

# State of South Dakota

NINETY-THIRD SESSION  
LEGISLATIVE ASSEMBLY, 2018

871Z0373

## HOUSE ENGROSSED NO. **HB 1123** - 2/2/2018

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~~ intellectually disabled at the time of the  
7 commission of the offense and whose ~~mental retardation~~ intellectual disability was manifested  
8 and documented before the age of eighteen years or upon any person who was suffering from  
9 a severe mental illness when the crime was committed and whose severe mental illness  
10 manifested itself and was documented prior to the commission of the offense.

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

12 23A-27A-26.2. As used in §§ 23A-27A-26.1 to 23A-27A-26.7, inclusive, ~~mental retardation~~



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

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

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

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

1 an order so stating. Unless the order is reversed on appeal, a separate sentencing proceeding  
2 under this section may not be conducted if the defendant is thereafter convicted of murder in the  
3 first degree. If a separate sentencing proceeding is not conducted, the court, upon conviction of  
4 a defendant for the crime of murder in the first degree, shall sentence the defendant to life  
5 imprisonment ~~without parole~~.

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

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

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

16 23A-27A-26.5. If a defendant serves notice pursuant to § 23A-27A-26.3, the state may make  
17 application, upon notice to the defendant, for an order directing that the defendant submit to an  
18 examination by a psychiatrist, licensed psychologist, or licensed psychiatric social worker  
19 designated by the state's attorney, for the purpose of rebutting evidence offered by the defendant.  
20 Counsel for the state and the defendant have the right to be present at the examination. A  
21 videotaped recording of the examination shall be made available to the defendant and the state's  
22 attorney promptly after its conclusion. The state's attorney shall promptly serve on the defendant  
23 a written copy of the findings and evaluation of the examiner. If a defendant is subjected to an  
24 examination pursuant to an order issued in accordance with this section, any statement made by

1 the defendant for the purpose of the examination is inadmissible in evidence against the  
2 defendant in any criminal action or proceeding on every issue other than that of whether the  
3 defendant was ~~mentally retarded~~ intellectually disabled or severely mentally ill at the time of  
4 the commission of the offense, but such statement is admissible upon such an issue whether or  
5 not it would otherwise be deemed a privileged communication.

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

7 23A-27A-26.6. The provisions of §§ 23A-27A-26.1 to 23A-27A-26.7, inclusive, as they  
8 relate to intellectual disability, apply only to offenses alleged to have been committed by the  
9 defendant after July 1, 2000. The provisions of §§ 23A-27A-26.1 to 23A-27A-26.7, inclusive,  
10 as they relate to serious mental illness, apply only to offenses alleged to have been committed  
11 by the defendant after July 1, 2018.