

**STORAGE NAME:** h1091.cpcs.doc  
**DATE:** February 14, 2002

**HOUSE OF REPRESENTATIVES  
COMMITTEE ON  
CRIME PREVENTION, CORRECTIONS & SAFETY  
ANALYSIS**

**BILL #:** HB 1091  
**RELATING TO:** Capital Collateral Proceedings  
**SPONSOR(S):** Representative Wilson  
**TIED BILL(S):**

**ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:**

- (1) CRIME PREVENTION, CORRECTIONS & SAFETY
  - (2) CRIMINAL JUSTICE APPROPRIATIONS
  - (3) HEALTHY COMMUNITIES
  - (4)
  - (5)
- 

I. SUMMARY:

THIS DOCUMENT IS NOT INTENDED TO BE USED FOR THE PURPOSE OF CONSTRUING STATUTES, OR TO BE CONSTRUED AS AFFECTING, DEFINING, LIMITING, CONTROLLING, SPECIFYING, CLARIFYING OR MODIFYING ANY LEGISLATION OR STATUTE.

HB 1091 requires private attorneys who represent capital defendants in postconviction collateral proceedings as a member of the statewide registry to annually attend a continuing legal education course of at least ten hours' duration that is specifically devoted to the defense of capital cases.

The bill provides for payment of Registry counsel in the active death warrant stage of a case. It deletes the statutory provision for payment of Registry counsel to represent a capital defendant before the United States Supreme Court.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- |                                   |                              |                             |   |
|-----------------------------------|------------------------------|-----------------------------|---|
| 1. <u>Less Government</u>         | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u>             | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u>      | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u>      | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Overview of Postconviction Proceedings in Capital Cases

A defendant who is convicted of a crime in which the death penalty is imposed receives a direct appeal of his or her sentence and conviction to the Florida Supreme Court. Art. V, Section 3(b)(1). At this stage, a capital defendant is represented by the public defender's office, if the defendant is indigent, or by a private attorney. Allegations that the trial court erred in an evidentiary ruling or in a procedural ruling are properly raised on direct appeal. If the Florida Supreme Court affirms the capital defendant's conviction and sentence, a defendant can appeal that decision to the United States Supreme Court by filing a petition for writ of certiorari. If the Supreme Court refuses to hear the defendant's appeal, a defendant is entitled to begin state postconviction proceedings.

State postconviction proceedings are controlled by Florida Rules of Criminal Procedure 3.850 and 3.851. Postconviction proceedings, also known as collateral review, usually involve claims that the defendant's trial counsel was ineffective, claims of newly discovered evidence and claims that the prosecution failed to disclose exculpatory evidence. A rule 3.850 or 3.851 motion is filed in the trial court where the defendant was tried and sentenced. According to rule 3.850, unless the record in the case conclusively shows that the defendant is entitled to no relief, the trial court must order the state attorney to respond to the motion and hold an evidentiary hearing. Fla.R.Crim P. 3.850(d).. If the trial court denies the motion for postconviction relief, the defendant then is entitled to an appeal of this denial to the Florida Supreme Court.

After state postconviction proceedings have been completed, a capital defendant is entitled to file a petition for writ of habeas corpus in federal court. 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. The most common issue raised is whether the defendant's trial counsel was ineffective.

Finally, once the Governor signs a death warrant, a defendant will typically file a second Rule 3.850 motion and a second federal habeas petition along with motions to stay the execution.

The Capital Collateral Regional Councils (CCRC) represent death sentenced inmates in collateral proceedings. s. 27.702(1), F.S. There are three CCRC offices which function independently -- Northern Region (Tallahassee), Middle Region (Tampa), and Southern Region (Miami). s. 27.701,

F.S. The CCRC represents defendants sentenced within his or her region. In the event that a CCRC has a conflict of interest with a client, the sentencing court may designate another CCRC or private counsel to represent the defendant. s. 27.703, F.S.

### **Registry Attorneys**

In 1998, the legislature created a registry of private attorneys who are appointed to represent a death row inmate when a Capital Collateral Regional Counsel (CCRC) has an excessive caseload or has a conflict of interest. The registry of attorneys is comprised of lawyers who have met certain statutory criteria and is maintained by the Commission on Capital Cases. s. 27.710(2), F.S. A member of the registry must be a member in good standing in the Florida Bar, with not less than 3 years experience in the practice of criminal law, and must have participated in at least five felony jury trials, five felony appeals, or five capital postconviction evidentiary hearings. s. 27.704(2), F.S.

Section 27.711(4), F.S., provides a fee and payment schedule. Upon approval by the trial court, and after certain stages in litigation are complete, a registry attorney is entitled to payment of \$100 per hour by the Comptroller, up to a maximum of:

- \$2,500 upon accepting the appointment and filing the notice of appearance,
- \$20,000 after timely filing in the trial court the capital defendant's complete original motion for postconviction relief, or if the trial court schedules a hearing on the matter that makes the filing of the motion unnecessary or otherwise disposes of the case,
- \$20,000 after the trial court issues a final order granting or denying the defendant's motion for postconviction relief,
- \$20,000 after timely filing in the Supreme Court the defendant's briefs that address the trial court's final order granting or denying the defendant's motion for postconviction relief and the state petition for writ of habeas corpus,
- \$10,000 after the trial court issues an order, pursuant to a remand from the Supreme Court, which directs the trial court to hold further proceedings on the motion for postconviction relief,
- \$4,000 after the appeal of the trial court's denial of the motion for postconviction relief and the state petition for writ of habeas corpus become final in the Supreme Court,
- \$2,500 at the conclusion of the defendant's postconviction capital collateral proceeding in state court and after filing a petition for writ of certiorari in the U.S. Supreme Court, and
- \$5,000 if the U.S. Supreme Court accepts for review the defendant's collateral challenge of the conviction and sentence of death. This payment shall be full compensation for representing the defendant throughout the certiorari proceedings before the U.S. Supreme Court.

In addition, the attorney is authorized to hire an investigator for \$40 per hour, up to a maximum of \$15,000, to assist in the defendant's representation. s. 27.711(5), F.S.

### **Litigations Relating to Attorneys Fees**

In May, 2000, an attorney was appointed in the Eighth Circuit to represent Bennie Demps, a capital defendant with an active death warrant. The attorney was appointed outside the normal appointment process for a Registry attorney and the attorney did not enter into a contractual arrangement with the Comptroller's Office. Demps was executed on June 7, 2000.

The attorney requested payment of attorney's fees in the amount of \$26,180.00 (130.9 hours x \$200 per hour) and reimbursement of costs in the amount of \$1,130.59. The Comptroller objected to the hourly rate because ss. 27.703 and 27.711, F.S., limit attorney's fees for Registry counsel to \$100 per hour.

The Circuit Court ruled that the \$100 statutory cap as applied in the "extraordinary circumstances" of the case is unconstitutional based on the holding and reasoning in Makemson v. Martin County, 491 So.2d 1109 (Fla. 1986). The Comptroller was ordered to pay the attorney at the requested rate. State v. Demps, Final Order on Attorney George F. Schaefer's Reapplication for Award of Attorney's Fees, Fla. 8th Circuit, Case No. 77-0116 CFA. The court's ruling is currently on appeal.

### **Continuing Legal Education Standards**

The Florida Bar requires attorneys who are licensed to practice law in Florida to complete a minimum of 30 hours continuing education course work over a three-year period.

The Florida Supreme Court has set forth the following minimum continuing legal education standards for attorneys representing clients in capital cases at the trial and direct appeal stage:

No attorney may be qualified on any of the capital lists unless he or she has attended within the last year a continuing legal education program of at least ten hours' duration devoted specifically to the defense of capital cases. Continuing legal education programs meeting the requirements of this rule shall be offered by the Florida Bar or another recognized provider and should be approved for continuing legal education credit by the Florida Bar. The failure to comply with this requirement shall be cause for removal from the list until the requirement is fulfilled. Fla.R.Cr.P. 3.112(c)(3).

The Court is currently considering setting minimum requirements for counsel in capital postconviction cases.

### **C. EFFECT OF PROPOSED CHANGES:**

The bill provides that in order to be part of the registry of capital collateral attorneys, an attorney must have attended within the last year a continuing legal education program of at least 10 hours duration devoted specifically to the defense of capital cases, if available. The bill provides that continuing legal education programs offered or approved by the Florida Bar shall satisfy the requirement. The failure to comply with this requirement may be cause for removal from the list until the requirement is fulfilled.

Section 27.711 fails to provide for payment to registry attorneys in the event that an attorney provides services after a death warrant is signed. The bill amends the payment schedule to provide that after a death warrant is issued, a registry attorney is entitled to \$100 per hour, up to a maximum of \$5,000. The payment shall be full compensation for attorneys fees and costs for representing the capital defendant throughout proceedings before the state courts of Florida.

D. SECTION-BY-SECTION ANALYSIS:

This section need be completed only in the discretion of the Committee.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See fiscal comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

See fiscal comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Attorneys who wish to be part of the private registry who are eligible to be appointed to represent death row inmates will be required to pay for 10 hours of continuing legal education each year.

D. FISCAL COMMENTS:

Under the bill, the state will be obligated to pay a registry attorney for legal services provided after a death warrant is signed.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

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

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that counties or municipalities have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

The Court's holding and reasoning in the Makemson, case seemed to look to the statutes which set fee caps as a "legislative guide," but stated that "it is within the inherent power of Florida's trial courts to allow, in extraordinary and unusual cases, departure from the statute's fee guidelines when necessary in order to ensure that an attorney who has served the public by defending the accused is not compensated in an amount which is confiscatory of his or her time, energy and talents. More precise delineation, we believe, is not necessary. Trial and appellate judges, well aware of the complexity of a given case and the attorney's effectiveness therein, know best those instances in which justice requires departure from statutory guidelines." *Id.*, at 1115.

The Court ruled on February 14, 2002, in the case of Olive v. Maas, (No. SC00-317, Florida Supreme Court, nonfinal opinion) that trial courts are authorized to grant fees in excess of the fee caps set forth in s. 27.711, F.S., where extraordinary or unusual circumstances exist in a capital collateral case. The Court applied the reasoning of the Makemson case discussed above, as well as Makemson's progeny. Based on the ruling in the Olive case, it is probable that the Court will rule similarly in the Demps case (discussed in the Present Situation – Pending Litigation section of the Staff Analysis). Therefore, it should be noted that the message from the Court seems to be clear that while the statute may be a guidepost for setting fees, the courts are free to exceed the statutory fee caps in extraordinary situations in order to ensure adequate representation.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

It should be noted that the amendment to s. 27.711(4)(h), F.S., will eliminate the provision for payment of attorneys for representation of their client before the United States Supreme Court should the court accept for review the capital defendant's collateral challenge of the conviction and sentence of death. Section 27.711(4)(g), F.S., provides for payment of up to \$2,500 for the *filing of the petition* for writ of certiorari in the U.S. Supreme Court. The Executive Director of the Commission on Capital Cases relates that there are monies available for compensation at the federal level should a case be accepted for review

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

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VII. SIGNATURES:

COMMITTEE ON CRIME PREVENTION, CORRECTIONS & SAFETY:

Prepared by:

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Trina Kramer

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