

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Criminal Justice Committee

BILL: CS/SB 1690

INTRODUCER: Criminal Justice Committee and Senator Crist

SUBJECT: Capital Collateral Representation

DATE: March 25, 2008 REVISED: _____

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

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

The bill revises aspects of the Capital Collateral Representation system by changing the method of appointing and terminating Capital Collateral Regional Counsel (CCRC), clarifying that the system is a legislative entity, reorganizing the Commission on Capital Cases with regard to the membership and its responsibilities, resurrecting the Northern Region of the Capital Collateral Counsel, and clarifying the Legislature's expectations of Registry Counsel.

This bill substantially amends sections 27.7001, 27.701, 27.702, 27.709, 27.710, and 27.711 of the Florida Statutes and reenacts section 27.7002, Florida Statutes.

II. Present Situation:

Overview of Postconviction Proceedings in Capital Cases

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) or registry counsel usually represent defendants in postconviction proceedings.

State postconviction proceedings are controlled by Rules 3.850, 3.851, and 3.852, Florida Rules of Criminal Procedure. Unlike a direct appeal that challenges the legal errors apparent from the trial transcripts or record on appeal, a postconviction proceeding is designed to raise claims that 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.

Because the consideration of these claims may require new fact-finding, Rule 3.850 and 3.851 motions are filed in the trial court which sentenced the defendant to death. Appeals from the Rule 3.850 and 3.851 motions are to the Florida Supreme Court. (At this point, the CCRC or registry attorney, 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). Finally, once the Governor signs a death warrant, a defendant will typically file a second Rule 3.850 or 3.851 motion and a second federal habeas petition along with motions to stay the execution.

Commission on Capital Cases

Section 27.709, F.S., creates the Commission on Capital Cases, a legislative commission within the Office of Legislative Services which is tasked with reviewing the "administration of justice in capital collateral cases." The commission is comprised of two members appointed by the Governor, two Senators appointed by the President of the Senate, and two members of the House of Representatives appointed by the Speaker of the House of Representatives.

Capital Collateral Regional Counsel

As described above, the Capital Collateral Regional Counsel (CCRC) represents 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.). Currently, there are two CCRC offices that function independently -- Middle Region (Tampa) and Southern Region (Miami) established under s. 27.701, F.S.

Since 2003, postconviction representation of capital defendants in the Northern Region has been provided by registry attorneys in a "pilot project" undertaken to determine whether capital collateral representation of indigent inmates could be provided in a more efficient manner pursuant to s. 27.701, F.S. The Auditor General conducted a performance review, that was submitted to the presiding officers of the Legislature in January 2007. This review provided data from which a determination could be made regarding the overall cost-effectiveness and

efficiency of the registry, compared to the CCRC system (s. 27.701(2), F.S.). The Review made three substantive findings.

- The overall costs of delivering services was significantly higher with the CCRC's which the review attributed to three reasons: 1) the administrative costs of the CCRC which do not factor into the cost of Registry counsel; 2) the CCRC spend more time investigating their cases, interview more experts and witnesses, and make more public records requests; and 3) the CCRC's provide an average of 355 of legal counsel per case while the Registry counsel spend an average of 196 hours per case.
- The overall length of time, under the direct control of counsel, for case completion in State court for the CCRC's is 2.0 years and 2.1 years for Registry counsel.
- The CCRC's achieved a higher incidence of providing relief to their clients with 14 instances over 2 years as compared to 5 for the Registry. This statistic could vary from year to year, though, because of the nature of the cases. One of the Legislative performance measures – number of factual issues raised – indicated that the CCRC's have a tendency to raise more factual issues than the Registry attorneys.

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.).

Attorney Registry for Postconviction Representation

The 1998 Legislature created a statewide registry of private attorneys to supplement the CCRC system and serve as a backup by alleviating any case backlog pursuant to 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, 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 to contract with a CCRC office, be appointed on a pro bono basis by a CCRC, or for inclusion on the registry, an attorney must meet the minimum qualifications specified in s. 27.704(2), F.S. 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.

Additionally, a registry attorney must have attended 10 hours of continuing legal education devoted to the defense of capital cases within the year prior to his or her inclusion on the registry (s. 27.710(1), F.S.).

The registry 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 (s. 27.710(3), F.S.).

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, (ss. 27.710(3), and 27.711(9), F.S.)
- An attorney may not file repetitive or frivolous pleadings that are not supported by law or facts, (s. 27.711(10), F.S.)
- An attorney may not represent the death-sentenced defendant during a retrial, a resentencing proceeding, a proceeding commenced under ch. 940, F.S. (executive clemency), or in a proceeding challenging a conviction or sentence other than the conviction and sentence of death for which the appointment was made (s. 27.711(11), F.S.), or
- An attorney may not represent the death-sentenced defendant in any civil litigation other than habeas corpus proceedings (s. 27.711(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 pursuant to s. 27.711(2), F.S. The attorney must specify that he will represent the defendant throughout all postconviction capital collateral proceedings, including federal habeas corpus proceedings, or until released by order of the trial court. *Id.* Additionally, the attorney must enter into a contract with the Chief Financial Officer (s. 27.710(4), F.S.). The Chief Financial Officer 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 Chief Financial Officer, 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, after filing a petition for writ of certiorari in the U.S. Supreme Court, and
- \$5,000, if, at any time a death warrant is signed.

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.

Litigation on Attorney's Fees, Fee Payment Caps

It should be noted that the Florida Supreme Court has held that the statutory fee caps, while not facially unconstitutional, could be unconstitutional if applied "in such a manner as to curtail the court's inherent power to ensure the adequate representation of the criminally accused."

Makemson v. Martin County, 491 So. 2d 1109, 1112 (Fla. 1986). However, *Makemson* involved the representation of criminal defendants at trial and on direct appeal where there is a constitutional right to counsel, unlike postconviction proceedings where the right to counsel is by statutory authorization and not a constitutional right. Despite the lack of a constitutional right to counsel in postconviction proceedings, the Court in *Olive v. Maas*, 811 So. 2d 644 (Fla. 2002) extended the reasoning of *Makemson* to the capital collateral context.

The Court's holding in *Olive* was not based on a constitutional right to postconviction counsel; rather, it interpreted the legislative history and staff analysis to allow for fees exceeding the statutory caps in cases where unusual or extraordinary circumstances exist. *Olive*, 811 So. 2d at 654.

Consideration of Minimum Continuing Legal Education Standards

The Florida Supreme Court has considered and opted not to set minimum requirements for counsel in capital postconviction cases that might vary from those enacted by the Legislature in this area. The Court, however, has shared concerns with the commission about deficiencies the Court has observed among registry counsel, and has endorsed the need for increased standards for registry counsel. (Remarks by Justice Cantero at the Commission's February 2005 Meeting, Tallahassee, Florida; Letter to Executive Director of the Commission, February 8, 2005, Chief Justice Pariente.)¹

III. Effect of Proposed Changes:

Section 1. This section amends s. 27.2001, F.S., to establish that the capital collateral representation system is a legislative entity. It also states the Legislature's intent that not all capital collateral cases are extraordinary or unusual.

¹ Jan Pudlow, *Justice Rips Shoddy Work of Private Capital Case Lawyers*, The Florida Bar News Online (Mar. 1, 2005), at <http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/76d28aa8f2ee03e185256aa9005d8d9a/6d34a7c218ae74c385256fb004f3311?OpenDocument> (last visited Feb. 3, 2006) (reporting on remarks of Justice Cantero and letter from Chief Justice Pariente to Roger Maas, executive director of the Commission on Capital Cases).

Section 2. This section amends s. 27.701, F.S., to allow the Commission on Capital Cases, rather than the Governor, to appoint the capital collateral regional counsel (CCRC) to a four year term. Under the provisions in the bill, the CCRC's will serve at the pleasure of the Commission. A time limitation of 120 days is placed upon the appointment process, notwithstanding that the act of the Senate in confirming counsel may not be accomplished within that time frame. The language in that section of current law which constrained former CCRC's from further public service for two years is deleted.

The pilot program which replaced the northern region of the CCRC is deleted from current law. The effect of this deletion is that the northern region is resurrected.

Section 3. Section 27.702, F.S., is amended to clarify that the capital collateral regional counsel are housed with the Justice Administrative Commission (JAC) for administrative purposes.

Section 4. The Commission on Capital Cases is reorganized and given additional powers in this section of the bill by changes made in s. 27.709, F.S. The Office of Legislative Services will no longer be providing staff support for the Commission, but rather the JAC will.

The Commission is given investigative powers and subpoena powers under this section of the bill. It is also given the power to request reports from other agencies.

The Commission is tasked with undertaking projects as approved by the members, and the Commission may sponsor legal education programs should it choose to do so.

This amendment to current law provides that the CCRC's are not only appointed by the Commission, but may be terminated at any time as well.

Section 5. The amendments to s. 27.710, F.S., effect the Registry of private lawyers who represent capital collateral clients with regard to minimum requirements for qualification, appointment, contractual matters, reporting requirements, and removal from the Registry.

Section 6. This section amends s. 27.711, F.S., by providing for pro bono attorneys to receive payments, under contract with the Chief Financial Officer (CFO), for costs and investigative services.

It also provides for payment, up to \$2,500, for an attorney to review a case prior to accepting appointment and entering the payment contract with the CFO.

The amendment to s. 27.711, F.S., also authorizes payment of \$100 per hour, up to a maximum of \$20,000, after the final hearing on the capital defendant's motion for postconviction relief rather than when the trial court issues a final order granting or denying the defendant's motion. In some cases, judges take an extended amount of time in ruling on a postconviction motion after the evidentiary hearing is held – this provision will authorize payment of the attorney sooner.

The bill authorizes payment of \$100 per hour, up to a maximum of \$2,500, for the preparation of the initial federal pleading.

The bill clarifies that a registry attorney who is representing at least one capital defendant is entitled to a maximum of \$500 per fiscal year for tuition and expenses for continuing legal education that pertains to the representation of capital defendants.

The bill increases the number of inmates an attorney may represent in capital postconviction litigation from 5 to 7. This includes contract cases with the Capital Collateral Regional Counsel, pro bono cases, and cases where the attorney is privately retained by an inmate. CCRC's may not enter into employment contracts with attorneys who are representing more than 7 clients in the specified categories.

The bill also provides that a judge may award fees exceeding those outlined in the statutes but when a judge intends to award fees in excess of the statutorily authorized amounts, the judge must make written findings of fact that specifically state the reasons that set the particular case apart from other capital collateral cases.

Section 7. This section of the bill reenacts s. 27.7002, F.S., for the purpose of incorporating amendments made by the bill that reference that section.

The effective date of this bill is July 1, 2008.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

See the discussion on *Litigation on Attorney's Fees, Fee Payment Caps*, in the Present Situation portion of the Bill Analysis.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Court-appointed capital collateral counsel should receive certain fees more quickly than under current law, in that the bill provides for payment after the final hearing on the

original motion for postconviction relief, rather than upon the issuance of the court's order on the motion.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Criminal Justice on March 25, 2008:

- The Committee Substitute amended the bill by establishing that the capital collateral representation system is a legislative branch entity.
- It increased the term of the CCRC's from 3 years to 4 years, provided a time limitation on the appointment process leading up to confirmation by the Senate, and eliminated the 2-year prohibition on further public service by former CCRC's.
- The membership of the Commission on Capital Cases is amended to allow the President of the Senate and the Speaker of the House of Representatives to appoint two members each, but eliminates the requirement that they be members of the Legislature.
- The Committee Substitute also establishes the vote counts by which CCRC's shall be appointed and their employment terminated.

B. Amendments:

None.