# 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: Criminal Justice Committee

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| BILL: | SB 1904 |
| INTRODUCER: | Senator Smith |
| SUBJECT: | Death Penalty/Mental Retardation |
| DATE: | March 13, 2006 |
| REVISED: | |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Cellon | Cannon | CJ | **Favorable** |
| 2. | | | JU | |
| 3. | | | | |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

## I. Summary:

Senate Bill 1904 repeals Rule 3.203, Florida Rule of Criminal Procedure. Rule 3.203 was adopted by the Supreme Court of Florida as the court rule that implemented the court procedures to be followed in cases where a capital defendant raises the issue that he or she is mentally retarded, and therefore, not subject to receiving the death penalty under s. 921.137, F.S. The Rule adopted by the Court differs significantly from the policy enacted by the 2001 Legislature.

This bill repeals Rule 3.203, Florida Rules of Criminal Procedure. To repeal the Rule of Court, the bill requires a two-thirds vote of both houses of the Legislature.

## II. Present Situation:

**Section 921.137, Florida Statutes**
During the 2001 Legislative Session the Legislature enacted s. 921.137, F.S., to bar the execution of the mentally retarded as follows:

***Definition:***
The statute contains a definition of mental retardation which is substantially the same as the definition in s. 393.063, F.S., and in s. 916.106, F.S. The definition in s. 921.137, F.S., has three prongs:

- low intellectual functioning;
- deficits in adaptive behavior; and
- manifestation of conditions by age 18.

The definition does not contain a set IQ level, but rather it provides that low intellectual functioning "means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Department of Children and Family Services." The statute provided express rule-making authority to the Department of Children and Family Services.

In January 2004, the department adopted its Rule specifying two nationally recognized tests to be administered for the purposes of the application of the statute. These are the Stanford-Binet Intelligence Scale and the Wechsler Intelligence Scale. *Rule 65B-4.032, F.A.C.*

Two standard deviations from these tests is approximately a 70 IQ, although it can be extended up to 75. The effect in practical terms will be that a person that has an IQ of around 70 or less will likely establish an exemption from the death penalty. An IQ score of 70 falls in the category of the "mildly retarded."

***Exemption:***
Section 921.137, F.S., provides that a death sentence may not be imposed on a person who has mental retardation. Before enactment of the statute, mental retardation was considered in death cases only as a "non-statutory" mitigating circumstance which may be outweighed by aggravating circumstances. The exemption created by the statute is limited to those cases where the defense is able to prove by clear and convincing evidence that the defendant has mental retardation.

***Notice required:***
Section 921.137, F.S., provides that a defendant who intends to raise the defense of mental retardation as a bar to the death penalty must give notice of his or her intention to do so in accordance with the rules of court governing notice of intent to offer expert testimony regarding mental health mitigation during the penalty phase of a capital trial. The rules of court governing the presentation of mental health mitigation through expert testimony requires the notice be provided not less than 20 days before trial. *Fla.R.Crim.P. 3.202(c).*

***Separate hearing held after conviction or adjudication where advisory jury recommends death sentence; standard of proof:***
Section 921.137, F.S., provides that after conviction or adjudication when an advisory jury has recommended a sentence of death, the court shall, upon receiving a motion from the defendant, conduct a separate proceeding to determine whether a capital defendant should be sentenced to life imprisonment because the defendant has mental retardation.

The court shall appoint two experts in the field of mental retardation who will evaluate the defendant and report their findings to the court and all interested parties prior to the final sentencing hearing. The state and the defendant may present the testimony of additional experts on the issue of whether the defendant has mental retardation.

The final sentencing hearing is conducted without a jury. If the court finds by clear and convincing evidence that the defendant suffers from mental retardation, the court shall enter a written order that sets forth with specificity its findings in support of its determination that the defendant has mental retardation.

***Separate hearing held where defendant waives right to a recommended sentence by advisory jury:***
When the defendant waives the right to a recommended sentence by an advisory jury, either subsequent to entering a plea to a capital felony or a jury finding of guilt by the trial jury, if the defendant has given notice of the intent to raise mental retardation as a bar to the death sentence and filed the requisite motion, the court shall proceed as outlined above.

***Separate hearing held where advisory jury recommends life imprisonment but state will ask court to sentence defendant to death:***
Where the defendant has filed notice of his or her intent to rely on mental retardation as a bar to the death penalty, if the advisory jury recommends life imprisonment but the state asks the court to sentence the defendant to death, upon the state notifying the defendant of that intent, the defendant may file the motion for determination of mental retardation by the court. The court shall then proceed as outlined above.

***State appeal authorized:***
The state is authorized to appeal a determination of mental retardation, pursuant to s. 924.07, F.S.

**The Criminal Rule of Procedure**
Subsequent to the enactment of s. 921.137, F.S., the Supreme Court of Florida adopted Florida Rule of Criminal Procedure 3.203, effective October 1, 2004. The Court Rule differs from the statute in several respects. This discussion shall focus on situations where the trial has not yet commenced, and will highlight the important differences.

***Expert witnesses on issue of mental retardation:***
The Rule provides that the defendant shall file a Motion for Determination of Mental Retardation not later than 90 days before trial. At the time of the filing of the Motion, the defendant may have already been examined by the defendant's experts, or the examination may take place after the Motion is filed.

Before the Motion is filed, if the defendant has been previously examined by the defendant's own expert(s), the Rule provides for *court-appointed experts* to examine the defendant and *report to all parties.* This differs from s. 921.137, F.S., in that: the defendant's experts are the defendant's witnesses where the examination has taken place prior to the Motion being filed, *but the State does not have the opportunity for its own expert witness*; if the defendant has not been examined prior to the Motion being filed, the *court appoints experts who report to all parties.* Unlike the Rule, the statute provides for two court appointed witnesses and experts from either or both parties.

The defendant may be required by the Court to cooperate with court-appointed experts or face the exclusion of his own experts, the disclosure of his own experts' reports, or any other relief the Court deems appropriate.

Another big difference in the particular area is that the *attorneys for the state and defense may be present at the examinations conducted by court-appointed experts.* This provision in the Rule,

along with the fact that under the Rule, expert witnesses examining the defendant are not conducting confidential examinations, and that the uncooperative defendant is arguably "compelled" to cooperate by the potential "consequences" faced by refusing to cooperate, may implicate the defendant's right to remain silent at a time in the proceedings when he is still considered to be innocent.

***Raising the issue of mental retardation:***
This is perhaps the most critical difference between the statute and the Rule. The Rule provides that the issue be raised *pretrial*. The statute requires it *after the verdict and jury's advisory sentence*.

There are arguments on both sides of this issue, as to which timing is "best." If the issue is raised pretrial, Justice Cantero opined in his concurrence to the majority opinion that adopted the Rule, when the defendant is ultimately found to be mentally retarded, the pretrial proceeding would "conserve vast judicial and legal resources." The requirements of a death case would not be present, such as judge, attorney, and jury qualifications, and the pretrial investigations necessary for the penalty phase would be eliminated. *Amendments to Florida Rules of Criminal Procedure and Florida Rules of Appellate Procedure*, 875 So.2d 563 (Fla. 2004).

On the other hand, the issue of mental retardation may be raised needlessly under the pretrial timing, in an effort by the defendant to avoid the death penalty whether or not he is mentally retarded. Likewise, it may be raised by defense counsel somewhat disingenuously in an effort to slow down the trial process. From the purely economic, or "judicial resource" perspective, if it is raised after the verdict and advisory sentence, many mental retardation examinations, Motions and determinations will be eliminated by lesser verdicts (i.e., second degree murder, manslaughter), acquittals, or recommended life sentences.

**Rule Repeal**
Our state government is created on the premise of a balance of power between the three co-equal branches. One method by which the Legislature can "check and balance" the power of the Judiciary is by repealing rules adopted by the Judiciary. This may only be accomplished by a two-thirds vote of both chambers of the Legislature. *Article V,* Section *2, Constitution of the State of Florida.*

## III. Effect of Proposed Changes:

The bill would repeal the current Rule of Procedure in the cases described above.

## 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:

The potential exists for a separation of powers argument, as it does any time one branch of government may be seen as encroaching upon another's power.

## V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

# VIII. Summary of Amendments:

None.