

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 7083      PCB CRJS 13-05      Postconviction Capital Case Proceedings  
**SPONSOR(S):** Justice Appropriations Subcommittee, Criminal Justice Subcommittee, Gaetz  
**TIED BILLS:** HJR 7081      **IDEN./SIM. BILLS:** SB 1750

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Criminal Justice Subcommittee	9 Y, 4 N	Cunningham	Cunningham
1) Justice Appropriations Subcommittee	8 Y, 3 N, As CS	Toms	Jones Darity
2) Judiciary Committee			

### SUMMARY ANALYSIS

Currently, Rules 3.811, 3.812, 3.850, 3.851, and 3.852 of the Florida Rules of Criminal Procedure, and Rule 9.142 of the Florida Rules of Appellate Procedure govern all state postconviction proceedings in capital cases.

The bill codifies the majority of the provisions of the rules identified above in their entirety. However, in an effort to make the capital postconviction process more efficient, the bill modifies provisions of the rules, adds new provisions to the rules, and creates new statutes addressing areas not currently contemplated by the rules. The bill:

- Sets standards for conflict of interest determinations;
- Bars courts from considering postconviction motions that are not fully pled or filed within statutorily established timeframes;
- Prohibits courts from granting extensions of time at various stages of the postconviction process;
- Shortens timeframes relating to case management conferences and postconviction motion amendments;
- Establishes timeframes in which the Florida Supreme Court must hear oral arguments;
- Requires the Florida Supreme Court to rule on an appeal of an initial or successive postconviction motion within 180 days after oral arguments have concluded; and
- Creates reporting requirements that hold courts accountable for delays in the postconviction process.

The bill also removes the court's authorization to appoint a public defender, private attorney, or a registry attorney to represent a death-sentenced person in clemency proceedings in instances where the application for clemency is filed on or after July 1, 2013.

The bill eliminates the registry attorney "pilot program" and appropriates \$432,170 in general revenue to reestablish the capital collateral regional counsel (CCRC) in the northern region of the state.

Due to the nuances of capital cases and the multitude of agencies and personnel involved, it is difficult to precisely quantify the costs associated with Florida's capital postconviction process. Research shows that the time it takes to litigate a capital case on appeal in both state and federal court is a major factor in determining how long it takes for an inmate to progress through the judicial system. How much that litigation costs can vary widely from case to case, depending on the legal matters involved. However, to the extent that the bill's provisions shorten the postconviction process, they will likely result in a cost savings to the state. Reestablishing the CCRC in the northern region will likely have a negative fiscal impact. See fiscal section.

This bill is tied to and is contingent upon the voter's approval of HJR 7081, which amends Article V, Section 2 of the Florida Constitution to require the procedures for postconviction or collateral review of capital cases resulting in a sentence of death be governed by, and to the extent provided by, general law.

The "procedural" portions of the bill take effect July 1, 2015, contingent on voter approval of HJR 7081 in the general election of 2014. Other portions of the bill are effective July 1, 2013.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Current Death Row Statistics**

Florida is currently one of 33 states that impose the death penalty.<sup>1</sup> As of March 3, 2013, there were 404 people on death row in Florida – more than any other state aside from California.<sup>2</sup> On average, Florida death row inmates spend 13.22 years on death row prior to execution.<sup>3</sup> Of the 404 inmates on death row, 155 have been in custody for more than 20 years, and ten have been on death row for more than 35 years.<sup>4</sup> Between 1976-2012, Florida executed 74 inmates.<sup>5</sup> During the same period, Texas executed 492 inmates, Virginia executed 109 inmates, and Oklahoma executed 102 inmates.<sup>6</sup> Florida executed 2 death row inmates in 2011, and 3 in 2012.<sup>7</sup>

#### **Capital Cases – Direct Appeal**

A defendant who is convicted of a crime and sentenced to death automatically receives a direct appeal of his or her conviction and sentence to the Florida Supreme Court.<sup>8</sup> During the direct appeal, the defendant is represented by the public defender's office, if the defendant is indigent, or by a private attorney. Matters which are raised on direct appeal include evidentiary rulings made by the trial court during the course of the defendant's trial, and other matters objected to during the course of the trial such as the jury instructions, prosecutorial misconduct, and procedural rulings made by the trial court.

The Florida Supreme Court must render a judgment within two years of the filing of the notice of appeal.<sup>9</sup> If the Florida Supreme Court affirms the appellant's conviction and sentence, the appellant has 90 days after the decision is entered to file a petition for a writ of certiorari with the United States Supreme Court seeking discretionary review of the Florida Supreme Court's decision.<sup>10</sup> If the United States Supreme Court denies the case, the direct appeal has concluded, and the defendant may begin state postconviction proceedings.

#### **State Postconviction Proceedings**

Rules 3.811, 3.812, 3.850, 3.851, and 3.852 of the Florida Rules of Criminal Procedure, and Rule 9.142 of the Florida Rules of Appellate Procedure govern all state postconviction proceedings initiated by death row inmates challenging a conviction and/or death sentence. Unlike a direct appeal, which challenges the legal errors apparent from the trial transcripts or record on appeal, state postconviction proceedings are designed to address claims which are "collateral" to what transpired in the trial court (e.g., claims that the defendant's trial counsel was ineffective, claims of newly discovered evidence, or claims that the prosecution failed to disclose exculpatory evidence). Since the consideration of these claims often require new fact finding, postconviction motions are filed in the trial court which sentenced the defendant to death. Appeals from the grant or denial of postconviction relief are to the Florida Supreme Court. A detailed review of how state postconviction proceedings are currently conducted.

---

<sup>1</sup> The other states are California, Texas, Pennsylvania, Alabama, North Carolina, Ohio, Arizona, Georgia, Louisiana, Tennessee, Nevada, Oklahoma, South Carolina, Mississippi, Missouri, Arkansas, Oregon, Kentucky, Delaware, Idaho, Indiana, Virginia, Nebraska, Kansas, Utah, Washington, Maryland, South Dakota, Colorado, Montana, New Hampshire, and Wyoming. *Facts About the Death Penalty* (updated December 28, 2012), Death Penalty Information Center, [www.deathpenaltyinfo.org/FactSheet.pdf](http://www.deathpenaltyinfo.org/FactSheet.pdf) (last visited on March 3, 2013).

<sup>2</sup> California has 724 inmates on death row. *Facts About the Death Penalty* (updated December 28, 2012), Death Penalty Information Center, [www.deathpenaltyinfo.org/FactSheet.pdf](http://www.deathpenaltyinfo.org/FactSheet.pdf) (last visited on March 3, 2013). *Also see*, <http://www.dc.state.fl.us/activeinmates/deathrowroster.asp> (last visited on March 3, 2013).

<sup>3</sup> <http://www.dc.state.fl.us/oth/deathrow/index.html#Statistics> (last visited on March 3, 2013).

<sup>4</sup> <http://www.dc.state.fl.us/activeinmates/deathrowroster.asp> (last visited on March 3, 2013).

<sup>5</sup> <http://www.dc.state.fl.us/oth/deathrow/index.html#Statistics> (last visited on March 3, 2013).

<sup>6</sup> *Facts About the Death Penalty* (updated December 28, 2012), Death Penalty Information Center, [www.deathpenaltyinfo.org/FactSheet.pdf](http://www.deathpenaltyinfo.org/FactSheet.pdf) (last visited on March 3, 2013).

<sup>7</sup> *Id.*

<sup>8</sup> Section 921.141(4), F.S.; Art. 5, Sec. 3, FLA. CONST.; Fla. R. App. Proc. 9.030(a)(1)(A)(i).

<sup>9</sup> Section 921.141(4), F.S.

<sup>10</sup> 28 U.S.C. s. 1257; Sup. Ct. R. 13.

### Appointment of Counsel, Judge, and other Preliminary Matters

When the Florida Supreme Court affirms a judgment and sentence of death on direct appeal, the court must simultaneously appoint the appropriate office of the Capital Collateral Regional Counsel (CCRC)<sup>11</sup> to represent the inmate during postconviction proceedings.<sup>12</sup> If the regional counsel has a conflict of interest and the postconviction judge accepts their motion to withdraw, or the inmate was convicted and sentenced to death in the Northern Region of Florida (which no longer has a CCRC office), the chief judge of the circuit court must appoint an attorney from the statewide registry<sup>13</sup> to represent the inmate in postconviction proceedings.<sup>14</sup>

Within 45 days of appointment of postconviction counsel, the inmate's trial counsel must provide postconviction counsel with all information pertaining to the inmate's capital case and postconviction counsel must maintain the confidentiality of all confidential information received.<sup>15</sup>

Within 30 days of the judgment of conviction and sentence of death being affirmed on direct appeal, the chief judge must assign the case to a judge qualified to conduct capital proceedings.<sup>16</sup> Within 90 days of the assignment, the judge must hold a status hearing and thereafter hold status conferences at least every 90 days until:

- An evidentiary hearing, if ordered, has been completed; or
- The motion has been ruled on without a hearing.<sup>17</sup>

At the status hearing and conferences, the judge will entertain pending motions, disputes involving public records, or any other matters ordered by the court.<sup>18</sup>

### Public Records

Rule 3.852 of the Florida Rules of Criminal Procedure establishes the timeframes and procedures that apply to the production of capital postconviction public records. The rule requires the Attorney General (AG), within 15 days after receiving notification of the Florida Supreme Court's mandate affirming the sentence of death, to file a written notice of the mandate with the trial court and serve a copy of it on:

- The state attorney who prosecuted the case;
- The Department of Corrections (DOC); and
- The defendant's trial counsel.<sup>19,20</sup>

The notice to the state attorney and to DOC must direct them to submit public records to the records repository within 90 days after receipt of the notice.<sup>21</sup> The notice to the state attorney must also direct the state attorney to notify each law enforcement agency involved in the investigation of the capital case to submit public records to the records repository<sup>22</sup> within 90 days of receiving the notice.<sup>23</sup>

---

<sup>11</sup> The CCRC represents persons convicted and sentenced to death for the sole purpose of instituting and prosecuting collateral actions challenging the legality of the judgment and sentence imposed against such person in the state courts, federal courts in this state, the United States Court of Appeals for the Eleventh Circuit, and the United States Supreme Court. Each regional office is administered by a regional counsel. Section 27.701(1), F.S.

<sup>12</sup> Fla. R. Crim. Proc. 3.851(b)(1).

<sup>13</sup> Section 27.701(2), F.S., requires the responsibilities of the northern region CCRC office to be met through a pilot program using only attorneys from the registry of attorneys maintained pursuant to s. 27.710, F.S.

<sup>14</sup> Fla. R. Crim. Proc. 3.851(b)(1); sections. 27.701(2), 27.703(1), and 27.710(5), F.S.

<sup>15</sup> Fla. R. Crim. Proc. 3.851(c)(4).

<sup>16</sup> Fla. R. Crim. Proc. 3.851(c)(1).

<sup>17</sup> Fla. R. Crim. Proc. 3.851(c)(2).

<sup>18</sup> *Id.*

<sup>19</sup> Fla. R. Crim. Proc. 3.852(d)(1).

<sup>20</sup> The original of all notices, requests, or objections filed under Rule 3.852 must be filed with the clerk of the trial court. Copies must be served on the trial court, the AG, the state attorney, postconviction counsel, and any affected person or agency, unless otherwise required by this section. Service must be made pursuant to Florida Rule of Criminal Procedure 3.030. In all instances requiring written notification or request, the party who has the obligation of providing a notification or request shall provide proof of receipt. Fla. R. Crim. Proc. 3.852(c).

<sup>21</sup> Fla. R. Crim. Proc. 3.852(d)(2) and (3), and (e)(2) and (3).

<sup>22</sup> Section 27.7081, F.S., requires the Secretary of State to establish and maintain a records repository for the purpose of archiving capital postconviction public records.

Within 90 days of receiving the AG's notice of the mandate, the state attorney and the defendant's trial counsel must provide the AG with the name and address of any person or agency that has public records or information pertinent to the case which has not previously been provided to defendant's postconviction counsel.<sup>24</sup> Within 15 days of receiving this information, the AG must notify the additional persons or agencies that they are required to copy, index, and deliver to the records repository all public records pertaining to the case that are in their possession.<sup>25</sup> The additional entities have 90 days from the receipt of the AG's notice to produce the records.<sup>26,27</sup>

Records delivered to the repository that are confidential or exempt pursuant to s. 119.07(1), F.S., or Art. I, Sec. 24(a) of the Florida Constitution must be separately contained, without being redacted, and sealed.<sup>28</sup> The outside of the container must clearly identify:

- That the public record is confidential or exempt;
- That the seal may not be broken without an order from the trial court; and
- The nature of the public records and the legal basis for the exemption.<sup>29</sup>

Upon court order, sealed containers must be shipped to the clerk of the court and may only be opened by the trial court in camera.<sup>30</sup>

Within 240 days after postconviction counsel is appointed, retained, or appear pro bono, counsel must send a written demand for additional public records to each entity described above.<sup>31</sup> Within 90 days of an entity receiving such demand, the entity must deliver to the records repository any additional public records in the entity's possession that pertain to the case, and certify that all such records have been provided (or that records previously provided were complete).<sup>32</sup> The entity may object to the demand for additional public records within 60 days of receiving the demand.<sup>33</sup> In such instances, the trial court must hold a hearing and rule within 30 days of the filing of the objection.<sup>34</sup> The court must order an entity to produce additional public records if the court determines each of the following exists:

- Postconviction counsel has made a timely and diligent search;
- Postconviction counsel's written demand identifies, with specificity, those additional public records that are not at the records repository;
- The additional public records sought are relevant to the subject matter of a postconviction proceeding under Rule 3.851, or appear reasonably calculated to lead to the discovery of admissible evidence; and
- The additional public records request is not overly broad or unduly burdensome.<sup>35</sup>

Postconviction counsel that seeks to obtain public records in addition to those described above must file an affidavit in the trial court which:

- Attests that postconviction counsel has made a timely and diligent search of the records repository;
- Identifies with specificity those public records not at the records repository;

---

<sup>23</sup> Fla. R. Crim. Proc. 3.852(e)(1) and (4).

<sup>24</sup> Fla. R. Crim. Proc. 3.852(d)(2) and (3).

<sup>25</sup> Fla. R. Crim. Proc. 3.852(d)(4).

<sup>26</sup> Fla. R. Crim. Proc. 3.852(e)(5).

<sup>27</sup> Persons and agencies required to produce records pursuant to Rule 3.852 must bear the costs of doing so, must provide written notification of compliance to the AG, and certify that to the best of their knowledge, all public records in their possession have been copied, indexed, and delivered to the records repository. Fla. R. Crim. Proc. 3.852(e).

<sup>28</sup> Fla. R. Crim. Proc. 3.852(f)(1).

<sup>29</sup> *Id.*

<sup>30</sup> The moving party bears the costs associated with the transportation and inspection of the records by the trial court. Fla. R. Crim. Proc. 3.852(f)(2).

<sup>31</sup> If counsel was appointed before October 1, 2001, counsel must submit the demand within 90 days of appointment, etc. Fla. R. Crim. Proc. 3.852(g)(1).

<sup>32</sup> Fla. R. Crim. Proc. 3.852(g)(2).

<sup>33</sup> Fla. R. Crim. Proc. 3.852(g)(3).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

- Establishes that the additional public records are either relevant to the subject matter of the postconviction proceeding or are reasonably calculated to lead to the discovery of admissible evidence; and
- Must be served on the AG, state attorney, and any affected person or agency.<sup>36</sup>

Within 30 days of the filing of the affidavit, the trial court must order a person or agency to produce additional public records, but only if the court finds:

- Postconviction counsel has made a timely and diligent search of the records repository;
- Postconviction counsel's affidavit identifies with specificity those additional public records that are not at the records repository;
- The additional public records sought are either relevant to the subject matter of a capital postconviction proceeding or appear reasonably calculated to lead to the discovery of admissible evidence; and
- The additional records request is not overly broad or unduly burdensome.<sup>37</sup>

In any capital postconviction public records proceeding, the trial court may:

- Compel or deny disclosure of records;
- Conduct an in-camera inspection;
- Extend established timeframes upon a showing of good cause;
- Impose sanctions upon any party, person, or agency affected by this section including initiating contempt proceedings, taxing expenses, extending time, ordering facts to be established, and granting other relief; and
- Resolve any dispute unless jurisdiction is in an appellate court.<sup>38</sup>

Any objections or motions to compel production of public records must be filed within 30 days after the end of the production time period provided.<sup>39</sup> Counsel for the party objecting or moving to compel must file a copy of the objection or motion directly with the trial court, which must hold a hearing on the objection or motion on an expedited basis.<sup>40</sup> The trial court may order mediation for any controversy as to public records production in accordance with Florida Rules of Civil Procedure 1.700, 1.710, 1.720, 1.730, or the trial court may refer any such controversy to a magistrate in accordance with Florida Rule of Civil Procedure 1.490.<sup>41</sup>

#### Time Limits for Filing an Initial Postconviction Motion

Any person sentenced to death whose judgment of conviction and sentence have been affirmed on direct appeal may file an initial Rule 3.851 motion, under oath, seeking postconviction relief.<sup>42</sup> This motion must be filed within one year after the inmate's judgment and sentence become final. A judgment and sentence become final:

- On the expiration of the time permitted to file in the United States Supreme Court a petition for writ of certiorari seeking review of the Florida Supreme Court's decision affirming the inmate's judgment and sentence of death (90 days after the opinion becomes final); or
- On the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed.<sup>43</sup>

The Florida Supreme Court may grant an extension of time for the filing of a postconviction motion if the inmate's counsel can demonstrate good cause as to why counsel could not file the motion within the one-year time limit.<sup>44</sup>

<sup>36</sup> Fla. R. Crim. Proc. 3.852(i)(1).

<sup>37</sup> Fla. R. Crim. Proc. 3.852(i)(2).

<sup>38</sup> Fla. R. Crim. Proc. 3.852(k).

<sup>39</sup> Fla. R. Crim. Proc. 3.852(l)(2).

<sup>40</sup> *Id.*

<sup>41</sup> Fla. R. Crim. Proc. 3.852(l)(3).

<sup>42</sup> Fla. R. Crim. Proc. 3.851.

<sup>43</sup> *Id.*

<sup>44</sup> Fla. R. Crim. Proc. 3.851(d)(5).

A motion filed after the one-year time limit will not be entertained unless the movant alleges that:

- The facts on which the claim is predicated were not known to the movant or his/her attorney and could not have been ascertained within the one-year time limit by the exercise of due diligence;<sup>45</sup>
- The fundamental constitutional right asserted was not established within the one-year time limit and has been held to apply retroactively; or
- His/her postconviction counsel, through neglect, failed to file the motion.<sup>46</sup>

In addition to the aforementioned exceptions, Florida law allows a litigant to overcome a valid procedural bar by claiming that the alleged error constitutes “fundamental error.” In order for an error to be fundamental and justify consideration—despite being otherwise barred—“the error must reach down into the validity of the trial itself to the extent that a verdict of guilty [or sentence of death] could not have been obtained without the assistance of the alleged error.”<sup>47</sup> For instance, improper comments made in the closing arguments of the penalty phase only constitute fundamental error when they are so prejudicial as to taint the jury’s sentencing recommendation.<sup>48</sup> Fundamental error can be raised at any time,<sup>49</sup> including to collaterally attack a conviction or sentence in postconviction proceedings.<sup>50</sup>

Timely filed motions may be amended or supplemented outside of the one-year time limit.<sup>51</sup> To accomplish this, the movant must file a motion to amend no later than 30 days before the evidentiary hearing, including in the motion the reasons additional claims were not raised upon the initial filing and attaching to the motion the claims sought to be added.<sup>52</sup> If the motion is allowed, the state has 20 days after the amended motion is filed to file an amended answer.<sup>53</sup>

#### Contents of an Initial Postconviction Motion

An initial postconviction motion must include:

- A statement specifying the judgment and sentence under attack and the name of the court that rendered the judgment and sentence;
- A statement of each issue raised on appeal and the disposition of each issue;
- The nature of the relief sought;
- A detailed allegation of the factual basis for any claim for which an evidentiary hearing is sought; and
- A detailed allegation as to the basis for any purely legal or constitutional claims for which an evidentiary hearing is not required and the reason that these claims could not have been or were not raised on direct appeal.<sup>54</sup>

The movant must also attach to the motion a memorandum of law setting forth the relevant case law supporting relief on each asserted claim.<sup>55</sup> The memorandum of law must also state why claims that should have or could have been raised on direct appeal are being raised for the first time in the postconviction motion.<sup>56</sup>

The court may strike an initial motion that fails to comply with the above requirements, but it is an abuse of discretion to do so without also allowing the movant to amend the motion within a reasonable time

---

<sup>45</sup> In order for evidence to be “newly discovered,” the movant must demonstrate that: (1) the asserted facts “must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that movant or his/her] counsel could not have known them by the use of diligence; and (2) “the newly discovered evidence must be of such nature that it would *probably* produce an acquittal on retrial.” See *Scott v. Dugger*, 604 So.2d 465, 468 (Fla. 1992); see also *Miller v. State*, 926 So.2d 1243, 1258 (Fla. 2006).

<sup>46</sup> Fla. R. Crim. Proc. 3.851(d)(2).

<sup>47</sup> *Miller*, 926 So.2d at 1261.

<sup>48</sup> *Id.* Fundamental error can never be found harmless. *Johnson v. State*, 460 So.2d 954, 958 (Fla. 5th DCA 1984).

<sup>49</sup> *Moore v. State*, 924 So.2d 840, 841 (Fla. 4th DCA 2006).

<sup>50</sup> *Johnson*, 460 So.2d at 958.

<sup>51</sup> Fla. R. Crim. Proc. 3.851(d)(4) and (f)(4).

<sup>52</sup> Fla. R. Crim. Proc. 3.851(f)(4).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

(normally between 10 and 30 days).<sup>57</sup> The state has 60 days from the filing of the initial postconviction motion to file its answer.<sup>58</sup>

#### Discovery and the Evidentiary Hearing

Within 90 days of the state filing its answer to an initial postconviction motion, the court must hold a case management conference where both parties must “disclose all documentary exhibits that they intend to offer at the evidentiary hearing, provide an exhibit list of all such exhibits, and exchange a witness list with the names and addresses of any potential witnesses.”<sup>59</sup> At this conference, the court must also:

- Schedule an evidentiary hearing, to be held within 90 days, on claims asserted by the movant which require a factual determination;
- Hear argument on purely legal claims not based on disputed facts; and
- Resolve any discovery disputes.<sup>60</sup>

The court, upon a showing of good cause by either party, may extend the time for holding an evidentiary hearing on the initial postconviction motion for up to 90 days.<sup>61</sup>

The court may dispose of an initial postconviction motion without holding an evidentiary hearing where:

- The motion, files, and records in the case conclusively show that the movant is not entitled to any relief; or
- The motion or a particular claim is legally insufficient.<sup>62</sup>

The movant must support the motion with specific factual allegations;<sup>63</sup> conclusory allegations will not justify an evidentiary hearing.<sup>64</sup>

When an evidentiary hearing is held, the court must immediately request a transcript of the hearing at its conclusion.<sup>65</sup> Within 30 days after receiving the transcript, the court must render its order, including:

- A ruling on each claim considered at the evidentiary hearing and all other claims asserted in the motion;
- Detailed findings of fact and conclusions of law with respect to each claim; and
- Attached or referenced portions of the record as are necessary for meaningful appellate review.<sup>66</sup>

Either party may move for a rehearing within 15 days of the rendition of the court's order on the postconviction motion.<sup>67</sup> Responses to such motions must be made within 10 days, and the court must render an order disposing of the motion for rehearing within 15 days.<sup>68</sup>

The movant may appeal the court's decision to the Florida Supreme Court within 30 days from the date the court rendered its order on the postconviction motion.<sup>69</sup> If the Florida Supreme Court affirms the lower court's decision, the movant may file a petition for a writ of certiorari with the United States Supreme Court.<sup>70</sup> If the United States Supreme Court declines review or affirms the lower's court decision, the postconviction appeal is complete.

---

<sup>57</sup> *Bryant v. State*, 901 So.2d 810, 819 (Fla. 2005).

<sup>58</sup> Fla. R. Crim. Proc. 3.851(f)(3)(A).

<sup>59</sup> The list of potential witnesses must include expert witnesses and the parties must attach reports of any potential expert witnesses to the list. Fla. R. Crim. Proc. 3.851(f)(5)(A).

<sup>60</sup> *Id.*

<sup>61</sup> Fla. R. Crim. Proc. 3.851(f)(5)(C).

<sup>62</sup> *Johnson v. State*, 904 So.2d 400, 403 (Fla. 2005).

<sup>63</sup> *Id.* at 404 (citing *Thompson v. State*, 759 So.2d 650, 659 (Fla. 2000)).

<sup>64</sup> *Id.* (citing *Kennedy v. State*, 547 So.2d 912, 913 (Fla. 1989)).

<sup>65</sup> Fla. R. Crim. Proc. 3.851(f)(5)(D).

<sup>66</sup> *Id.*

<sup>67</sup> Fla. R. Crim. Proc. 3.851(f)(7).

<sup>68</sup> *Id.*

<sup>69</sup> Fla. R. App. Proc. 9.110(b), Fla. R. App. Proc. 9.140(b)(1)(D) and (b)(3).

<sup>70</sup> 28 U.S.C. s. 1257.

## Successive Motions

When the state court has previously ruled on a postconviction motion, a motion filed thereafter challenging the same judgment and sentence is considered a “successive motion.”<sup>71</sup> In addition to the contents required for an initial motion, a successive motion must include:

- The disposition of all previous claims raised in postconviction proceedings and the reason(s) the claims in the present motion were not raised in the former motion(s); and
- The following, if the claims are based on newly discovered evidence:
  - The names, addresses, and telephone numbers of all witnesses supporting the claim;
  - A statement that the witness will be available to testify under oath to the facts alleged in the motion, should an evidentiary hearing be held on that issue;
  - If evidentiary support is in the form of documents, copies of relevant documents and affidavits must be attached to the motion; and
  - As to any witness or document in the motion or attachment to the motion, an explanation as to why the witness or document was not previously available.<sup>72</sup>

The state has 20 days from the filing of a successive motion to file its answer.<sup>73</sup>

Within 30 days after the state files its answer to a successive postconviction motion, the court must hold a case management conference, at which the court must determine whether an evidentiary hearing should be held and hear arguments on any purely legal claims not based on disputed facts.<sup>74</sup> As with initial postconviction motions, the court may dispose of any successive motion without holding an evidentiary hearing where the motion, files, and records in the case conclusively show that the movant is not entitled to any relief.<sup>75</sup> Additionally, the court may dismiss successive motions without an evidentiary hearing where:

- The movant does not provide a reason for failing to raise the successive claims in his/her previous Rule 3.851 motion; or<sup>76</sup>
- The motion raises claims that have already been asserted and adjudicated on the merits in a previous Rule 3.851 proceeding.<sup>77</sup>

If, however, the court determines that an evidentiary hearing should be held, the hearing should be scheduled and held within 60 days.<sup>78</sup> The court, upon a showing of good cause by either party, may extend the time for holding an evidentiary hearing on a successive motion for up to 90 days.<sup>79</sup>

The deadlines for requesting transcripts and rendering orders after an evidentiary hearing on a successive postconviction motion are the same as those applicable to initial postconviction motions.<sup>80</sup> The rules relating to motions for rehearing and appealing an initial postconviction motion also apply to successive motions.<sup>81</sup>

## Appeal to the Florida Supreme Court *Postconviction Motions*

---

<sup>71</sup> Fla. R. Crim. Proc. 3.851(e)(2).

<sup>72</sup> *Id.*

<sup>73</sup> Fla. R. Crim. Proc. 3.851(f)(3)(B).

<sup>74</sup> Fla. R. Crim. Proc. 3.851(f)(5)(B).

<sup>75</sup> *Id.*

<sup>76</sup> *See, e.g., Hill v. State*, 921 So.2d 579, 584 (Fla. 2006)(holding that the movant’s successive claim alleging that he was mentally retarded and, therefore, could not be executed pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002), was procedurally barred because the movant gave no reason why the claim could not have been raised in his 2003 Rule 3.851 motion, which was filed after the issuance of the *Atkins* decision).

<sup>77</sup> *See, e.g., Johnson v. State*, 904 So.2d 400, 412 (Fla. 2005)(rejecting the movant’s successive claim that lethal injection constitutes cruel and unusual punishment because it was raised and rejected in the movant’s previous postconviction proceeding).

<sup>78</sup> Fla. R. Crim. Proc. 3.851(f)(5)(B).

<sup>79</sup> Fla. R. Crim. Proc. 3.851(f)(5)(C).

<sup>80</sup> Fla. R. Crim. Proc. 3.851(f)(5)(D).

<sup>81</sup> Fla. R. Crim. Proc. 3.851(f)(7) and (8).

Any party to a Rule 3.851 motion may appeal a trial court's final order to the Florida Supreme Court (Court) by filing a notice of appeal with the trial clerk within 30 days of the rendition of the order.<sup>82</sup> When the notice of appeal is filed, the Court's chief justice directs the appropriate chief judge of the circuit court to monitor the preparation of the complete record<sup>83</sup> for timely filing in the Court.<sup>84</sup>

After the record is filed, the clerk establishes a briefing schedule that gives the defendant 30 days to serve an initial brief.<sup>85</sup> The answer brief must be served within 20 days after service of the initial brief, and the reply brief, if any, must be served within 20 days after service of the answer brief. The cross reply brief, if any, must be served within 20 days thereafter.<sup>86</sup> If any brief is delinquent, an order to show cause may be issued,<sup>87</sup> and sanctions may be imposed.<sup>88</sup> Oral argument is scheduled after the filing of the defendant's reply brief.<sup>89</sup> The rules do not prescribe when the Court must rule on the appeal.

#### *Petitions for Extraordinary Relief*

Petitions for extraordinary relief are generally treated as original proceedings.<sup>90</sup> Such petitions must be in the form prescribed by Rule 9.100 of the Rules of Appellate Procedure, may include supporting documents, and must include in the statement of facts:

- The date and nature of the lower tribunal's order sought to be reviewed;
- The name of the lower tribunal rendering the order;
- The nature, disposition, and dates of all previous court proceedings;
- If a previous petition was filed, the reason the claim in the present petition was not raised previously; and
- The nature of the relief sought.<sup>91</sup>

Petitions seeking a belated appeal must include a detailed allegation of the specific acts, sworn to by the petitioner or petitioner's counsel, that constitute the basis for entitlement to belated appeal, including:

- Whether petitioner requested counsel to proceed with the appeal and the date of any such request;
- Whether counsel misadvised the petitioner as to the availability of appellate review or the filing of the notice of appeal; or
- Whether there were circumstances unrelated to counsel's action or inaction, including names of individuals involved and dates of the occurrences, that were beyond the petitioner's control and otherwise interfered with the petitioner's ability to file a timely appeal.<sup>92</sup>

A petition for belated appeal may not be filed more than one year after the expiration of time for filing the notice of appeal from a final order denying Rule 3.851 relief, unless it alleges under oath with a specific factual basis that the petitioner:

- Was unaware an appeal had not been timely filed, was not advised of the right to an appeal, was misadvised as to the rights to an appeal, or was prevented from timely filing a notice of appeal due to circumstances beyond the petitioner's control; and
- Could not have ascertained such facts by the exercise of due diligence.<sup>93</sup>

---

<sup>82</sup> Fla. R. Crim. Proc. 3.851(f)(8).

<sup>83</sup> The complete record in a death penalty appeal includes all items required by Rule 9.200 of the Florida Rules of Appellate Procedure and by any order issued by the Court. In any appeal following the initial direct appeal, the record that is electronically transmitted must begin with the most recent mandate issued by the Court, or the most recent filing not already electronically transmitted in a prior record in the event the preceding appeal was disposed of without a mandate, and excludes any materials already transmitted to the Court as the record in any prior appeal. Fla. R. App. Proc. 9.142(a)(1)(B).

<sup>84</sup> Fla. R. App. Proc. 9.142(a)(1).

<sup>85</sup> Fla. R. App. Proc. 9.142(a)(2).

<sup>86</sup> *Id.*

<sup>87</sup> Pursuant to Fla. R. Crim. Proc. 3.840.

<sup>88</sup> Fla. R. App. Proc. 1.942(a)(3).

<sup>89</sup> Fla. R. App. Proc. 1.942(a)(4).

<sup>90</sup> Fla. R. App. Proc. 1.942(b)(1).

<sup>91</sup> Fla. R. App. Proc. 1.942(b)(2).

<sup>92</sup> Fla. R. App. Proc. 1.942(b)(3)(A).

A petition for belated appeal may never be filed more than two years after the expiration of time for filing the notice of appeal.<sup>94</sup>

A petition alleging ineffective assistance of direct appeal counsel must include detailed allegations of the specific acts that constitute the alleged ineffective assistance of counsel and must be filed simultaneously with the initial brief in the appeal from the lower tribunal's order on the defendant's application for postconviction relief.<sup>95</sup>

*Petitions Seeking Review of Nonfinal Orders in Death Penalty Postconviction Proceedings*

Petitions seeking review of nonfinal orders in postconviction proceedings are generally treated as original proceedings, and must be filed within 30 days of rendition of the nonfinal order to be reviewed.<sup>96</sup> Either party to the proceeding may file a petition, but must serve it on the opposing party and the judge who issued the nonfinal order being reviewed.<sup>97</sup>

The petition must be in the form prescribed by Rule 9.100 of the Florida Rules of Appellate Procedure and must contain:

- The basis for invoking the jurisdiction of the court;
- The date and nature of the order sought to be reviewed;
- The name of the lower tribunal rendering the order;
- The name, disposition, and dates of all previous trial, appellate, and postconviction proceedings relating to the conviction and death sentence that are the subject of the proceedings in which the order sought to be reviewed was entered;
- The facts on which the petitioner relies, with references to the appropriate pages of the supporting appendix;
- Argument in support of the petition, including an explanation of why the order departs from the essential requirements of law and how the order may cause material injury for which there is no adequate remedy on appeal, and appropriate citations of authority; and
- The nature of the relief sought.<sup>98</sup>

The petition must be accompanied by an appendix<sup>99</sup> containing the portions of the record necessary for a determination of the issues presented.<sup>100</sup>

If the petition demonstrates a preliminary basis for relief or a departure from the essential requirements of law that may cause material injury for which there is no adequate remedy by appeal, the Court may issue an order directing the respondent to show cause, within the time set by the Court, why relief should not be granted.<sup>101</sup> No response is permitted unless ordered by the Court.<sup>102</sup> Within 20 days after service of the response or such other time set by the Court, the petitioner may serve a reply, which may not exceed 15 pages in length, and supplemental appendix.<sup>103</sup>

A stay of proceedings is not automatic - the party seeking a stay must petition the Court for a stay.<sup>104</sup> During the pendency of a review of a nonfinal order, unless a stay is granted by the Court, the lower tribunal may proceed with all matters, except that the lower tribunal may not render a final order disposing of the cause pending review of the nonfinal order.<sup>105</sup>

---

<sup>93</sup> Fla. R. App. Proc. 1.942(b)(3)(B).

<sup>94</sup> *Id.*

<sup>95</sup> Fla. R. App. Proc. 1.942(b)(4).

<sup>96</sup> Fla. R. App. Proc. 1.942(c)(2) and (c)(3)(A).

<sup>97</sup> Fla. R. App. Proc. 1.942(c)(3).

<sup>98</sup> Fla. R. App. Proc. 1.942(c)(4).

<sup>99</sup> As prescribed by Fla. R. App. Proc. 9.220.

<sup>100</sup> Fla. R. App. Proc. 1.942(c)(5).

<sup>101</sup> Fla. R. App. Proc. 1.942(c)(6).

<sup>102</sup> Fla. R. App. Proc. 1.942(c)(7).

<sup>103</sup> Fla. R. App. Proc. 1.942(c)(8).

<sup>104</sup> Fla. R. App. Proc. 1.942(c)(9).

<sup>105</sup> *Id.*

### Inmate's Motion to Dismiss Postconviction Proceedings and to Discharge Postconviction Counsel

An inmate may file a motion to dismiss pending postconviction proceedings and to discharge postconviction counsel pro se.<sup>106</sup> In such instances, the clerk must serve copies of the motion on counsel of record for both the inmate and the state, and counsel of record may file responses within 10 days.<sup>107</sup>

The trial judge must review the motion and the responses and schedule a hearing, at which the inmate, collateral counsel, and the state must be present.<sup>108</sup> At the hearing, the judge must examine the inmate and hear the arguments of the inmate, postconviction counsel, and the state. If the judge concludes that there are reasonable grounds to believe the inmate is not mentally competent, no fewer than two or more than three qualified experts shall be appointed to examine the inmate.<sup>109</sup> The experts must file reports with the trial court setting forth their findings. The trial court must then conduct an evidentiary hearing and enter an order setting forth findings of competency or incompetency.<sup>110</sup>

If the inmate is found to be incompetent, the trial court must deny the motion without prejudice.<sup>111</sup> If the inmate is found to be competent, the trial court must conduct a complete inquiry to determine whether the inmate knowingly, freely and voluntarily wants to dismiss pending postconviction proceedings and discharge postconviction counsel.<sup>112</sup>

If the trial court determines that the inmate has made the decision to dismiss pending postconviction proceedings and discharge collateral counsel knowingly, freely, and voluntarily, the court must enter an order dismissing all pending postconviction proceedings and discharging collateral counsel.<sup>113</sup> If the trial court determines that the opposite is true, it must enter an order denying the motion without prejudice.<sup>114</sup>

If the trial court grants the motion:

- A copy of the motion, the order, and the transcript of the hearing or hearings conducted on the motion shall be electronically forwarded to the clerk of the Florida Supreme Court within 30 days; and
- Discharged counsel shall, within 10 days after issuance of the order, file with the clerk of the circuit court two copies of a notice seeking review in the Florida Supreme Court, and must, within 20 days after the filing of the transcript, serve an initial brief.<sup>115</sup>

If the trial court denies the motion, the inmate may seek review as prescribed by Florida Rule of Appellate Procedure 9.142(b).<sup>116</sup>

### Special Procedures for Postconviction Motions Filed After a Death Warrant is Signed

In cases in which the Governor signs a death warrant prior to the one-year filing deadline, the Florida Supreme Court is required, on the movant's request, to grant a stay of execution to allow postconviction motions to proceed in a timely and orderly manner.<sup>117</sup> In practice, however, this requirement is unnecessary because the Governor has agreed that, absent the circumstance where a competent death-sentenced individual voluntarily requests that a death warrant be signed, no death warrants will

---

<sup>106</sup> Fla. R. Crim. Proc. 3.851(i)(2).

<sup>107</sup> *Id.*

<sup>108</sup> Fla. R. Crim. Proc. 3.851(i)(3).

<sup>109</sup> Fla. R. Crim. Proc. 3.851(i)(4).

<sup>110</sup> *Id.*

<sup>111</sup> Fla. R. Crim. Proc. 3.851(i)(5).

<sup>112</sup> Fla. R. Crim. Proc. 3.851(i)(6).

<sup>113</sup> Fla. R. Crim. Proc. 3.851(i)(7).

<sup>114</sup> *Id.*

<sup>115</sup> Both the inmate and the state may serve responsive briefs. Fla. R. Crim. Proc. 3.851(i)(8). *Also see*, Fla. R. App. Proc. 9.142(d)(2)(A).

<sup>116</sup> Fla. R. Crim. Proc. 3.851(i)(9).

<sup>117</sup> Fla. R. Crim. Proc. 3.851(d)(4).

be issued during the initial round of federal and state review, provided that counsel for the death penalty movant is proceeding in a timely and diligent manner.<sup>118</sup>

Once the one-year filing deadline has passed and after the initial round of state and federal collateral review is over, the Governor may sign a death warrant. At this point, any subsequently-filed postconviction motions, initial or successive, are subject to the following expedited procedures:

- The chief judge of the circuit court is required to assign the case to a judge as soon as the judge receives notification of the death warrant.
- Proceedings after a death warrant has been issued are required to take precedence over all other cases.
- The normal time limitations in Rule 3.851 do not apply after a death warrant has been signed; instead, all motions must be heard expeditiously considering the time limitations set by the execution date and the time required for appellate review.
- The assigned judge must schedule a case management conference as soon as reasonably possible after receiving notification that a death warrant has been signed.
- At the conference, the court must set a deadline for the filing of a Rule 3.851 postconviction motion, schedule a hearing to determine whether an evidentiary hearing should be held, and hear arguments on any purely legal claims not based on disputed facts.<sup>119</sup>

All motions for postconviction relief filed after a death warrant is issued are considered successive motions and must comply with the content requirements for successive motions.<sup>120</sup> If the motion, files, and records in the case conclusively show that the movant is not entitled to relief, the motion may be denied without an evidentiary hearing.<sup>121</sup> If, however, the trial court determines that an evidentiary hearing should be held, it must hold the evidentiary hearing as soon as reasonably possible considering the time limitations set by the date of execution and the time required for appellate review.<sup>122</sup>

After the evidentiary hearing is completed, the court must immediately obtain a transcript of all proceedings and, as soon as possible after the hearing is concluded, render its order.<sup>123</sup> A copy of the final order must immediately be electronically transmitted to the Florida Supreme Court and to the attorneys of record.<sup>124</sup> The record must also be sent to the Florida Supreme Court—electronically, where possible.<sup>125</sup>

### Federal Habeas Corpus

After state postconviction proceedings have been completed, a capital defendant is entitled to file a petition for writ of habeas corpus in federal court. In habeas proceedings, the federal court reviews whether the conviction or sentence violates federal law. Federal habeas is limited to consideration of claims previously asserted on direct appeal or in state postconviction proceedings. Federal habeas proceedings may require an evidentiary hearing and may, in specified instances, be appealed to the Eleventh Circuit Court of Appeals and the United States Supreme Court.<sup>126</sup>

### Execution

An inmate's death sentence may not be carried out until the Governor issues a death warrant.<sup>127</sup> A death warrant may be issued after the inmate has pursued all possible collateral remedies in a timely manner or after the inmate has failed to pursue said remedies within specified time limits.<sup>128</sup> Upon

---

<sup>118</sup> Fla. R. Crim. Proc. 3.851 (comment).

<sup>119</sup> Fla. R. Crim. Proc. 3.851(h).

<sup>120</sup> Fla. R. Crim. Proc. 3.851(h)(5).

<sup>121</sup> Fla. R. Crim. Proc. 3.851(h)(6).

<sup>122</sup> *Id.*

<sup>123</sup> Fla. R. Crim. Proc. 3.851(h)(8).

<sup>124</sup> *Id.*

<sup>125</sup> Fla. R. Crim. Proc. 3.851(h)(9).

<sup>126</sup> *See* 28 U.S.C. ss. 2161-2166.

<sup>127</sup> Section 922.052(1), F.S.

<sup>128</sup> Section 922.095, F.S.

issuance of a death warrant, the Governor must transmit the warrant and the record to the warden and direct the warden to execute the sentence at a time designated in the warrant.<sup>129</sup>

An inmate's death sentence will be carried out by lethal injection unless the inmate requests to be executed by electrocution.<sup>130</sup> The warden of the state prison designates the executioner.<sup>131</sup> The warden (or a deputy) must be present at the execution and must select twelve individuals to witness the execution.<sup>132</sup> A qualified physician must be present, and the inmate's counsel, ministers of religion, representatives of the media, and prison and correctional officers may be present.<sup>133</sup> Immediately before the inmate's execution, the death warrant must be read to the inmate.<sup>134</sup> The physician must announce when death has been inflicted.<sup>135</sup>

After the death sentence has been executed, the warden must send the warrant and a signed statement of the execution to the Secretary of State and file an attested copy of the warrant and statement with the clerk of the court that imposed the sentence.<sup>136</sup>

Sixty days after a capital sentence is carried out, after a defendant is released from incarceration following the granting of a pardon or reversal of the sentence, or after a defendant has been resentenced to a term of years, the AG must provide written notification of this occurrence to the Secretary of State.<sup>137</sup> After the expiration of the 60 days, the Secretary of State may destroy the copies of the public records held by the records repository that pertain to that case, unless an objection to the destruction is filed in the trial court and served upon the Secretary of State. If an objection is served, the records shall not be destroyed until a final disposition of the objection.<sup>138</sup>

### **Clemency**

Clemency is an act of mercy that absolves the individual upon whom it is bestowed from all or any part of the punishment that the law imposed.<sup>139</sup> Types of clemency include pardons, commutation of sentence, remission of fines or forfeitures, restoration of the authority to possess a firearm, and restoration of civil rights.<sup>140</sup>

The Governor and members of the Cabinet collectively are the Board of Executive Clemency. Pursuant to the Florida Constitution, the Governor has the power to grant clemency with the consent of at least two Cabinet members.<sup>141</sup> The Florida Parole Commission acts as the agent of the Board of Executive Clemency in determining whether offenders are eligible for clemency, investigating clemency applications, conducting hearings when required, and making recommendations to the Board.<sup>142</sup>

Currently, ss. 27.40, 27.51, 27.511, 27.5303, and 27.5304, F.S., authorize the trial court to appoint a public defender, private attorney, or a registry attorney to represent a person who has been convicted and sentenced to death in clemency proceedings.

### **Death Penalty Reform Efforts**

---

<sup>129</sup> Section 922.052(1), F.S.

<sup>130</sup> Section 922.105, F.S.

<sup>131</sup> Section 922.10, F.S. A person authorized by state law to prepare, compound, or dispense medication and designated by the Department of Corrections may prepare, compound, or dispense a lethal injection. Section 922.105(6), F.S.

<sup>132</sup> Section 922.11, F.S.

<sup>133</sup> *Id.*

<sup>134</sup> Section 922.10, F.S.

<sup>135</sup> Section 922.11(2), F.S.

<sup>136</sup> Section 922.12, F.S.

<sup>137</sup> Fla. R. Crim. Proc. 3.852(m).

<sup>138</sup> *Id.*

<sup>139</sup> Rule 1, Rules of Executive Clemency. March 9, 2011.

<sup>140</sup> Section 940.01, F.S. Also see Rule 4 I., Rules of Executive Clemency. March 9, 2011.

<sup>141</sup> Article IV, Section 8(a), FLA. CONST.

<sup>142</sup> Annual Report 2009-2010. Florida Parole Commission, p. 23.

As noted above, as of March 3, 2013, there were 404 people on death row in Florida.<sup>143</sup> On average, Florida death row inmates spend 13.22 years on death row prior to execution.<sup>144</sup> Of the 404 inmates on death row, 155 have been in custody for more than 20 years, and 10 inmates have been on death row for more than 35 years.<sup>145</sup>

The capital postconviction process has often been cited as one of the areas that causes the most delays in capital cases.<sup>146</sup> There are several reasons for this - delays can result from litigation over public records requests, or from sentencing courts which may not hear or rule on postconviction motions for several months, or sometimes years. Postconviction attorneys often amend their motions to introduce new claims, which, if allowed, requires additional time to investigate and respond to. Sometimes these motions improperly attempt to revisit issues that were or could have been resolved at trial or during the first appeal.

In a 1998 Florida Supreme Court opinion reviewing the death penalty of an inmate convicted in 1974, Justice Wells strongly expressed his position that the process needs to be changed, stating that,

. . . I do again state my view that such an extended time period to finally adjudicate these cases is totally unacceptable and is this Court's and the State's prime responsibility to correct. (citation omitted). . . . The courts and the State must be able to do better, and any explanation of why we are unable to do so is insufficient.<sup>147</sup>

Numerous reforms have been made over the years in an effort to improve the capital postconviction process. In 1993, the Florida Supreme Court created Rule 3.851 of the Florida Rules of Criminal Procedure and adopted the recommendation of the "Florida Supreme Court Committee on Postconviction Relief" to require that postconviction motions be filed within one-year from the date the direct appeal became final.<sup>148</sup> In March of 1999, Chief Justice Harding established by administrative order a Supreme Court Committee on Postconviction Relief in Capital Cases (the "Morris Committee"), to assist the Court in identifying inherent delays in the current postconviction process and recommend improvements.<sup>149</sup> While the Court was considering the Morris Committee's report, the Florida Legislature passed the Death Penalty Reform Act of 2000.

### **Death Penalty Reform Act of 2000**

During a special session in January of 2000, the Legislature passed the Death Penalty Reform Act (DPRA).<sup>150</sup> DPRA made a number of significant statutory changes to the capital postconviction process. However, on April 14, 2000, the Florida Supreme Court struck down the majority of the provisions of DPRA based on a separation of powers claim.<sup>151,152</sup> Specifically, the Court held that that the "DPRA is an unconstitutional encroachment on the Court's exclusive power to 'adopt rules for the practice and procedure in all courts.'"<sup>153</sup> The Court held that the provisions of the DPRA were

---

<sup>143</sup> California has 724 inmates on death row. *Facts About the Death Penalty* (updated December 28, 2012), Death Penalty Information Center, [www.deathpenaltyinfo.org/FactSheet.pdf](http://www.deathpenaltyinfo.org/FactSheet.pdf) (last visited on March 3, 2013). *Also see*, <http://www.dc.state.fl.us/activeinmates/deathrowroster.asp> (last visited on March 3, 2013).

<sup>144</sup> <http://www.dc.state.fl.us/oth/deathrow/index.html#Statistics> (last visited on March 3, 2013).

<sup>145</sup> <http://www.dc.state.fl.us/activeinmates/deathrowroster.asp> (last visited on March 3, 2013).

<sup>146</sup> *See, In Rule of Criminal Procedure 3.851 (Collateral Relief after Death Sentence Has Been Imposed)*, 626 So.2d. 198, 199 (Fla. 1993)(stating that the Supreme Court Committee on Postconviction Relief in Capital Cases was created because of the substantial delays in the death penalty postconviction relief process).

<sup>147</sup> *Knight v. State*, 746 So.2d 42, 439-440 (Fla. 1998).

<sup>148</sup> *In Rule of Criminal Procedure 3.851 (Collateral Relief after Death Sentence Has Been Imposed)*, 626 So.2d. 198 (Fla. 1993).

<sup>149</sup> *Amendments to Florida Rules Criminal Procedure 3.851, 3.852, and 3.993*, 772 So.2d 488 (Fla. 2000).

<sup>150</sup> Chapter 2000-3, L.O.F.

<sup>151</sup> Article II, Section 3 of the Florida Constitution provides, "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." Further, Article V, Section 2 authorizes the Florida Supreme Court to "adopt rules of practice and procedure in all courts . . ." This same section of the constitution authorizes the Legislature to repeal court rules of procedure with a 2/3 vote of the membership of both houses.

<sup>152</sup> *Allen v. Butterworth*, 756 So.2d 52, 59 (Fla. 2000).

<sup>153</sup> *Id.* at 54.

“procedural” (rather than substantive) and ruled that because the constitution gives the court the authority to adopt rules of practice and procedure, the Legislature was not permitted to act in this area.

The Court rejected the state’s argument that the deadlines for filing postconviction motions in DPRA were statutes of limitations which are substantive. The Court stated that Florida Rule of Criminal Procedure 3.850 is a “procedural vehicle for the collateral remedy otherwise available by a writ of habeas corpus”<sup>154</sup> and further held that:

Due to the constitutional and quasi-criminal nature of habeas proceedings and the fact that such proceedings are the primary avenue through which convicted defendants are able to challenge the validity of a conviction and sentence, we hold that article V, section 2(a) of the Florida Constitution grants this Court the exclusive authority to set deadlines for postconviction motions.<sup>155</sup>

### **2001 Florida Supreme Court Rule Revisions**

Shortly after the DPRA was held unconstitutional, the Florida Supreme Court made a variety of revisions to the rules applicable to postconviction proceedings in capital cases. For example:

- Rule 3.851(b) was added to ensure appointment of postconviction counsel upon the Florida Supreme Court’s issuance of mandate on direct appeal.
- Rule 3.851(c) was added to provide for, among other things, the assignment of a qualified judge within 30 days after mandate issues on direct appeal and status conferences every 90 days after the assignment until the evidentiary hearing has been completed or the motion has been ruled on without a hearing. These status conferences are intended to provide a forum for the timely resolution of public records issues and other preliminary matters.
- Rule 3.851(f) was added to set forth general procedures relating to evidentiary hearings. Most significantly, to require an evidentiary hearing on claims listed in an initial motion as requiring a factual determination. The Court has identified the failure to hold evidentiary hearings on initial motions as a major cause of delay in the capital postconviction process and has determined that, in most cases, requiring an evidentiary hearing on initial motions presenting factually based claims will avoid this cause of delay.<sup>156</sup>

### **Effect of the Bill**

This bill is tied to and is contingent upon the voter’s approval of HJR 7081, which amends Article V, Section 2 of the Florida Constitution to require the procedures for postconviction or collateral review of capital cases resulting in a sentence of death to be governed by, and to the extent provided by, general law. This addresses the separation of powers concerns that were raised by the DPRA.

The bill codifies the majority of the provisions contained in Rules 3.811, 3.812, 3.850, 3.851, and 3.852 of the Florida Rules of Criminal Procedure, and Rule 9.142 of the Florida Rules of Appellate Procedure, all of which are described in detail above. The bill also creates new statutes related to capital postconviction proceedings that contain provisions not currently addressed in court rules.

### Whereas Clauses

The bill is cited as the "Timely Justice Act of 2013" and provides the following whereas clauses:

- WHEREAS, it is in the best interest of the administration of justice that a sentence of death ordered by a court of this state be carried out in a manner that is fair, just, and humane and that conforms to constitutional requirements;
- WHEREAS, in order for capital punishment to be fair, just, and humane for both the family of victims and for offenders, there must be a prompt and efficient administration of justice following any sentence of death ordered by the courts of this state;
- WHEREAS, in order to ensure the fair, just, and humane administration of capital punishment, it is necessary for the Legislature to comprehensively address the processes by which an

---

<sup>154</sup> *Id.* at 61 (citations omitted).

<sup>155</sup> *Id.* at 62.

<sup>156</sup> *Amendments to Florida Rules of Criminal Procedure 3.851, 3.852 and 3.993*, 772 So.2d 488, 491 (Fla. 2000).

offender sentenced to death may pursue postconviction and collateral review of the judgment and the sentence of death;

- WHEREAS, the Death Penalty Reform Act of 2000, chapter 2000-3, Laws of Florida, was designed to accomplish these objectives and was passed by the Legislature and approved by the Governor of Florida in January of 2000;
- WHEREAS, the Death Penalty Reform Act of 2000, chapter 2000-3, Laws of Florida, was declared unconstitutional by the Florida Supreme Court three months after becoming a law in *Allen v. Butterworth*, 756 So.2d 52 (Fla. 2000), as being an encroachment on the court's "exclusive power to 'adopt rules for the practice and procedure in all courts;'"
- WHEREAS, the Constitution of the State of Florida has been amended to require postconviction and collateral review of capital cases resulting in a sentence of death to be governed by, and to the extent provided by, general law;
- WHEREAS, provisions of the Death Penalty Reform Act of 2000 which were held unconstitutional may now be reenacted, while other provisions can be modified, and new provisions added to ensure a prompt and efficient administration of justice following any sentence of death.

#### Legislative Intent

The DPRA amended s. 924.055, F.S., to provide that it was the Legislature's intent to "reduce delays in capital cases and to ensure that all appeals and postconviction actions in capital cases are resolved within 5 years after the date a sentence of death is imposed in the circuit court." The section also provided the following legislative intent:

- All postconviction actions should be filed as early as possible after imposition of the death sentence, which may be during a direct appeal of the conviction and sentence;
- No death-sentenced person or that person's capital postconviction counsel should file more than one postconviction action in a sentencing court and one appeal therefrom to the Florida Supreme Court;
- No state resources be expended in violation of DPRA; and
- The AG must deliver to the Speaker of the House of Representatives and the President of the Senate a copy of any court pleading or order that describes or adjudicates a violation of DPRA by any state employee or party contracting with the state.

The bill amends s. 924.055, F.S., to specify that it is the Legislature's intent to "reduce delays in capital cases and to ensure that all postconviction actions in capital cases are resolved as quickly as possible after the date a sentence of death is imposed in the circuit court." The bill removes obsolete intent language relating to postconviction actions being filed during a direct appeal.

#### State Postconviction Death Penalty Proceedings

The bill amends ss. 27.703, 924.056, 924.058, F.S., to codify the majority of Rules 3.811, 3.812, 3.850, 3.851, and 3.852 of the Florida Rules of Criminal Procedure, and Rule 9.142 of the Florida Rules of Appellate Procedure. The significant differences between the current rules and the bill are outlined below.

#### *Appointment of Counsel, Judge, and other Preliminary Matters*

- The bill amends s. 924.056, F.S., to require the CCRC to file a notice of appearance in the trial court or a motion to withdraw based on an actual conflict of interest or some other legal ground within 30 days of *being appointed by the Florida Supreme Court* (the rule requires such notice or motion to be filed within 30 days of the issuance of the mandate affirming a judgment and sentence of death on direct appeal).
- The bill adds new language to s. 924.056, F.S., specifying that if the defendant requests without good cause that an appointed attorney be removed or replaced, the court must notify the defendant that no further state resources will be expended for postconviction representation, unless the defendant withdraws his or her request.

#### *Conflicts of Interest*

- The bill amends ss. 27.703 and 924.056, F.S., to require the court to conduct a hearing in accordance with s. 924.059, F.S. (created by the bill), if postconviction counsel alleges a conflict of interest.
- The bill creates s. 924.059, F.S., to require the court to hold a hearing within 30 days of an allegation that there is a conflict of interest with postconviction counsel to determine whether an actual conflict exists, and whether such conflict will adversely affect a defendant's lawyer's performance. An actual conflict exists when an attorney actively represents conflicting interests. To demonstrate an actual conflict, the defendant must identify specific evidence suggesting that his or her interests may be compromised. A possible, speculative, or merely hypothetical conflict is insufficient to support an allegation that a conflict of interest exists. The bill requires the court to rule within 10 days of the conclusion of the hearing.

#### *Public Records*

The bill codifies Rule 3.852 of the Florida Rules of Criminal Procedure, which specifically relates to public records in capital postconviction proceedings, in s. 27.7081, F.S. The bill retains language currently in s. 27.7081, F.S., requiring the Secretary of State to establish and maintain a public records repository for the purpose of archiving capital postconviction public records.

#### *Time Limits for Filing an Initial Postconviction Motion*

- As noted above, any person sentenced to death whose judgment of conviction and sentence have been affirmed on direct appeal may file an initial postconviction motion within one year after the inmate's judgment and sentence become final. Rule 3.851 of the Florida Rules of Criminal Procedure specifies that an extension of time may be granted by the Florida Supreme Court if the inmate's counsel makes a showing of good cause for counsel's inability to file the postconviction pleadings within the one-year period. The bill does not authorize any extension of time.
- Rule 3.851 of the Florida Rules of Criminal Procedure permits a postconviction motion to be amended within 30 days of a scheduled evidentiary hearing upon motion and good cause shown. The bill amends s. 924.056, F.S., to prohibit a postconviction motion from being amended beyond the one-year time period established for the filing of the motion, and to require court approval.

#### *Contents of an Initial Postconviction Motion*

- Rule 3.851 of the Florida Rules of Criminal Procedure requires a defendant's initial postconviction motion to include certain information. The bill amends s. 924.056, F.S., to add the following to the list of information that an initial postconviction motion must include:
  - Whether a previous postconviction motion has been filed and, if so, the disposition of all previous claims raised in postconviction litigation and the reasons claims in the present postconviction motion were not raised in the previous motion.
- The bill also specifies that postconviction motions must be *fully pled* and raise all cognizable claims that the defendant's judgment or sentence was entered in violation of the Constitution or laws of the United States or the Constitution or laws of Florida (including any claim of ineffective assistance of trial or direct appeal counsel, allegations of innocence, or that the state withheld evidence favorable to the defendant).
- Rule 3.851 of the Florida Rules of Criminal Procedure allows a postconviction motion to include claims that could have or should have been raised at trial or on direct appeal if explained in a memorandum of law. The bill bars such claims altogether.
- The bill prohibits a postconviction motion from including a claim of ineffective assistance of postconviction counsel.

#### *Discovery and Evidentiary Hearing*

- Rule 3.851 of the Florida Rules of Criminal Procedure requires the court to hold a case management conference within 90 days of the filing of the state's answer. The bill amends s. 924.056, F.S., to change the timeframe to within 30 days of the filing of the state's answer.
- Rule 3.851 of the Florida Rules of Criminal Procedure authorizes the court to extend the time for holding an evidentiary hearing for 90 days if good cause is shown. The bill does not contain such a provision.

- The bill adds a provision to s. 924.056, F.S., specifying that if the court determines that an evidentiary hearing is not necessary and that the defendant's postconviction motion is legally insufficient or that the motion, files, and records show that the defendant is not entitled to relief, the court must, within 30 days of the conclusion of the case management conference, deny the postconviction motion. The court must include a detailed rationale therefore and attach or reference the portions of the record that will allow for meaningful appellate review of the order denying relief.
- Rule 3.851 of the Florida Rules of Criminal Procedure provides that an appeal of a court's ruling on an initial postconviction motion may be filed within 30 days of the entry of the order. The bill changes this timeframe to within 15 days of the entry of the order, and specifies that interlocutory appeals are prohibited.

### *Successive Motions*

The bill creates s. 924.058, F.S., which addresses the procedures relating to successive postconviction motions.

- Rule 3.851 of the Florida Rules of Criminal Procedure does not contain any time limitations on the filing of successive postconviction motions. The bill bars successive postconviction motions unless fully pled and filed within 90 days:
  - After the facts giving rise to the claim were discovered or should have been discovered with the exercise of due diligence; or
  - After the fundamental constitutional right asserted was established and held to apply retroactively.
- The bill prohibits successive postconviction motions from being filed or considered if filed beyond the timelines described above unless it alleges that postconviction counsel, through neglect, failed to file the motion.
- The bill bars successive postconviction motion claims that could have or should have been raised at trial, on direct appeal, or in the initial postconviction motion.
- The bill prohibits a successive postconviction motion from including a claim of ineffective assistance of postconviction counsel.
- Rule 3.851 of the Florida Rules of Criminal Procedure permits a successive postconviction motion to be amended within 30 days of a scheduled evidentiary hearing upon motion and good cause shown. The bill prohibits a successive postconviction motion from being amended beyond the time period established for the filing of the successive motion, and requires court approval.
- Rule 3.851 of the Florida Rules of Criminal Procedure requires the court to hold a case management conference within 90 days of the filing of the state's answer to a successive postconviction motion. The bill amends s. 924.056, F.S., to change the timeframe to within 30 days of the filing of the state's answer.
- The bill adds a provision to s. 924.056, F.S., specifying that if the court determines that an evidentiary hearing is not necessary and that the defendant's successive postconviction motion is legally insufficient or that the motion, files, and records show that the defendant is not entitled to relief, the court must, within 30 days of the conclusion of the case management conference, deny the successive postconviction motion. The court must include a detailed rationale therefore and attach or reference the portions of the record that will allow for meaningful appellate review of the order denying relief.
- Rule 3.851 of the Florida Rules of Criminal Procedure provides that an appeal of a court's ruling on a successive postconviction motion may be filed within 30 days of the entry of the order. The bill changes this timeframe to within 15 days of the entry of the order, and specifies that interlocutory appeals are prohibited.

### *Appeal to the Florida Supreme Court*

The bill creates s. 924.0581, F.S., which establishes the procedures that must be followed when an initial or successive postconviction motion is appealed to the Florida Supreme Court. The majority of the provisions of s. 924.0581, F.S., mirror those found in Rule 9.142 of the Florida Rules of Appellate Procedure.

- The bill includes a provision in s. 924.0581, F.S., that requires the Court, in instances where the lower court denied the initial or successive motion without an evidentiary hearing, to review the

case to determine whether the lower court correctly resolved the case without a hearing. If the Court determines that a hearing should have been held, the Court may remand the case for such hearing. The lower court must schedule such hearing within 30 days of the Court's order and conclude the hearing within 90 days of scheduling. The Florida Rules of Appellate Procedure does not contain a similar provision.

- Rule 9.142 of the Florida Rules of Appellate Procedure establishes timeframes in which briefs must be filed, and specifies that if a brief is delinquent, an order to show cause can be issued and sanctions may be imposed. The bill provides that a brief submitted after the timeframes is barred and cannot be heard.
- Rule 9.142 of the Florida Rules of Appellate Procedure does not establish a specific timeframe in which the Court must hear oral argument - only that oral argument be scheduled after the filing of the defendant's reply brief. The bill requires oral arguments to be scheduled within 30 days after the filing of the defendant's reply brief.
- Rule 9.142 of the Florida Rules of Appellate Procedure does not establish a timeframe in which the Court must ultimately rule on an appeal of an initial or successive postconviction motion. The bill requires the Court to rule within 180 days after oral arguments have concluded, and specifies that if the Court affirms a denial of an action for postconviction relief, the Governor may proceed to issue a warrant for execution.
- In instances in which the Court does not rule within 180 days of oral arguments, the bill requires the Chief Justice of the Court to, within 10 days after the expiration of the 180-day deadline, submit a report to the Legislature explaining why a decision was not timely rendered. Such report must be submitted every 30 days thereafter in which a decision is not rendered.

#### Reporting Requirements

The bill creates s. 924.0585, F.S., requiring the Court to annually report to the Legislature the status of each capital case in which a postconviction action has been filed that has been pending for more than three years. The report must include the name of the state court judge assigned to the case. This section of statute also specifies that in any capital postconviction action in which it has been determined that an attorney of record was ineffective, the court making such determination must furnish a copy of the findings of ineffectiveness to the Florida Bar for appropriate disciplinary action. The Florida Bar must submit an annual report to the Legislature listing the names of the attorneys found ineffective, the findings of the court, and the disciplinary action taken, if any. If no disciplinary action was taken, the report must specify why. The bill prohibits attorneys deemed ineffective in a capital case from representing capital defendants for five years.

The bill also bars postconviction actions filed in violation of established time limits, specifies that all claims raised in such actions are waived, and prohibits a court from hearing such actions. The bill requires the AG to deliver to the Governor and the Legislature a copy of any pleading or order that alleges or adjudicates any claim filed in violation of the established time limits.

#### Applicability

The bill includes language in ss. 924.056, 924.058, 924.0581, and 924.0592, F.S., clarifying that the statutes apply to postconviction proceedings in every capital case in which the conviction and sentence of death have been affirmed on direct appeal on or after July 1, 2015.

The bill amends s. 924.057, F.S., to specify that postconviction proceedings in every capital case in which the conviction and sentence of death have been affirmed on direct appeal *before* July 1, 2015, will be governed by the rules and laws in effect immediately prior to the effective date of the bill. The bill removes obsolete provisions (created by the DPRA) specifying otherwise.

#### Conforming Changes

The bill makes a variety of technical changes correcting statutory cross-references and obsolete references to the Florida Rules of Criminal Procedure.

#### Northern Region of the Capital Collateral Regional Counsel

Although s. 27.701, F.S., provides for three capital collateral regional offices, legislation passed in 2003 created a pilot program using a registry of attorneys instead of the capital collateral regional counsel in

the northern region of the state.<sup>157</sup> The pilot program was extended indefinitely in 2004.<sup>158</sup> The bill amends ss. 27.701, 27.702, and 27.7091, F.S., to eliminate the "pilot program" and reestablish the capital collateral regional counsel in the northern region of the state.

#### Clemency

As noted above, ss. 27.40, 27.51, 27.511, 27.5303, and 27.5304, F.S., authorize the court to appoint a public defender, private attorney, or a registry attorney to represent a person who has been convicted and sentenced to death in clemency proceedings. The bill amends these sections of statute to remove this authorization in instances where the application for clemency is filed on or after July 1, 2013, by a person who has been convicted and sentenced to death.

#### Severability

The bill contains a severability clause specifying that if any provision of the act or the application thereof is held invalid, the invalidity does not affect other provisions or applications of the act which can be given effect without the invalid provision or application.

#### Effective Dates

The "procedural" portions of the bill take effect July 1, 2015, contingent on voter approval of HJR 7081 in the general election of 2014. Other portions of the bill are effective July 1, 2013.

### B. SECTION DIRECTORY:

Section 1. Entitles the bill the "Timely Justice Act of 2013."

Section 2. Amends s. 27.40, F.S., relating to court-appointed counsel; circuit registries; minimum requirements; appointment by court.

Section 3. Amends s. 27.51, F.S., relating to duties of public defender.

Section 4. Amends s. 27.51, F.S., relating to duties of public defender.

Section 5. Amends s. 27.511, F.S., relating to offices of criminal conflict and civil regional counsel; legislative intent; qualifications; appointment; duties.

Section 6. Amends s. 27.511, F.S., relating to offices of criminal conflict and civil regional counsel; legislative intent; qualifications; appointment; duties.

Section 7. Amends s. 27.5303, F.S., relating to public defenders; criminal conflict and civil regional counsel; conflict of interest.

Section 8. Amends s. 27.5304, F.S., relating to private court-appointed counsel; compensation; notice.

Section 9. Amends s. 27.701, F.S., relating to capital collateral regional counsel.

Section 10. Reenacts s. 27.702, F.S., relating to duties of the capital collateral regional counsel; reports.

Section 11. Amends s. 27.702, F.S., relating to duties of the capital collateral regional counsel; reports.

Section 12. Amends s. 27.703, F.S., relating to conflict of interest and substitute counsel.

Section 13. Amends s. 27.708, F.S., relating to access to prisoners; compliance with the Florida Rules of Criminal Procedure; records requests.

Section 14. Amends s. 27.7081, F.S., relating to capital postconviction public records production.

---

<sup>157</sup> Chapter 2003-399, L.O.F.

<sup>158</sup> Chapter 2004-240, L.O.F.

Section 15. Amends s. 27.7091, F.S., relating to legislative recommendations to Supreme Court; postconviction proceedings; pro bono service credit.

Section 16. Amends s. 27.711, F.S., relating to terms and conditions of appointment of attorneys as counsel in postconviction capital collateral proceedings.

Section 17. Amends s. 27.711, F.S., relating to terms and conditions of appointment of attorneys as counsel in postconviction capital collateral proceedings.

Section 18. Amends s. 922.095, F.S., relating to grounds for death warrant; limitations of actions.

Section 19. Reenacts s. 922.108, F.S., relating to sentencing orders in capital cases.

Section 20. Amends s. 924.055, F.S., relating to postconviction review in capital cases; legislative findings and intent.

Section 21. Amends s. 924.056, F.S., relating to Commencement of capital postconviction actions for which sentence of death is imposed on or after January 14, 2000; limitations on actions.

Section 22. Amends s. 924.057, F.S., relating to limitation on postconviction cases in which the death sentence was imposed before January 14, 2000.

Section 23. Amends s. 924.058, F.S., relating to capital postconviction claims.

Section 24. Creates s. 924.0581, F.S., relating to capital postconviction appeals to the Florida Supreme Court.

Section 25. Creates s. 924.0585, F.S., relating to capital postconviction proceedings; reporting requirements.

Section 26. Amends s. 924.0585, F.S., relating to capital postconviction proceedings; reporting requirements.

Section 27. Amends s. 924.059, F.S., relating to time limitations and judicial review in capital postconviction actions.

Section 28. Creates s. 924.0591, F.S., relating to incompetence to proceed in capital postconviction proceedings.

Section 29. Creates s. 924.0592, F.S., relating to capital postconviction proceedings after a death warrant has been issued.

Section 30. Creates s. 924.0593, F.S., relating to insanity at the time of execution.

Section 31. Creates s. 924.0594, F.S., relating to dismissal of postconviction proceedings.

Section 32. Provides a severability clause.

Section 33. Appropriates \$432,170 in general revenue to the Justice Administration Commission.

Section 34 Provides effective dates.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:  
See "Fiscal Comments."
2. Expenditures:  
See "Fiscal Comments."

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:  
The bill does not appear to have an impact on local government revenues.
2. Expenditures:  
The bill does not appear to have an impact on local government expenditures.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

Due to the nuances of capital cases and the multitude of agencies and personnel involved (e.g., judges, clerks, CCRC, public defenders, registry attorneys, AG staff, etc.), it is difficult to precisely quantify the costs associated with Florida's capital postconviction process. Research shows that the time it takes to litigate a capital case on appeal in both state and federal court is a major factor in determining how long it takes for an inmate to progress through the judicial system. How much that litigation costs can vary widely from case to case, depending on the legal matters involved.<sup>159</sup>

Capital Postconviction Proceedings

The bill codifies many of the current procedures that relate to capital postconviction proceedings. However, the bill modifies the rules or creates provisions designed to make the postconviction process more efficient. For example, the bill:

- Sets standards for conflict of interest determinations;
- Bars postconviction motions that are not filed within statutorily established timeframes or that are not fully pled;
- Prohibits courts from granting extensions of time at various stages of the postconviction process;
- Shortens timeframes relating to case management conferences and the amendment of postconviction motions;
- Establishes timeframes in which the Florida Supreme Court must hear oral arguments;
- Requires the Florida Supreme Court to rule on an appeal of an initial or successive postconviction motion within 180 days after oral arguments have concluded; and
- Creates reporting requirements that hold courts accountable for delays in the postconviction process.

The Office of State Courts Administrator (OSCA) has stated this bill would decrease judicial workload due to the reduction of postconviction filings. OSCA also noted that it is unclear how much the changes this bill proposes would reduce postconviction death penalty litigation. The new reporting requirements would create an insignificant impact to judicial workload.<sup>160</sup>

Death Row Inmates

---

<sup>159</sup> *Special report: Cost of Florida's death row easily exceeds \$1M per inmate*, <http://www.tcpalm.com/news/2012/oct/07/newspaper-investigates-florida-death-row-cost/?print=1> (last visited on March 3, 2013).

<sup>160</sup> Office of State Courts Administrator 2013 Judicial Impact Statement, HB 7083, March 25, 2013. On file with Justice Appropriations Subcommittee staff.

Death row inmates are currently housed at Union Correctional Institution and Florida State Prison. The average per diem for inmates housed at these facilities is \$67.58 and \$61.35, respectively, per day. It should be noted that these figures are not specific to death row inmates but instead apply to the entire inmate populations at those facilities.

On average, Florida death row inmates spend 13.22 years on death row prior to execution. Using the per diem figures above, Florida spends anywhere between \$326,093 and \$296,032 housing a death row inmate prior to his or her execution. To the extent the bill shortens the postconviction process and thereby the time an inmate spends on death row prior to execution, the bill would have a positive fiscal impact on DOC.

### Clemency

Currently, the court is authorized to appoint a public defender, private attorney, or a registry attorney to represent a person who has been convicted and sentenced to death in clemency proceedings. Section 27.5304, F.S., requires the appointed attorney to be allowed compensation, not to exceed \$1,000, for attorney's fees and costs incurred in representing the defendant in clemency proceedings. However, a judge may order payment of over \$1,000 if he or she deems it necessary. Such compensation is paid out of general revenue within DOC.

Effective and ethical clemency representation requires experienced attorneys, investigators, and support staff to investigate evidence of the underlying crime, the original proceedings, and the appellate proceedings for indications of uncertainty regarding the defendant's guilt and the possibility of ineffective representation by trial counsel.<sup>161</sup> Public Defenders must pay above-average salaries in order to employ and retain attorneys who are qualified to be appointed to capital clemency cases.

The bill removes the court's authorization to appoint a public defender, private attorney, or a registry attorney to represent a person who has been convicted and sentenced to death in clemency proceedings in instances where the application for clemency is filed on or after July 1, 2013. This will result in a savings to DOC and the public defenders.

### Capital Collateral Regional Counsel

The bill eliminates the registry attorney "pilot program" and appropriates \$432,170 in general revenue to reestablish the capital collateral regional counsel (CCRC) in the northern region of the state.

For FY 2013-14, the base budget for the South Region CCRC office is \$3 million with 32 positions and \$3.6 million with 41 positions for the Middle Region CCRC office. In FY 2011-12, the Department of Financial Services spent \$1.6 million compensating registry attorneys, who are paid based on the amounts set forth in s. 27.711, F.S. (note that this figure represents the amount paid to registry attorneys appointed in postconviction proceedings throughout the state, not just those in the northern region).

Reestablishing the North Region CCRC will have an annualized fiscal impact of \$417,338 recurring on the General Revenue Fund and a \$14,832 nonrecurring impact. The funding includes \$306,832 for salaries and benefits for a director, an attorney, an investigator, and support staff; \$32,806 for routine expenses, such as telephones, office supplies, building rental, and data communication. The estimate also includes \$77,700 for due process-related expenses, such as expert witness fees, and funding for court transcripts. The \$14,832 in nonrecurring costs will go towards the purchase of telephones, office furniture, computer equipment and the costs of training staff.

The North Region CCRC would only be appointed to new cases, making the staff and funding minimal to start. The current private appointed attorneys would continue to work on the cases they have already been appointed to. Over the next few years the legislature will decrease the funding for the private appointed attorneys and increase the funding for the North Region CCRC as they are appointed to more cases. In FY 2002-03, the last year the North Region existed, the legislature appropriated \$125K for private attorneys who were appointed to conflict capital collateral cases. In FY 2002-03 the

---

<sup>161</sup> Public Defenders Legislative Budget Request, Agency Issue Narrative. March 2013.

GAA appropriated \$2.7 million for the North Region, \$3.6 million for the Middle Region and \$3 million for the South Region.

### **III. COMMENTS**

#### **A. CONSTITUTIONAL ISSUES:**

##### **1. Applicability of Municipality/County Mandates Provision:**

The bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

##### **2. Other:**

None.

#### **B. RULE-MAKING AUTHORITY:**

The bill does not appear to create a need for rulemaking or rulemaking authority.

#### **C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On April 4, 2013, the Justice Appropriations Subcommittee adopted one amendment and one amendment to the amendment and reported the bill favorably as a committee substitute. The amendment, as amended, appropriates \$432,170 in general revenue to reestablish the capital collateral regional counsel (CCRC) in the northern region of the state. This analysis is drafted to the committee substitute as passed by the Justice Appropriations Subcommittee.