific findings in support of that determination.

A defendant is not precluded from offering evidence that he or she had a serious mental illness at the time the capital offense was committed even though the diagnosis occurred at a subsequent time. Additionally, a defendant may present mitigating evidence of serious mental illness at the sentencing phase.

The bill also provides that statements made by a person in an evaluation or pretrial hearing may not be used against the defendant on the issue of guilt in any criminal action or proceeding.

The bill allows for retroactivity of the provisions in the bill. A person whose state postconviction claims have been completed is authorized to request leave to file a successive petition in state court. The request must be filed not later than July 1, 2022. If the postconviction court determines that the petitioner is an individual with a serious mental illness, it must vacate the petitioner's death sentence and impose a sentence of life imprisonment without parole. The court may grant any additional relief to which the person is entitled based on the merits.

The filing of a motion to establish serious mental illness as a bar to execution does not stay further proceedings in the absence of a separate order staying execution.

The bill is effective July 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill may have a negative fiscal impact on the state courts both at the trial and appellate levels because of the new procedures provided in the bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 921.135 of the Florida Statutes.

IX. Additional Information:

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

None.

B. Amendments:

None.