

# State of South Dakota

NINETY-THIRD SESSION  
LEGISLATIVE ASSEMBLY, 2018

871Z0373

## HOUSE STATE AFFAIRS ENGROSSED NO. **HB 1123** - 1/31/2018

Introduced by: Representatives Johns, Ahlers, Barthel, Bartling, Beal, Bordeaux, Campbell, Clark, Conzet, DiSanto, Duvall, Glanzer, Hawley, Heinemann, Holmes, Jamison, Jensen (Kevin), Johnson, Kaiser, Lesmeister, Lust, Marty, May, McCleerey, Mills, Pischke, Reed, Ring, Schaefer, Schoenfish, Smith, Steinhauer, Tulson, Turbiville, Willadsen, Wismer, York, and Zikmund and Senators Rusch, Bolin, Cronin, Ewing, Frerichs, Kennedy, Killer, Kolbeck, Maher, Nesiba, Solano, and Sutton

1 FOR AN ACT ENTITLED, An Act to prohibit certain persons suffering from a severe mental  
2 illness from receiving capital punishment.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 Section 1. That § 23A-27A-26.1 be amended to read:

5 23A-27A-26.1. Notwithstanding any other provision of law, the death penalty may not be  
6 imposed upon any person who was mentally retarded at the time of the commission of the  
7 offense and whose mental retardation was manifested and documented before the age of  
8 eighteen years or upon any person who was suffering from a severe mental illness when the  
9 crime was committed.

10 Section 2. That § 23A-27A-26.2 be amended to read:

11 23A-27A-26.2. As used in §§ 23A-27A-26.1 to 23A-27A-26.7, inclusive, the term, mental  
12 retardation, means significant subaverage general intellectual functioning existing concurrently



1 with substantial related deficits in applicable adaptive skill areas. An intelligence quotient  
2 exceeding seventy on a reliable standardized measure of intelligence is presumptive evidence  
3 that the defendant does not have significant subaverage general intellectual functioning.

4 As used in §§ 23A-27A-26.1 to 23A-27A-26.7, inclusive, the term, severe mental illness,  
5 means the same as in § 27A-1-1.

6 Section 3. That § 23A-27A-26.3 be amended to read:

7 23A-27A-26.3. Not later than ninety days prior to the commencement of trial, the defendant  
8 may upon a motion alleging reasonable cause to believe the defendant was mentally retarded  
9 or suffering from a severe mental illness at the time of the commission of the offense, apply for  
10 an order directing that a mental retardation or severe mental illness hearing be conducted ~~prior~~  
11 ~~to~~ before trial. If, upon review of the defendant's motion and any response thereto, the court  
12 finds reasonable cause to believe the defendant was mentally retarded, ~~it~~ or severely mentally  
13 ill, the court shall promptly conduct a hearing without a jury to determine whether the defendant  
14 was mentally retarded or severely mentally ill. If the court finds after the hearing that the  
15 defendant was not mentally retarded or severely mentally ill at the time of the commission of  
16 the offense, the court shall, ~~prior to~~ before commencement of trial, enter an order so stating, but  
17 nothing in this ~~paragraph~~ section precludes the defendant from presenting mitigating evidence  
18 of mental retardation or severe mental illness at the sentencing phase of the trial. If the court  
19 finds after the hearing that the defendant established mental retardation or severe mental illness  
20 by a preponderance of the evidence, the court shall ~~prior to~~ before commencement of trial, enter  
21 an order so stating. Unless the order is reversed on appeal, a separate sentencing proceeding  
22 under this section may not be conducted if the defendant is thereafter convicted of murder in the  
23 first degree. If a separate sentencing proceeding is not conducted, the court, upon conviction of  
24 a defendant for the crime of murder in the first degree, shall sentence the defendant to life

1 imprisonment without parole.

2 Section 4. That § 23A-27A-26.4 be amended to read:

3 23A-27A-26.4. If the court enters an order pursuant to § 23A-27A-26.3 finding that the  
4 defendant was mentally retarded or suffering from a severe mental illness at the time of the  
5 commission of the offense, the state may appeal as of right from the order. Upon entering such  
6 an order, the court shall afford the state a reasonable period of time, which may not be less than  
7 ten days, to determine whether to take an appeal from the order finding that the defendant was  
8 mentally retarded or severely mentally ill. The taking of an appeal by the state stays the  
9 effectiveness of the court's order and any order fixing a date for trial.

10 Section 5. That § 23A-27A-26.5 be amended to read:

11 23A-27A-26.5. If a defendant serves notice pursuant to § 23A-27A-26.3, the state may make  
12 application, upon notice to the defendant, for an order directing that the defendant submit to an  
13 examination by a psychiatrist, licensed psychologist, or licensed psychiatric social worker  
14 designated by the state's attorney, for the purpose of rebutting evidence offered by the defendant.  
15 Counsel for the state and the defendant have the right to be present at the examination. A  
16 videotaped recording of the examination shall be made available to the defendant and the state's  
17 attorney promptly after its conclusion. The state's attorney shall promptly serve on the defendant  
18 a written copy of the findings and evaluation of the examiner. If a defendant is subjected to an  
19 examination pursuant to an order issued in accordance with this section, any statement made by  
20 the defendant for the purpose of the examination is inadmissible in evidence against the  
21 defendant in any criminal action or proceeding on every issue other than that of whether the  
22 defendant was mentally retarded or severely mentally ill at the time of the commission of the  
23 offense, but such statement is admissible upon such an issue whether or not it would otherwise  
24 be deemed a privileged communication.

1       Section 6. That § 23A-27A-26.6 be amended to read:

2       23A-27A-26.6. The provisions of §§ 23A-27A-26.1 to 23A-27A-26.7, inclusive, as they  
3       relate to mental retardation, apply only to offenses alleged to have been committed by the  
4       defendant after July 1, 2000. The provisions of §§ 23A-27A-26.1 to 23A-27A-26.7, inclusive,  
5       as they relate to serious mental illness, apply only to offenses alleged to have been committed  
6       by the defendant after July 1, 2018.