

# State of South Dakota

NINETY-THIRD SESSION  
LEGISLATIVE ASSEMBLY, 2018

808Z0152

## SENATE JUDICIARY ENGROSSED NO. **HB 1077** - 2/15/2018

Introduced by: Representatives Ahlers, Dennert, Hawley, Howard, Latterell, Lesmeister, Peterson (Kent), and Smith and Senators Langer, Cronin, Frerichs, Greenfield (Brock), Kennedy, Killer, Maher, and Nesiba

1 FOR AN ACT ENTITLED, An Act to update certain language regarding capital punishment  
2 and to revise the mandatory sentence for persons with an intellectual disability convicted of  
3 murder in the first degree.

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

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

6 23A-27A-26.1. Notwithstanding any other provision of law, the death penalty may not be  
7 imposed upon any person who was ~~mentally retarded~~ intellectually disabled at the time of the  
8 commission of the offense and whose ~~mental retardation~~ intellectual disability was manifested  
9 and documented before the age of eighteen years.

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, ~~mental retardation~~  
12 intellectual disability means significant subaverage general intellectual functioning existing  
13 concurrently with substantial related deficits in applicable adaptive skill areas. An intelligence  
14 quotient exceeding seventy on a reliable standardized measure of intelligence is presumptive



1 evidence that the defendant does not have significant subaverage general intellectual  
2 functioning.

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

4 23A-27A-26.3. Not later than ninety days ~~prior to~~ before the commencement of trial, the  
5 defendant may upon a motion alleging reasonable cause to believe the defendant was ~~mentally~~  
6 ~~retarded~~ intellectually disabled at the time of the commission of the offense, apply for an order  
7 directing that a ~~mental retardation~~ an intellectual disability hearing be conducted ~~prior to~~ before  
8 trial. If, upon review of the defendant's motion and any response ~~thereto~~ to the defendant's  
9 motion, the court finds reasonable cause to believe the defendant was ~~mentally retarded, it~~  
10 intellectually disabled, the court shall promptly conduct a hearing without a jury to determine  
11 whether the defendant was ~~mentally retarded~~ intellectually disabled. If the court finds after the  
12 hearing that the defendant was not ~~mentally retarded~~ intellectually disabled at the time of the  
13 commission of the offense, the court shall, ~~prior to~~ before commencement of trial, enter an order  
14 ~~so stating, but nothing~~ the court's finding. ~~Nothing~~ in this paragraph precludes the defendant  
15 from presenting mitigating evidence of ~~mental retardation~~ an intellectual disability at the  
16 sentencing phase of the trial. If the court finds after the hearing that the defendant established  
17 ~~mental retardation~~ an intellectual disability by a preponderance of the evidence, the court shall  
18 ~~prior to~~ before commencement of trial, enter an order ~~so stating~~ the court's finding. Unless the  
19 order is reversed on appeal, a separate sentencing proceeding under this section may not be  
20 conducted if the defendant is thereafter convicted of murder in the first degree. If a separate  
21 sentencing proceeding is not conducted, the court, upon conviction of a defendant for the crime  
22 of murder in the first degree, shall sentence the defendant to life imprisonment without parole.

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

24 23A-27A-26.4. If the court enters an order pursuant to § 23A-27A-26.3 finding that the

1 defendant was ~~mentally retarded~~ intellectually disabled at the time of the commission of the  
2 offense, the state may appeal as of right from the order. Upon entering such an order, the court  
3 shall afford the state a reasonable period of time, which may not be less than ten days, to  
4 determine whether to take an appeal from the order finding that the defendant was ~~mentally~~  
5 ~~retarded~~ intellectually disabled. The taking of an appeal by the state stays the effectiveness of  
6 the court's order and any order fixing a date for trial.

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

8 23A-27A-26.5. If a defendant serves notice pursuant to § 23A-27A-26.3, the state may make  
9 application, upon notice to the defendant, for an order directing that the defendant submit to an  
10 examination by a psychiatrist, licensed psychologist, or licensed psychiatric social worker  
11 designated by the state's attorney, for the purpose of rebutting evidence offered by the defendant.  
12 Counsel for the state and the defendant have the right to be present at the examination. A  
13 videotaped recording of the examination shall be made available to the defendant and the state's  
14 attorney promptly after its conclusion. The state's attorney shall promptly serve on the defendant  
15 a written copy of the findings and evaluation of the examiner. If a defendant is subjected to an  
16 examination pursuant to an order issued in accordance with this section, any statement made by  
17 the defendant for the purpose of the examination is inadmissible in evidence against the  
18 defendant in any criminal action or proceeding on every issue other than that of whether the  
19 defendant was ~~mentally retarded~~ intellectually disabled at the time of the commission of the  
20 offense, but such statement is admissible upon such an issue whether or not it would otherwise  
21 be deemed a privileged communication.