

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Prepared By: Judiciary Committee

BILL: SB 2576

SPONSOR: Senator Haridopolos

SUBJECT: Competency to Proceed

DATE: April 11, 2005

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Brown</u>	<u>Maclure</u>	<u>JU</u>	<u>Pre-meeting</u>
2.	_____	_____	<u>CF</u>	_____
3.	_____	_____	<u>CJ</u>	_____
4.	_____	_____	<u>JA</u>	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill contains numerous provisions that facilitate and identify the Department of Children and Family Services (DCF) as the entity providing treatment for the restoration of competency to death row, post-conviction inmates who have been found incompetent to proceed.

In cases in which the defendant remains incompetent to proceed for five years and the charges against the defendant are dismissed without prejudice to the state, the defendant is required to be returned to the Department of Corrections (DOC) custody if the defendant has an active sentence; otherwise, conditional release is still authorized.

In contrast with current law, which authorizes a competency challenge to be made up until the day of execution, this bill requires the Governor to issue a stay of execution only when defense counsel provides written notification of insanity at least ten days prior to the scheduled execution date.

This bill authorizes the Governor to appoint a commission to examine a defendant who has been found incompetent, for competency at any time and not pursuant to a facility administrator's finding.

Regarding a collateral counsel motion to determine competency, this bill requires specific information to be contained in the motion, including conversations between the defendant and counsel, to the extent that lawyer-client privilege is not impeded.

This bill substantially amends the following sections of the Florida Statutes: 916.115, 916.145, 916.17, 916.301, 916.304, 922.07, 945.41, and 945.42. This bill creates the following sections of the Florida Statutes: 945.501, 945.502, 945.503, and 945.504.

II. Present Situation:

Provision of Mental Health Treatment

Part II of Chapter 916, F.S., addresses forensic services for mentally ill persons. The Department of Children and Family Services (DCF) is authorized to contract with accredited institutions to provide:

- A plan to train community mental health professionals to perform forensic evaluations and to standardize the criteria and procedures to be used in evaluations;
- Clinical protocol and procedure consistent with the Florida Rules of Criminal Procedure;
- Training for professionals in applying protocol and procedure in performing evaluations and providing the court with reports; and
- A system to evaluate program success.¹

The Department of Children and Family Services is required to annually provide the court with a list of mental health professionals approved as experts.² The court is authorized to appoint no more than three nor fewer than two experts to evaluate a criminal defendant's mental condition, including competency, insanity, and involuntary hospitalization or placement.³ The court is required to authorize reasonable fees for evaluations and testimony to be paid to the mental health experts.⁴

Mental Competence to Proceed

A defendant is considered to be 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
- Has no rational, as well as factual, understanding of the proceedings against him or her.⁵

In determining whether a defendant is competent to proceed, examining experts must consider, and detail in their reports, the defendant's capacity to:

- Appreciate the charges or allegations;
- Appreciate the range and nature of possible penalties that may be imposed;
- Understand the adversarial nature of the legal process;
- Disclose to counsel pertinent facts;

¹ s. 916.111, F.S.

² s. 916.115(1)(a), F.S.

³ s. 916.115(1)(b), F.S.

⁴ s. 916.115(2), F.S.

⁵ s. 916.12(1), F.S.

- Manifest appropriate courtroom decorum;
- Testify relevantly; and
- Any other factor considered relevant by the experts.⁶

In a report which states that the defendant is incompetent to proceed, the expert is required to include recommended treatment for competency to be restored.⁷

Involuntary Commitment

The court is authorized to involuntarily commit defendants who are charged with a felony and adjudicated incompetent to proceed, upon a clear and convincing showing that:

- The defendant is manifestly incapable of surviving alone or with support from others, including available services, and, without treatment, the defendant is likely to suffer from neglect or refuse to care for herself or himself, which poses a real or present threat of substantial harm to the defendant's well-being and there is a substantial likelihood of harm to self or others in the near future; and
- All available, less restrictive treatment alternatives, including treatment in community residential facilities or inpatient or outpatient settings, are inappropriate, and there is a substantial probability that the defendant can be restored to competency in the near future.⁸

A defendant who is charged with a felony, adjudicated incompetent, and who meets criteria for commitment may be committed to DCF, and DCF is required to retain the defendant and provide treatment.⁹ Within six months of the defendant's date of admission, at the end of any period of extended commitment, or at any time that the administrator or designee determines that the defendant is competent, a report shall be filed with the court.¹⁰

Dismissal of Charges

If the defendant remains incompetent to proceed for a period of five years after the determination, the court is required to dismiss charges without prejudice to the state, unless the court specifies through order grounds for believing that the defendant will become competent to proceed in the foreseeable future, including the time estimated for competency restoration.¹¹

Conditional Release

A court may order a conditional release of a defendant who has been found incompetent to proceed, instead of an involuntary commitment, based on an approved plan which identifies

⁶ s. 916.12(3), F.S.

⁷ s. 916.12(4), F.S.

⁸ s. 916.13(1), F.S.

⁹ s. 916.13(2), F.S.

¹⁰ *Id.*

¹¹ s. 916.145, F.S.

appropriate outpatient treatment.¹² Conditional release is subject to modification, to include involuntary commitment, if the defendant's condition has deteriorated.¹³

Inmate under Sentence of Death and Insanity

When the Governor is informed that a person under sentence of death may be insane, the Governor is required to issue a stay of sentence and appoint a three-psychiatrist commission to examine the defendant. Counsel for the defendant and the state attorney are authorized to be present during the examination.¹⁴

After receiving the commission's report, if the Governor determines that the defendant has the mental capacity to appreciate the death penalty and why it was imposed, the Governor is required to immediately lift the stay and notify the Attorney General of this action, and, within ten days of such notification, shall set the new execution date.¹⁵ If the Governor decides that the defendant lacks requisite mental capacity, the Governor is required to commit the defendant to a Department of Corrections mental health treatment facility.¹⁶

Case Law

In *Carter v. State*, the Florida Supreme Court determined that, in the absence of direction from court rules in post-conviction cases, rules relating to competency at the trial level control, but that a defendant is not automatically entitled to a competency hearing in a post-conviction proceeding.¹⁷ If a post-conviction defendant is found incompetent, claims based on legal issues that are entirely matter of record and that do not require the defendant's participation do not trigger a competency hearing.¹⁸ Rather, a defendant must first show that there are specific factual matters at issue that require the defendant to competently communicate with counsel.¹⁹

While acknowledging that the decision to house an inmate in a particular location is typically within the exclusive jurisdiction of the Department of Corrections, the court in *Florida Department of Corrections v. Watts* ruled that the determination of where to house the defendant should be based on the best facility to restore the defendant to competency, for the purpose of continuing with post-conviction proceedings.²⁰ Above DOC objections, the court selected the only mental health hospital available to DOC inmates that is also recognized as a forensics facility.²¹

¹² s. 916.17(1), F.S.

¹³ s. 916.17(2), F.S.

¹⁴ s. 922.07, F.S.

¹⁵ s. 922.07(2), F.S.

¹⁶ s. 922.07(3), F.S.

¹⁷ 706 So.2d 873 (Fla. 1998).

¹⁸ *Id.* at 876.

¹⁹ *Id.* at 875.

²⁰ 800 So.2d 225, 233 (Fla. 2001).

²¹ *Id.*

Department of Corrections

The Department of Corrections (DOC) indicates that a recent court trend has emerged which requires the DOC to restore a death row inmate to legal competency in post-conviction, collateral appeals. The Department of Corrections asserts that the requirement to restore competency had previously applied only to pretrial incompetent defendants. This is problematic, in that there is an inherent conflict in DOC being required to restore competency in order to impose death, and DOC mental health staff do not have the expertise to provide actual treatment to restore competency. The Department of Corrections asserts that the type of mental health treatment appropriately, and traditionally, provided by the DOC is that used to help inmates who pose an immediate threat of harm to self or others. The Department of Corrections indicates that the Department of Children and Family Services has mental health professionals on staff better equipped to provide specific treatment to restore competency for death row inmates who have been declared incompetent and have post-conviction appeal cases pending.²²

III. Effect of Proposed Changes:

This bill contains numerous provisions that facilitate and identify the Department of Children and Family Services (DCF) as the entity providing treatment for the restoration of competency to death row, post-conviction inmates who have been found incompetent to proceed.

Definitions

This bill defines the following terms:

- Court: the circuit court;
- Inmate: a defendant under a death sentence who has been found incompetent to proceed or whose competence is in question;
- Psychotropic medication: any drug or compound used to treat mental or emotional disorders affecting the mind, behavior, intellectual functions, perception, moods, or emotions, including anti-psychotic, anti-depressant, anti-manic, and anti-anxiety drugs; and
- Treatment team: personnel assigned by the DCF to evaluate and treat an inmate who is competent and in the custody of the Department of Corrections (DOC).

Department of Corrections Jurisdiction

This bill clarifies that regarding expert examinations of a criminal defendant's mental condition relating to a competency to proceed, insanity, and involuntary hospitalization or placement, besides examining the defendant in jail or in another appropriate local facility, the panel of experts is also authorized to conduct the evaluation in a DOC facility.

²² Susan Maher and Barbara Debelius, Florida Department of Corrections, *Summary of Restoration of Capital Post Conviction Incompetents Issue*, White Paper, April 8, 2005.

In cases in which the defendant remains incompetent to proceed for five years and the charges against the defendant are dismissed without prejudice to the state, the defendant is required to be returned to DOC custody if the defendant has an active sentence.

Conditional release or discharge of an incompetent defendant is only authorized when the defendant does not have an active sentence with the DOC.

Governor's Authority

Current law authorizes defense counsel to inform the Governor at any time, up until execution, that the defendant may be insane, which then requires the Governor to issue a stay of execution. This bill requires the Governor to issue a stay of execution only when defense counsel provides written notification of insanity at least ten days prior to the scheduled execution date.

This bill stipulates that if the Governor decides that the defendant lacks requisite mental capacity, the Governor is required to transfer that defendant to a DOC mental health treatment facility that is capable of housing death row inmates. A treatment team from DCF is required to provide evaluation and treatment services to the defendant pursuant to contract, and to report its findings to the Governor every 30 days regarding the defendant's mental condition.

Current law requires the Governor to appoint a commission to reexamine the defendant only when the facility administrator first determines that the defendant has been restored to sanity. This bill authorizes the Governor to appoint a commission at any time and not pursuant to a facility administrator's finding. This bill specifies that death penalty inmates whose competency is in question and who are in the custody of the DOC remain there, but that DCF is required to provide them with mental health services.

Defense Motion to Determine Competency

In filing a motion requesting the court to determine the inmate's competency, post-conviction collateral counsel must include a certificate attesting that the motion is filed in good faith and on reasonable grounds. This motion and certificate replaces the current signed oath of the inmate that otherwise accompanies a Florida Rule of Criminal Procedure Rule 3.851 post-conviction motion. The motion for a competency examination must be in writing and allege with specificity the facts at issue and the reason that consultation is necessary.

To the extent that it does not impede lawyer-client privilege, the motion must include a summary of specific observations of, and conversations with, the inmate which have formed the basis of the motion. The court is required to determine whether there are facts that require the inmate to be able to consult with his or her attorney with a reasonable degree of rational understanding; otherwise, issues that involve only matters of record shall proceed.

Competency Examinations

If issues do exist that require the inmate's participation, the court is required to order the defendant's mental condition to be examined by two to three experts who are not employed by or

under contract with the DOC. Counsel for the inmate, the DOC, and the state attorney may be present at the examination.

In examining the inmate, the experts are required to consider and document:

- The inmate's capacity to understand the adversary nature of the legal process and the proceeding;
- The inmate's capacity to reveal pertinent facts to counsel; and
- Any other factors that the experts deem relevant.

Each expert is required to file a written report with the court that identifies specific matters referred for evaluation; procedures, techniques, and tests used; clinical observations, findings, and opinions; the sources of information relied upon; and recommended treatment in the event of incompetency. The court is required to schedule a hearing on competence to proceed within 30 days after the experts have filed their reports.

Involuntary Commitment

An incompetent inmate who has met the criteria for involuntary commitment is required to be committed to DCF for evaluation and treatment or training, but remain in DOC custody and be located in a DOC facility designed to house death-row inmates. The court is not authorized to issue an involuntary commitment order to DCF unless the court finds by clear and convincing evidence that the inmate is mentally ill or retarded, and that there is a substantial likelihood of harm to self or others; less-restrictive alternatives are inappropriate or unavailable; and a substantial probability exists that the mental illness or retardation will respond to treatment or training so that the inmate shall reasonably regain competency.

Within six months after the date of admission, the DCF treatment team must file a report with the court detailing treatment provided and the inmate's prognosis. The Department of Children and Family Services must file a report earlier if the inmate no longer meets commitment criteria or becomes competent. Defense counsel, DOC personnel, and the state attorney are all authorized to file motions for hearing during the six-month period based on reasonable grounds that the inmate is competent. Based on a motion or other information giving the court reasonable grounds to believe that the defendant is competent, the court shall order a hearing. If the court finds that the inmate continues to be incompetent, the court shall order continued commitment for up to a year.

Treatment

This bill provides for emergency, involuntary treatment for post-conviction inmates. Where an emergency does not exist, the treatment team must petition the court for an order authorizing treatment for the inmate, for a period of no more than 90 days from the date of entry of the order.

This bill takes effect July 1, 2005.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

This bill raises two potential concerns:

- In prohibiting defense counsel from informing the Governor of a potential sanity issue within the ten-day period prior to the scheduled date of execution, constitutional due process and Eighth Amendment cruel and unusual punishment arguments may potentially be made; and
- Requiring defense counsel to summarize conversations with the inmate in a motion for competency examination may compromise attorney-client privilege, by encouraging defense counsel to submit a comprehensive motion at the expense of the privilege, and ultimately undermine a fair trial.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

This bill may result in expedited death sentences, and therefore reduce prison bed costs for the Department of Corrections.

This bill may have a fiscal impact on the Department of Children and Family Services, based on additional duties required.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

VIII. Summary of Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
