SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 2112

SPONSOR: Criminal Justice Committee and Senator Brown-Waite

SUBJECT: Public records exemptions

DATE: April 25, 2000 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Gomez	Cannon	CJ	Favorable/CS
2.			FP	
3.				
4.				
5.				

I. Summary:

This bill revises public records exemptions in ss. 119.011(3)(d)(2), 119.07(3)(b), and 119.07(3)(l), F.S. These changes are designed to make the public records exemptions expire 15 days after a sentence of death is imposed. The intended effect is to disclose records and thereby allow postconviction counsel to access records in a death case when it is on direct appeal. These changes are done in response to the Supreme Court's request that the Legislature amend these exemptions in order to effectuate the Court's proposed dual-track rule.

This bill substantially amends the following sections of the Florida Statutes: 119.011, 119.07.

II. Present Situation:

A. Overview of Public Records Law

Article I, Section 24(a), Florida Constitution, provides that "[e]very person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state ... except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution." Article I, Section 24(c) provides that the legislature may exempt certain records and meetings from the requirements of subsection (a) by general law, providing that such a law must "state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law."

Section 119.011(1), F.S., defines "public records" to include: all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material; regardless of the physical form, characteristics, or means of transmission; made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

Section 119.07(1), F.S., states that "[e]very person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, [and] under reasonable conditions...."

Subsection (3) of s. 119.07, F.S., contains numerous exemptions from the provisions of both s. 119.07(1), F.S., and Art. I, s. 24(a), of the Florida Constitution. Several exemptions relate to the criminal justice system. Section 119.07(3)(b), F.S., exempts "[a]ny active criminal intelligence information and active criminal investigative information" (*see also* ss. 119.07(3)(c), (e), (f), (g), (h), and (k), F.S.). The term "active criminal intelligence information" is defined in s. 119.011(3)(d), F.S., as information "relat[ing] to intelligence gathering conducted with a reasonable, good faith belief that it will lead to detection of ongoing or reasonably anticipated criminal activities." The term "active criminal investigative information" is defined in s. 119.011(3)(d), F.S., as information "relat[ing] to an ongoing investigation which is continuing with a reasonable, good faith anticipation of securing an arrest or prosecution in the foreseeable future."

Further, s. 119.07(3)(l), F.S., contains an exemption for attorney work-product, defined as a public record which "reflects the mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency, and which was prepared exclusively for civil or criminal litigation...." The exemption exists until the conclusion of the litigation. The exception contains a provision related to capital collateral proceedings, as follows:

> For purposes of capital collateral litigation as set forth in s. 27.2001, the Attorney General's Office is entitled to claim this exemption for those public records prepared for direct appeal as well as for all capital collateral litigation after direct appeal until execution of sentence or imposition of a life sentence.

B. Studies on Delays in the Proceedings and the Chapter 119 Problem

A longstanding criticism of the death penalty proceedings is that the process takes far too much time due in large measure to unnecessary delays. In the 1990s, several groups studied the problem. In 1996, former Attorney General Robert Shevin submitted a report on CCR to Florida's Chief Justice. The Shevin Report identified what it called the "Chapter 119 problem." The Report stated:

> One of the major problems confronting CCR attorneys is the absence of any formal discovery attendant to 3.850 motions. Discovery of certain documents, such as a prosecutor's files and the local police files, are obviously necessary for CCR to prepare a 3.850 motion.... Because there is no formal 3.850 discovery mechanism, CCR is required to seek documents through Chapter 119 public records requests.

As the report concluded, a major problem with chapter 119 requests was that the trial court that ultimately determined the 3.850 motion had no involvement administering the chapter 119 request; as a result, CCR was required to file "separate civil lawsuits to resolve chapter 119 disputes, resulting in significant delays and time consuming civil litigation." Mr. Shevin went on to recommend that the supreme court enact a "Rule of Discovery in 3.850 proceedings, with

expedited time schedules for both requesting and providing public records, for the filing of objections, and for the resolution of disputes by the trial judge who eventually will rule on the 3.850 motion." The supreme court acted on this recommendation by promulgating Rule 3.852.

C. Supreme Court Promulgates Rule 3.852

After the Shevin Report's release, the Florida Supreme Court, on its own initiative, proposed rule 3.852 in April 1996. *In re Amendment to Florida Rules of Criminal Procedure--Capital Postconviction Public Records Production*, 673 So. 2d 483 (Fla. 1996). After considering comments and oral arguments from interested parties, the court amended and adopted Rule 3.852 in October 1996. *In re Amendment to Florida Rules of Criminal Procedure--Capital Postconviction Public Records Production*, 683 So. 2d 475 (Fla. 1996). In adopting the rule, the court explained that it was promulgated in response to its own study of "problems with procedures pertaining to the production of public records in capital postconviction proceedings." *Id*.

The court rejected an argument, raised in the public comments, that the rule would unconstitutionally limit a capital postconviction defendant's constitutional and statutory rights to production of public records. *Id*. at 475-76. The court clarified that the rule was "a carefully tailored discovery rule for public records production ancillary to rule 3.850 or 3.851 proceedings." *Id*. at 476. The court stated:

> The time requirements and waiver provisions of the rule pertain only to documents which are sought for use in these proceedings. The rule does not affect, expand, or limit the production of public records for any purpose other than use in a 3.850 or 3.851 proceeding. *Id*.

The court also stated that the rule was not a rule of evidence and that any public record offered by a postconviction defendant in a proceeding "shall be admitted on the basis of the applicable law of evidence." *Id*.

D. 1998 Legislature Creates Records Repository; Repeals Rule 3.852

In 1998, the Legislature required the Secretary of State to establish and maintain a records repository for the purpose of archiving capital postconviction records. *See* s. 119.19, F.S. Section 119.19, F.S., requires the state attorney, local law enforcement agencies, and the Department of Corrections to submit to the repository all relevant public records produced in a death penalty case. Other agencies are to submit records to the repository when they have public records relevant to the case. Agencies are to submit records upon notification that a death sentence has been affirmed on direct appeal. The intended effect is to collect all relevant records while the case is "fresh" in everyone's mind.

Section 119.19, F.S., requires postconviction counsel to review the records in the repository and file a written demand for additional agency records within 90 days of appointment. If the agency objects to the demand, the trial court must resolve the dispute within 30 days. The trial court may only order additional records production if it makes specific findings. After that one request, postconviction counsel is prohibited from making any further public records requests. However,

in the event postconviction counsel can, through an affidavit, establish that the agency still possesses relevant public records, the trial court may order them produced upon specific findings.

Section 119.19, F.S., provides that postconviction counsel must give written notification of each pleading filed and the name of the person filing the pleading to the Commission on the Administration of Justice in Capital Cases and to the trial court assigned to the case. It also provides that a notice of hearing must be filed with each pleading with the court in a capital case.

E. Legislature repeals and court adopts a modified Rule 3.852

Along with the creation of the records repository the Legislature repealed rule 3.852 so that the Court would adopt a new rule which would work with the new law. In September 1998, the Court responded by adopting a revised rule 3.852. 723 So. 2d 163. The Court subsequently amended the rule in 1999 to conform it to changes in the records repository law (Chapter 119.19) made that year.

What follows is a summary of the main features of Rule 3.852.

- *Applicability*. It is a rule of discovery, applicable to all chapter 119 public records requests by postconviction defendants for use in postconviction proceedings.

- *Trial court hears requests/objections*. Requires that all requests and objections for production of public records be filed in the trial court which entered the death sentence or which is handling or will handle the postconviction motion. Allows trial court to consider complaints or a motion to compel production of a public record. Prior to the rule's adoption, disputes over the production of public records were settled in a separate civil action when the request was of agencies outside the judicial circuit in which the case was tried or those within the circuit which had no connection to the state attorney. *See Hoffman v. State*, 613 So. 2d 405 (Fla. 1992); s. 119.07, F.S.

- *Timetables*. Provides deadlines for filing requests for certain criminal justice agencies to deliver relevant public records to the records repository. Provides deadlines for postconviction counsel to request additional records or request records of other agencies. These deadlines are identical to the deadlines provided in s. 119.19, F.S.

- *Scope of the rule*. Specifies that the rule only governs discovery in 3.850 and 3.851 proceedings and "does not render inadmissible into evidence any relevant evidence which is in the possession of a postconviction defendant."

F. Special Session Legislation and *Allen* and *Court Rules* Opinions

In January 2000, the Legislature met in Special Session to consider death penalty legislation providing for lethal injection and reforming the capital postconviction process. The Legislature enacted the Death Penalty Reform Act of 2000 (DPRA), chapter 2000-3, Laws of Florida. The DPRA makes various significant changes to the capital postconviction process. Section 4 of the DPRA provides that a capital defendant must pursue all collateral remedies within the statutory limits set by the DPRA, that any claim outside the limits is barred, and the failure to seek relief

within the required time limits constitutes grounds for issuance of a death warrant. Section 6 implements a "dual-track" system by providing that postconviction counsel must be appointed within fifteen days of imposition of the death sentence and that postconviction actions are barred unless a fully pled motion is filed within 180 days of the filing of the initial appellate brief.

Section 3 of the DPRA contains revisions to s. 119.19, F.S., designed to conform it to the dual-track provisions. Section 3 amends s. 119.19, F.S., to provide production of public records during the pendency of a defendant's direct appeal proceeding. It compresses the time frames for agency responses to public records requests and requires agencies to send records claimed to be confidential or exempt directly to the clerk of the court instead of the records repository, in order to facilitate in-camera inspection by the court.

The DPRA was challenged on various constitutional grounds as soon as it became effective. The Supreme Court considered these challenges in conjunction with proposed rule recommendations of the Supreme Court Committee on Postconviction Relief in Capital Cases (the Morris Committee). On April 14, 2000, the Supreme Court issued an opinion on the challenges to the DPRA and in a separate opinion it responded to the Morris Committee recommendations by adopting its own proposed rules. *See Allen v. Butterworth*, Nos. SC00-113, SC00-154, SC00-410 (Fla. Apr. 14, 2000); *Amendments to Florida Rules of Criminal Procedure*, 3.851, 3.852, and 3.993, No. SC96646 (Fla. Apr. 14, 2000).

In *Allen*, the Court unanimously declared the DPRA unconstitutional because it encroached on the Court's "exclusive power to 'adopt rules for the practice and procedure in all courts.' Art. V. s.2(a), Fla. Const." Further, the Court found some of the sections of the DPRA violated due process and equal protection. However, in the Court's separate rules opinion, it proposed rules which it characterized as "consistent with the Legislature's intent that the postconviction process begin immediately upon imposition of the death sentence." *Allen* at p.2. The Court explained its proposed rule as follows:

> under our proposed new rules the postconviction process will begin immediately after the imposition of the death sentence. Within fifteen days after imposition of the death sentence, collateral counsel will be appointed under proposed rule 3.851 and the production of public records will begin under proposed rule 3.852. This will allow postconviction counsel the opportunity to immediately begin the investigation of the case and have access to the necessary public records.
>
> Unlike the Legislature's dual track scheme, however, under our proposal, the defendant will not be required to file a motion for postconviction relief until after [the] Court issues its mandate on direct appeal.

Amendments to Florida Rules of Criminal Procedure, at p. 6-7. The Court explained that its proposal to hold off the filing of the motion for postconviction relief until after mandate issues on direct appeal was based on "constitutional dilemmas," "conflict of interest and privilege problems" and that it would deprive postconviction counsel of the opportunity to use the Court's direct appeal opinion as a "road map" to the issues to raise in a postconviction motion. In addition, the Court stated: "according to the statements of several attorneys and judges who appeared at oral argument, the requests for public records and the litigation that follows is the single biggest cause

for delay in the current system. Under our proposed rules, the issue of public records should be resolved well before the postconviction motion is due to be filed in the circuit court." *Id*.

The Court then called the Legislature's attention to a "serious problem" involved in implementing a dual-track system because there currently exist two public records exemptions in chapter 119 which do not end until the defendant's conviction and sentence become final after direct appeal (when a mandate issues). *Id*. at 8. "[T]he State conceded at oral argument that in order for a dual-track system to work properly, the public records exemption must expire upon the imposition of the death sentence, rather than upon issuance of mandate from [the] Court." *Allen* at 31*; See also Amendments to Florida Rules of Criminal Procedure* at 8-9. The Court pointed out that in passing the DPRA, the Legislature did not change the definitions of exemptions in ss. 119.011(3)(d)(2), 119.07(3)(b), and 119.07(3)(l), F.S., and "therefore the State can still claim exemptions for the majority of its files until [the] Court issues its mandate." *Id*. *See also State v. Kokal*, 562 So.2d 324 (Fla. 1990).

The Court stated: "As long as this statutory exemption remains, any rule we adopt will have to provide for an extension of the period for filing an initial postconviction motion in order to allow collateral counsel adequate time to receive and review public records before the initial postconviction motion must be filed." *Amendments to Florida Rules of Criminal Procedure*, at 9. The Court elaborated in the *Allen* opinion:

> If the Legislature is committed to a dual-track system, then we urge it to amend sections 119.011(3)(d)(2), 119.07(3)(b), and 119.07(3)(l) to reflect that the exemptions will expire upon imposition of the death sentence. Our proposed rules cannot take effect until the Legislature takes these steps. ...[W]e are publishing the proposed rules in *The Florida Bar News* and affording interested parties until June 1, 2000, to file comments with this Court. This should give the Legislature ample time to amend the exemptions in chapter 119. If the Legislature does not act in this area, then we will be forced to extend the period for filing an initial postconviction motion in order to allow adequate time after mandate for public records requests. In other words, without these changes, the dual-track system would in essence, be meaningless.

Allen at 31.

III. Effect of Proposed Changes:

Section 119.011(3)(d)(2), F.S., is amended to revise the definition of "active" criminal intelligence and criminal investigative information to provide that such information shall not be considered "active" 15 days after a sentence of death is imposed. An exception is provided for any portion of such information that remains "active" as part of an ongoing criminal intelligence and ongoing criminal investigation or which relates to a pending criminal trial in which judgment has not yet been entered.

Section 119.07(3)(b), F.S., is amended to revise the exemption for active criminal intelligence and active criminal investigative information to provide that such information ceases to be exempt in a capital case 15 days after a sentence of death is imposed.

Section 119.07(3)(l), F.S., is amended to revise the exemption for agency attorney notes to provide that such information ceases to be exempt in a capital case 15 days after a sentence of death is imposed. The bill retains the current exemption for public records from the Attorney General's office that were created in preparation for the direct appeal or subsequent collateral litigation.

These changes are designed to make the public records exemptions expire 15 days after a sentence of death is imposed. The intended effect is to disclose records and thereby allow postconviction counsel to access records in a death case when it is on direct appeal. These changes are done in response to the Supreme Court's request that the Legislature amend these exemptions in order to effectuate the Court's proposed dual-track rule.

The bill's effective date is contingent upon the rules adopted by the Supreme Court which provide for the appointment of collateral counsel within a specified period after the date a sentence of death is imposed and which provide for public-records production during the pendency of the direct appeal in capital cases.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

This bill amends current public records exemptions to provide that certain records that would otherwise be exempt from public disclosure cease to be exempt upon the filing of a notice of appeal in a case in which the court has imposed a death sentence. Consequently, by making public currently exempt records the bill need not meet the public records requirements of Article I, Section 24, Florida Constitution.

C. Trust Funds Restrictions:

None.

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. Amendments:

None.