

The Senate Committee on Judiciary offered the following substitute to HB 123:

A BILL TO BE ENTITLED
AN ACT

1 To amend Title 17 of the Official Code of Georgia Annotated, relating to criminal procedure,
2 so as to provide for pretrial proceedings in capital offense cases where the death penalty is
3 sought when the accused has an intellectual disability; to provide for a definition; to provide
4 for notice of intent to claim intellectual disability; to provide for pretrial determination of
5 intellectual disability; to provide for verdicts; to provide for capital case procedures; to
6 provide for reports investigating reversible error; to provide for a standard of review; to
7 provide for an effective date; to provide for related matters; to repeal conflicting laws; and
8 for other purposes.

9 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

10 **SECTION 1.**

11 Title 17 of the Official Code of Georgia Annotated, relating to criminal procedure, is
12 amended by adding a new Code section to Part 2 of Article 6 of Chapter 7, relating to
13 insanity and mental incompetency, to read as follows:

14 "17-7-128.

15 (a) As used in this Code section, the term 'intellectual disability' shall have the same
16 meaning as set forth in Code Section 17-7-131.

17 (b) In criminal cases involving a capital offense for which the death penalty is sought, the
18 accused may file a pretrial notice of intent to raise a claim of intellectual disability. Such
19 notice shall state that the accused has an intellectual disability.

20 (c) A pretrial hearing on the issue of whether the defendant has an intellectual disability:

21 (1) May be conducted upon motion of the defendant, at the discretion of the court; or

22 (2) Shall be conducted upon joint consent motion of the defendant and the state to
23 proceed with a pretrial hearing to determine if the accused has an intellectual disability.

24 (d)(1) The defendant shall provide all discovery relating to the claim of intellectual
25 disability, including, but not limited to, reports, names, contact information of any
26 witnesses, and any other information, to the prosecuting attorney no later than 60 days
27 prior to the date of the pretrial hearing, or at such time as the court orders.

28 (2) Within 30 days of the defendant providing discovery, or as otherwise ordered by the
29 court, the prosecuting attorney shall provide all discovery relating to the claim of
30 intellectual disability, including, but not limited to, reports, names, contact information
31 of any witnesses, and any other information, to the defendant.

32 (3) If, prior to the pretrial hearing, a party discovers additional evidence or material
33 previously requested or ordered which is subject to discovery under this subsection, such
34 party shall promptly notify the opposing party of the existence of the additional evidence
35 or material and make the additional evidence or material available to the opposing party.

36 (e) Such pretrial determination of intellectual disability shall be made by the court sitting
37 as the finder of fact.

38 (f) The defendant shall have the burden of production and persuasion to demonstrate
39 intellectual disability by a preponderance of the evidence, and, if such pretrial
40 determination does not find the defendant to have an intellectual disability, he or she shall
41 not be precluded from raising such issue in further proceedings.

42 (g) If the defendant is found to have an intellectual disability, the court shall bar the state
43 from seeking the death penalty. If the court does not find that the defendant has an

intellectual disability, the defendant may raise the issue of his or her alleged intellectual disability as set forth in paragraph (2) of subsection (b) or paragraph (2) of subsection (c) of Code Section 17-7-131.

(h) Either party may seek immediate review of the trial court's determination regarding intellectual disability, pursuant to subsection (b) of Code Section 5-6-34 or to Code Section 5-7-1."

SECTION 2.

Said title is further amended by revising subsections (b) and (c) and adding a new paragraph to subsection (j) of Code Section 17-7-131, relating to proceedings upon plea of insanity or mental incompetency at time of crime, to read as follows:

"(b)(1) In all cases in which the defense of insanity, mental illness, or intellectual disability is interposed, the jury, or the court if tried by it, shall find whether the defendant is:

(A) Guilty;

(B) Not guilty;

(C) Not guilty by reason of insanity at the time of the crime;

(D) Guilty but mentally ill at the time of the crime, but the finding of guilty but mentally ill shall be made only in felony cases; or

(E) Guilty but with intellectual disability, but the finding of intellectual disability shall be made only in felony cases.

(2)(A) A plea of guilty but mentally ill at the time of the crime or a plea of guilty but with intellectual disability shall not be accepted until the defendant has undergone examination by a licensed psychologist or psychiatrist and the court has examined the psychological or psychiatric reports, held a hearing on the issue of the defendant's mental condition, and is satisfied that there is a factual basis that the defendant was

mentally ill at the time of the offense or has intellectual disability to which the plea is entered.

~~(2.1)~~(B) A plea of not guilty by reason of insanity at the time of the crime shall not be accepted and the defendant adjudicated not guilty by reason of insanity by the court without a jury until the defendant has undergone examination by a licensed psychologist or psychiatrist and the court has examined the psychological or psychiatric reports, has held a hearing on the issue of the defendant's mental condition, and the court is satisfied that the defendant was insane at the time of the crime according to the criteria ~~of~~ set forth in Code Section 16-3-2 or 16-3-3.

(C) In criminal cases involving a capital offense for which the death penalty is sought and a pretrial notice of intent to raise a claim of intellectual disability has been filed, the procedure set forth in Code Section 17-7-128 shall be followed.

~~(3)~~(D) In all cases and applicable criminal trials in which the defense of insanity, mental illness, or intellectual disability is interposed, the trial judge shall charge the jury, in addition to other appropriate charges, the following:

~~(A)~~(i) I I charge you that should you find the defendant not guilty by reason of insanity at the time of the crime, the defendant will be committed to a state mental health facility until such time, if ever, that the court is satisfied that he or she should be released pursuant to ~~law~~ law;

~~(B)~~(ii) I I charge you that should you find the defendant guilty but mentally ill at the time of the crime, the defendant will be placed in the custody of the Department of Corrections which will have responsibility for the evaluation and treatment of the mental health needs of the defendant, which may include, at the discretion of the Department of Corrections, referral for temporary hospitalization at a facility operated by the Department of Behavioral Health and Developmental ~~Disabilities~~ Disabilities; and

~~(C)(iii)~~ If charge you that should you find the defendant guilty but with intellectual disability, the defendant will be placed in the custody of the Department of Corrections, which will have responsibility for the evaluation and treatment of the mental health needs of the defendant, which may include, at the discretion of the Department of Corrections, referral for temporary hospitalization at a facility operated by the Department of Behavioral Health and Developmental ~~Disabilities~~. Disabilities.

(c)(1) Except as provided in paragraph (2) of this subsection, in ~~in~~ all criminal trials in any of the courts of this state wherein an accused shall contend that he or she was insane, mentally ill, or ~~intellectually disabled~~ had an intellectual disability at the time the act or acts charged against him or her were committed, the trial judge shall instruct the jury that they may consider, in addition to verdicts of 'guilty' and 'not guilty,' the additional verdicts of 'not guilty by reason of insanity at the time of the crime,' 'guilty but mentally ill at the time of the crime,' and 'guilty but with intellectual disability.' The defendant may:

~~(1)(A)~~ Be ~~The defendant may be~~ found 'not guilty by reason of insanity at the time of the crime' if he or she meets the criteria of Code Section 16-3-2 or 16-3-3 at the time of the commission of the crime. If the court or jury should make such finding, it shall so specify in its verdict:;

~~(2)(B)~~ Be ~~The defendant may be~~ found 'guilty but mentally ill at the time of the crime' if the jury, or court acting as trier of facts, finds beyond a reasonable doubt that the defendant is guilty of the crime charged and was mentally ill at the time of the commission of the crime. If the court or jury should make such finding, it shall so specify in its verdict:; or

~~(3)(C)~~ Be found 'guilty but with intellectual disability' if the jury, or court acting as trier of facts, both convicts the defendant beyond a reasonable doubt and finds by a preponderance of the evidence that the defendant has an intellectual disability. The defendant may be found 'guilty but with intellectual disability' if the jury, or court

~~acting as trier of facts, finds beyond a reasonable doubt that the defendant is guilty of the crime charged and is with intellectual disability.~~ If the court or jury should make such finding, it shall so specify in its verdict.

(2) When the death penalty has been sought and the defendant contends he or she has an intellectual disability, the court shall instruct the jury that it shall consider whether it finds beyond a reasonable doubt that the defendant is guilty of the crime charged. If the jury convicts the defendant of such capital crime, the defendant shall then present evidence regarding his or her alleged intellectual disability. The state shall have the opportunity to present evidence in response, and the defendant may offer evidence in rebuttal. Following the presentation of evidence, the court shall instruct the jury that, if the jury finds by a preponderance of the evidence that the defendant has an intellectual disability, such jury shall enter a separate finding of 'intellectual disability' and so specify in its verdict. If the jury does not find by a preponderance of the evidence that the defendant has an intellectual disability, such jury shall enter a separate finding of 'no intellectual disability.' When the jury returns a finding of 'no intellectual disability,' there shall be a capital sentencing proceeding as provided for in Code Section 17-10-30."

"(3) In the trial of any case in which the death penalty is sought, should the judge find in accepting a plea of guilty but with intellectual disability, or the jury or court find in its verdict that the defendant is guilty of the crime charged but with intellectual disability, the death penalty shall not be imposed and the court shall sentence the defendant to imprisonment for life or imprisonment for life without possibility of parole."

SECTION 3.

Said title is further amended by revising subsection (d) of Code Section 17-7-171, relating to time for a demand for speedy trial in capital cases, discharge and acquittal when no trial held before end of two court terms of demand, counting of terms in cases in which death penalty is sought, and special pleas of incompetency, as follows:

148 "(d) If a defendant files a pretrial notice of intent to raise a claim of intellectual disability
149 pursuant to Code Section 17-7-128 or a special plea of incompetency to stand trial pursuant
150 to Code Section 17-7-130 or if the court, pursuant to Code Section 17-7-129, conducts a
151 trial on the competency of the defendant, the period of time during which such matter is
152 pending shall not be included in the computation of determining whether a demand for
153 speedy trial has been satisfied."

154 **SECTION 4.**

155 Said title is further amended by revising subsection (b) of Code Section 17-10-35.1, relating
156 to the review of pretrial proceedings when death penalty is sought, reports investigating
157 reversible error, transmittal of reports to Supreme Court, orders regarding review, Attorney
158 General assistance, res judicata, applicability, and waiver of rights, as follows:

159 "(b) The reports of the trial judge, prosecutor, prosecuting attorney, and defendant under
160 subsection (a) of this Code section shall be in the form of standard questionnaires prepared
161 and supplied by the Supreme Court. Such questionnaires shall be designed to determine
162 whether there is arguably any existence of reversible error with respect to any of the
163 following matters:

- 164 (1) Any proceedings with respect to change of venue;
165 (2) Any proceedings with respect to recusal of the trial judge;
166 (3) Any challenge to the jury array;
167 (4) Any motion to suppress evidence;
168 (5) Any motion for psychiatric or other medical evaluation; ~~and~~
169 (6) Any proceedings with respect to a pretrial determination of intellectual disability; and
170 ~~(6)(7)~~ Any other matter deemed appropriate by the Supreme Court."

171

SECTION 5.

172 This Act shall become effective upon its approval by the Governor or upon its becoming law
173 without such approval.

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SECTION 6.

175 All laws and parts of laws in conflict with this Act are repealed.