

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 1228

SPONSOR: Criminal Justice Committee and Senator Crist

SUBJECT: Capital Collateral Representation

DATE: April 15, 2003      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	Fav/CS
2.			JU	
3.			AAV	
4.			AP	
5.			RC	
6.				

## I. Summary:

Committee Substitute for Senate Bill 1228 eliminates the northern region of the Capital Collateral Regional Councils (CCRC's); the other regions, middle and south remain intact. The bill provides for the assignment of cases currently being litigated by the northern region to either the middle or southern region if the crime occurred within their jurisdiction and there is no conflict, or to private registry attorneys. As of July 1, 2003, new cases in the northern region will be assigned to private registry attorneys.

The bill contains a provision that would prevent a CCRC attorney who worked on a case in the northern regional office and subsequently took that case over, as a registry attorney, from being compensated as a registry attorney for work performed while on the state payroll.

The bill changes the terms of the middle and southern region counsel so that the expiration dates of their appointments are staggered. The bill requires that the roster of registry attorneys be maintained at no less than 75 attorneys.

The Commission on Capital Cases is given oversight responsibility, akin to its responsibility with regard to the Capital Collateral Regional Councils. The Commission is directed to conduct a three-year cost and program analysis of the Capital Collateral Regional Councils and the registry attorneys, including an analysis of the regional councils since 1997. The resulting report must be delivered to the Governor and the presiding officers of the Legislature by December 31, 2006.

This bill substantially amends sections 27.701, 27.702, 27.703, 27.709, 27.710 and 27.711 of the Florida Statutes.

## II. Present Situation:

### A. Overview of Death Penalty Proceedings

After a defendant has been sentenced to death, he or she is entitled to challenge the conviction and sentence in three distinct stages. First, the public defender or private counsel is required to file a *direct appeal* to the Florida Supreme Court. An appeal of the Florida Supreme Court's decision on the direct appeal is to the United States Supreme Court by *petition for certiorari*.

Second, if the U.S. Supreme Court rejects the appeal, *state postconviction* proceedings or *collateral review*, begins. The Capital Collateral Regional Counsel (CCRC) represents defendants in postconviction proceedings.

State postconviction proceedings are controlled by Rules 3.850 and 3.851, Florida Rules of Criminal Procedure. Unlike a direct appeal which challenges the legal errors apparent from the trial transcripts or record on appeal, a postconviction proceeding is designed to raise claims which are collateral to what transpired in the trial court. Consequently, postconviction proceedings usually involve three categories of claims:

- ▶ ineffective assistance of trial counsel,
- ▶ *Brady* violations, *i.e.*, a due process denial from the prosecution's suppression of material, exculpatory evidence, and
- ▶ newly discovered evidence, for example, post-trial recantation by a principal witness.

Since the consideration of these claims require new fact-finding, Rules 3.850 and 3.851 motions are filed in the trial court which sentenced the defendant to death. Appeals from Rules 3.850 and 3.851 motions are to the Florida Supreme Court. (At this point, the CCRC, in a writ of habeas corpus, usually will raise the claim of ineffective assistance of appellate counsel for the direct appeal.)

The third and what is intended to be the final stage is federal habeas corpus, a proceeding controlled by 28 U.S.C. s. 2254 (a). Federal habeas allows a defendant to petition the federal district court to review whether the conviction or sentence violates or was obtained in violation of federal law. Federal habeas is limited to consideration of claims previously asserted in direct appeal or in state postconviction proceedings. Appeals of federal habeas is to the Circuit Court of Appeals and then to the United States Supreme Court.

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.

### B. Capital Collateral Regional Counsel

As described above, the Capital Collateral Regional Counsel (CCRC) represents all death sentenced inmates on collateral actions challenging the legality of the judgment and sentence in the state and federal courts. 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.

The CCRCs are appointed by the Governor from a list of three qualified candidates selected by the Supreme Court Judicial Nominating Commission. s. 27.701, F.S. The CCRCs serve 3 year terms and are subject to confirmation by the Senate. *Id.*

The current term of the northern regional counsel expired on March 30, 2003. The middle and southern regional counsel's terms expire on September 30, 2003.

The 1997 Legislature created the three regional offices. ch. 97-313, L.O.F. Prior to 1997, one capital collateral representative represented all death sentenced inmates.

Each CCRC is required to provide a quarterly report to the Legislature's presiding officers and the Commission on Capital Cases. The report details the number of hours worked by investigators and legal counsel per case and the amount per case expended during the preceding quarter in investigating and litigating capital collateral cases. s. 27.702(4), F.S. The 6 member Commission (its members are appointed by the presiding officers and the Governor), is charged with reviewing the administration of justice in capital collateral cases and the operation of the CCRCs. s. 27.709(2), F.S.

### **C. Attorney Registry for Postconviction Representation**

The 1998 Legislature created a statewide registry of private criminal defense attorneys to supplement the CCRC system and serve as a "backup" by alleviating any case backlog. ss. 27.710 and 27.711, F.S. Backlog cases are those which are ready for the postconviction process to begin, yet no attorney is assigned to the case.

*Attorney appointment.* The executive director of the Commission on Capital Cases compiles and maintains the statewide attorney registry. Under s. 27.710(5), F.S., an attorney from the statewide registry is appointed by the trial court that sentenced the defendant when it is notified by the executive director of the need for counsel to be appointed.

*Attorney qualifications.* To be eligible for the registry, an attorney must meet the qualifications specified in s. 27.704(2), F.S., for private counsel who represent death-sentenced defendants in capital collateral proceedings. That is, the attorney must have at least 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 or any combination of at least five such proceedings.

The attorney must certify that, if appointed, he or she will continue such representation under the terms and conditions set forth in s. 27.711, F.S., until the sentence is reversed, reduced, or carried out, unless he or she is permitted by the trial court to withdraw.

*Attorney limitations.* Certain limitations are placed on attorneys who are appointed pursuant to the registry statute:

- ▶ An attorney may not represent more than 5 capital defendants at any one time,
- ▶ an attorney may not file repetitive or frivolous pleadings that are not supported by law or facts,
- ▶ an attorney may not represent the death-sentenced defendant during a retrial, a resentencing proceeding, or a proceeding commenced under ch. 940 (executive clemency), an attorney may not represent the death-sentenced defendant in a proceeding challenging a conviction or sentence other than the conviction and sentence of death for which the appointment was made, or
- ▶ an attorney may not represent the death-sentenced defendant in any civil litigation other than habeas corpus proceedings. s. 27.711 (9) – (11), F.S.

*Attorney contract.* Immediately after appointment by the trial court that sentenced the defendant to death, the attorney must file a notice of appearance with the trial court indicating acceptance of the appointment. s. 27.11(2), F.S. The attorney must specify that he will represent the defendant throughout all postconviction capital collateral proceedings or until released by order of the trial court. *Id.* Additionally, the attorney must enter into a contract with the Comptroller. s. 27.710(4), F.S. The Comptroller develops the form of the contract and functions as contract manager as well as enforces performance of the terms and conditions of the contract. *Id.*

*Fee and payment schedule.* 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 a death warrant is issued, for attorney's fees and costs.

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.

Finally, the attorney is entitled to a maximum of \$15,000 for miscellaneous expenses, such as transcript preparation, expert witnesses, and copying, unless the trial court finds that extraordinary circumstances exist in which case the attorney is entitled to payment in excess of \$15,000. s. 27.711(6), F.S.

Section 27.711(7), F.S., provides for a payment of up to \$500 per fiscal year to an attorney who is actively representing a capital defendant for tuition and expenses for continuing legal education. The curriculum is not specified by the statute.

### ***Current Caseloads***

There are currently 48 attorneys employed by the Capital Collateral Regional Counsel offices carrying 218 cases. The registry consists of 137 attorneys on the roster. Not all of those attorneys have been assigned cases by the local trial courts. At this time 48 registry attorneys have been assigned 170 cases.

### **D. Recent Litigation on Attorney's Fees**

#### ***Demps v. State***

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.

The Supreme Court's holding and reasoning in the *Makemson v. Martin County* 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.

On April 3, 2003, the Supreme Court issued its ruling in the *State v. Demps* case. The Court ruled that the lower court's order awarding fees in the amount of \$26,180.00 is reversed. The Court ordered fees corresponding to the hourly rate of \$100 specified in ss. 27.703 and 27.711 (4), F.S. The Court also reversed the lower court's ruling that the statutory rate as applied to Schaefer was unconstitutional. *State v. Demps*, (Fla. S. Ct. Order, April 3, 2003, Nos. SC01-1301, SC02-302).

### ***Olive v. Maas, I and II***

The Court ruled on February 14, 2002, in the case of *Olive v. Maas*, 811 So.2d 644 (Fla. 2002), 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. The pertinent issue in *Olive* was that the Registry attorney did not sign the contract for services, contending that by agreeing to the costs and fees set forth in s. 27.711, F.S., the attorney would be waiving any other compensation to which he may be entitled.

Subsequent to that ruling, the Legislature amended chapter 27 to provide that:

No provision of this chapter shall be construed to generate any right on behalf of any attorney appointed pursuant to s. 27.710, or seeking appointment pursuant to s. 27.710, to be compensated above the amounts provided in s. 27.711.

No attorney may be appointed, at state expense, to represent any defendant in collateral legal proceedings except as expressly authorized in this chapter.

The use of state funds for compensation of counsel appointed pursuant to s. 27.710 above the amounts authorized in s. 27.711 is not authorized.

The executive director of the Commission on Capital Cases is authorized to permanently remove from the registry of attorneys provided in ss. 27.710 and 27.711, any attorney who seeks compensation for services above the amounts provided in s. 27.711. s. 27.7002 (3)–(6), F.S.

In February 2003 Mr. Olive filed an action seeking Declaratory Judgment asking the court to “clarify the current status of the law, and Mr. Olive’s rights thereunder, and ultimately to secure the relief affirmatively granted to Mr. Olive, and all Registry attorneys, by the Florida Supreme Court’s decision in *Olive v. Maas I.*” (Complaint for Declaratory Judgment, Case No. 03CA291, 2nd Cir., Leon County, Florida.) The action is still pending in the Circuit Court.

### **E. Minimum 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)*.

In 2002, the Legislature amended the requirements for private attorneys who are included in the registry to provide that the attorney attend within the last year a continuing legal education program of at least 10 hours' duration devoted specifically to the defense of capital cases. This essentially codifies the court rule regarding attorneys representing clients in capital trial and direct appeal litigation.

### **III. Effect of Proposed Changes:**

Committee Substitute for Senate Bill 1228 eliminates the northern region of the Capital Collateral Regional Councils (CCRC's); the other regions, middle and south remain intact. The bill provides for the assignment of cases currently being litigated by the northern region to either the middle or southern region if the crime occurred within their jurisdiction and there is no conflict, or to private registry attorneys. As of July 1, 2003, new cases in the northern region will be assigned to private registry attorneys.

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### **IV. Constitutional Issues:**

#### **A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

**V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Attorneys who work in the private sector will potentially benefit from capital collateral litigation that would otherwise remain in the CCRC northern region's jurisdiction.

C. Government Sector Impact:

This bill eliminates one of the three Capital Collateral Regional Counsel Offices. The cases that would be assigned to the northern region after July 2003, the effective date of the bill, would be assigned to private registry attorneys appointed pursuant to ss. 27.710 and 27.711, F.S.

The fiscal impact of the "privatizing" of the CCRC functions has been the subject of some study and much debate. The Executive Office of the Governor has suggested that outsourcing the capital collateral cases could save \$3.8 million, based on the current level of CCRC funding (\$9.4 million) and the estimated cost of registry representation (\$5.4 million). The estimated savings assumes that the courts will abide by the fee schedule set forth in s. 27.711, F.S., but as recent litigation has indicated, this may not always be the case. The extent to which the courts will award attorneys fees in excess of the statutory fee schedule cannot be anticipated with any certainty, but it will be a factor that may reduce the estimated cost avoidance.

The Governor's suggestion that exclusively using registry attorneys will improve efficiency has been countered by evidence that the efficiency of the CCRC's cannot be accurately measured against the registry attorneys due to the relatively "new" status of registry cases, with regard to their place in the process time line.

This bill would require a study, to be completed by December 31, 2006, for the purpose of comparing the performance of the registry in the northern region with CCRC performance in the middle and southern regions. It may be that the fiscal impact of the bill will not be known until the comparison is made by the study.



**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

One potential issue with eliminating an operation like CCRC and shifting cases wholesale to new attorneys could be resulting process delay as new attorneys get up to speed in complex and voluminous cases.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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