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.)

Date: March 3, 1998 Revised: _____ _____ _____ _____

Subject: Capital Collateral Proceedings

	Analyst	Staff Director	Reference	Action
1.	Miller	Miller	CJ	Favorable/CS
2.				
3.				
4.				
5.				

I. Summary:

Committee Substitute for Senate Bill 1328 would provide for the representation of certain death-sentenced defendants by attorneys in private practice instead of state-employed attorneys with the Capital Collateral Regional Counsel (CCRC). The CCRC would continue to represent those defendants who it currently represents; however, an attorney in private practice would be appointed to represent a death-sentenced defendant who was previously represented by private counsel and who is unrepresented at the time this CS becomes law.

The intent of this legislation is to alleviate the CCRC's backload of capital cases which have not been assigned an attorney. As of February 9, 1998, there were 30 death-sentenced defendants who would be eligible for appointment of private counsel, pursuant to the provisions of this CS. Forty-six defendants have filed a Rule 3.850 motion with the Florida Supreme Court indicating that the CCRC will be handling the appellate work; however, this group also *may* be eligible for appointment of private counsel.

The Justice Administration Commission (JAC) would maintain a registry of attorneys who, because of experience and high ethical standards, are statutorily qualified to represent defendants in postconviction capital collateral proceedings. The Attorney General would notify the JAC when ninety-one (91) days have elapsed since the Florida Supreme Court issued a mandate on a direct appeal, *or* when the U.S. Supreme Court has denied a petition for certiorari, *or* when a person under a death sentence who was previously represented by private counsel is currently unrepresented in a postconviction capital collateral proceeding. Upon notification by the Attorney General, the JAC would immediately notify the trial court that imposed the death sentence and the judge would then appoint private counsel from the registry.

Committee Substitute for Senate Bill 1328 would provide a schedule of fees for the payment of private counsel and investigators.

This CS would substantially amend or create the following sections of the Florida Statutes: 27.702, 27.710, and 27.711.

II. Present Situation:

A. The Appellate and Postconviction Process In Death Sentence Cases

An offender's judgment of capital conviction and death sentence is subject to automatic review by the Florida Supreme Court. The Court's review of capital felony cases takes precedence over all other cases. The 1996 Legislature provided that the Court must render a final disposition of the appeal within two years after the filing of the notice of appeal. s. 5, ch. 96-290, Laws of Florida; s. 921.141(4), F.S. The Supreme Court reviews the record and may:

- Find that there was an error made at trial and remand the case back to the trial court for a new trial or a penalty phase review, depending upon the error;
- Find that there was an error made in the sentencing and reduce the sentence from death to life imprisonment; *or*
- Refuse to overturn the conviction, affirming the trial court's judgment and sentence.

If the Supreme Court affirms the offender's judgment and death sentence, the offender has 90 days after the opinion becomes final to file a petition for a writ of certiorari in the United States Supreme Court, seeking a review of the Florida Supreme Court's decision. The United States Supreme Court has the discretion to grant or deny review, and usually certiorari is denied. If the Florida Supreme Court upholds the conviction and the United States Supreme Court denies certiorari, the offender may seek postconviction or "collateral" relief in the state courts.

In Florida, this is typically done by filing a motion under Rule 3.850, Fla. R.Crim.P., or by petition for writ of habeas corpus, depending upon the particular claim. These motions request the Court to vacate, set aside, or correct a sentence, which are directed to the original trial court to review issues of fact or law that were unknown or could not have been raised at trial or on appeal. Habeas corpus is a means of challenging unlawful detention.

In *State v. Broom*, 523 So.2d 639, 640 (Fla. 2d DCA 1988), the Second District Court of Appeal explained the history of Rule 3.850 and how habeas corpus operates and is limited in its relation to this rule:

> Prior to the adoption of Criminal Procedure Rule No. 1 (now Florida Rule of Criminal Procedure 3.850) . . . the proper procedure for collaterally attacking a judgment and sentence in Florida,

> post-judgment and post-appeal, was by filing a petition for writ of habeas corpus in the county in which the petitioner was incarcerated. However, because of the flood of habeas petitions stemming from the retroactive application of the decision of *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), the Florida Supreme Court adopted Rule 3, effective April 1, 1963. See *Roy v. Wainwright*, 151 So.2d 825 (Fla.1963). The venue for Rule [3.850] motions, as provided in the rule, is the same court which imposed the judgment or sentence which is being collaterally attacked. Thus, the adoption of Rule [3.850] tended to relieve the circuit courts where the major prisons were located from this burden. Also, as the opinion in *Roy* indicates, the trial court where petitioner was tried is "best equipped" to adjudicate the rights of that petitioner.
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> Rule [3.850] contains the following reference to habeas corpus:
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> An application for writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this rule, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. 523 So.2d at 640.
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> Accordingly, it has been held that [3.850 motions] completely superseded habeas corpus as the means of collateral attack of a judgment and sentence. *Id.* at 641. As such, the rule is intended to provide a complete and efficacious post-conviction remedy to correct convictions on any grounds which subject them to collateral attack. *Id.*

In *Leichtman v. Singletary*, 674 So.2d 889, 892 n.1 (Fla. 4th DCA 1996), the Fourth District Court of Appeals described what areas remain available to habeas corpus:

> Habeas corpus remains available in the following areas which do not involve a collateral attack of the judgment and sentence and thus are not covered by Rule [3.850]: (1) to attack computations of gain time and other determinations of the parole and probation commission; (2) to test pretrial detention and the denial of pretrial bond or excessive pretrial bond; (3) to determine the right to a delayed appeal; (4) to challenge extradition; and (5) to challenge the effectiveness of appellate counsel in a previous appeal.

Effective January 1, 1994, Rule 3.851, Fla.R.Crim.P., provides that any Rule 3.850 motion to vacate judgment of conviction and sentence of death must be filed within one year from the date

the judgment and sentence become final. The judgment and sentence become final upon expiration of the time permitted to file a petition for writ of certiorari in the United States Supreme Court seeking review of the decision of the Florida Supreme Court affirming a judgment and sentence of death (90 days after the opinion becomes final), or upon the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed. The one-year time limitation applies unless: the motion alleges that the facts upon which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence; *or* the motion asserts a new fundamental constitutional right that was not established within the one-year time period (e.g., a new interpretation of an amendment) and is held to apply retroactively.

The time limitations for filing a Rule 3.850 motion are established with the understanding that the defendant will have counsel assigned and available to begin addressing the defendant's postconviction issues within 30 days after the judgment and sentence are final. Should the Governor sign a death warrant before the expiration of the time limitation, the Florida Supreme Court, upon the defendant's request, will grant a stay of execution to allow any postconviction relief motions to proceed.

For Rule 3.850 motions that have not been ruled on as of January 1, 1997, the trial court is required to conduct a hearing to determine if an evidentiary hearing is required, and if so determined, shall promptly hold an evidentiary hearing. If the motion does not fall into this select class, the trial court is required to deny the motion without a hearing when the motion, files, and records in the case conclusively show that the defendant is not entitled to relief. If the motion is not denied, and after the answer is filed, the trial court is required to conduct an evidentiary hearing. If the trial court determines that the motion has merit, the court shall vacate and set aside the judgment and shall discharge or resentence the defendant, grant a new trial, or correct the sentence as may be appropriate.

An application for writ of habeas corpus on behalf of a defendant who is authorized to apply for relief by motion pursuant to Rule 3.850 shall not be entertained if it appears that the applicant has failed to apply for relief, by motion to the trial court that sentenced the applicant or that the applicant has been denied relief, unless it appears that the remedy by Rule 3.850 motion is inadequate or ineffective to test the legality of the applicant's detention.

After a Rule 3.850 motion is heard and ruled on by the trial court, the defendant or the state may appeal the ruling to the Florida Supreme Court. Under Rule 9.140, Fla.R.App.P., all petitions for extraordinary relief over which the Florida Supreme Court has original jurisdiction, including petitions for writ of habeas corpus, must be filed simultaneously with the initial brief in the appeal from the lower tribunal's order on the defendant's application for relief under Rule 3.850.

Sentencing errors may not be raised on appeal unless the alleged error has been brought to the attention of the lower tribunal at the time of sentencing, or by motion to correct a sentence under Rule 3.800, Fla. R.Crim.P. An appeal from a summary denial of a motion (denial without a hearing) under Rule 3.850 or Rule 3.800(a) is commenced as prescribed in Rule 9.110, Fla.

R.App. P., which governs appeal proceedings to review final orders of lower tribunals and new trials in jury and non-jury cases.

The defendant may again petition for certiorari to the United States Supreme Court. Once all of the defendant's claims have been denied in the state system, the defendant has 60 days within which to initiate federal habeas corpus review. The death-sentenced offender may file a habeas corpus petition in the appropriate United States District Court, asking the court to review any violations of the federal constitution or law that may have tainted the conviction or sentence. In order for a death-sentenced offender to reach the federal courts for review, the offender must first exhaust all avenues of appeal within the state system. If an offender fails to do this, the federal courts will deny review and remand the case back to the state courts. An appeal of the federal district court's habeas decision in a Florida case is made to the Eleventh Circuit Court of Appeals, and then to the United States Supreme Court.

B. The McDonald Commission

In December 1996, the Governor, Senate President, and House Speaker formed a commission to review the subject of postconviction representation. The McDonald Commission was chaired by former Florida Supreme Court Chief Justice Parker Lee McDonald. The commission's other members were: Senator Locke Burt, Representative Victor Crist, and J. Hardin Peterson, the Governor's former General Counsel. The joint agreement creating the commission stated that CCR's budget had been increased by the Legislature from $3.1 million in fiscal year 1995-96 to $4.4 million in fiscal year 1996-97. During this time period, the CCR's office increased from 52 positions to 77, and start-up money was also provided for branch offices. Despite this increase, the joint agreement pointed out that in December 1996, the Florida Supreme Court reported that 13 CCR cases had not been assigned to counsel and four conflict cases had also not been assigned to outside counsel. The commission's mission was to review the entire subject of postconviction representation and to present proposals to the Legislature. [McDonald Commission Joint Agreement, entered December 16, 1996.]

The McDonald Commission held four public hearings where it received testimony from interested parties. The commission submitted its report on February 13, 1997. The commission's primary recommendation was that the Legislature create three separate and distinct regional capital collateral representatives to be located in Northern, Central and Southern Florida.

C. The Capital Collateral Regional Counsel Provides Postconviction Legal Counsel

Section 27.51 (5)(a), F.S., provides that upon termination of the direct appellate proceedings and the challenge to a judgment of conviction and sentence of death, the public defender is required to notify the accused of his rights pursuant to Rule 3.850, Fla.R.Crim. P. (motion for postconviction relief), and advise the person that representation in any collateral proceeding is the responsibility of the capital collateral representative. The public defender is required to forward all original files on the matter to the capital collateral representative. The trial court retains the power to appoint

the public defender or other attorney not employed by the capital collateral representative to represent such person in executive clemency proceedings.

The Office of the Capital Collateral Representative [recently renamed the Capital Collateral Regional Counsel (CCRC)] was created in the judicial branch in 1985 to "provide for the representation of any person convicted and sentenced to death in this state who is unable to secure counsel due to indigency, so that collateral legal proceedings to challenge such conviction and sentence may be commenced in a timely manner and so as to assure the people of this state that the judgments of its courts may be regarded with the finality to which they are entitled in the interests of justice." s. 27.7001, F.S. The 1997 Legislature deleted the statutory reference that the office is in the judicial branch of state government.

The 1996 Legislature also modified the intent and the duties of the capital collateral representative. Ch. 96-290, Laws of Florida [amending s. 27.701, F.S. (1996 Supp.)]. The newly created Capital Collateral Regional Counsel now represents all persons convicted and sentenced to death, even if not indigent, unless the court permits other counsel to appear. s. 27.702, F.S. Representation by the CCRC commences automatically upon termination of the direct appellate proceedings.

Section 27.702, F.S., provides that the CCRC shall represent any person convicted and sentenced to death in this state who is without counsel for the 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 Eleventh Circuit Court of Appeals, and the United States Supreme Court. The section directs the CCRC's representation to commence upon termination of direct appellate proceedings in state or federal court.

Rather than one office with one capital collateral representative, three offices were created with each located in newly drawn regions of the state and each having a capital collateral regional counsel (regional counsel) to administer its respective office. The three regions were divided along judicial circuit lines with a fairly equal distribution of death appeal cases in each region.

The *northern* region consists of the following judicial circuits:

First - Escambia, Okaloosa, Santa Rosa, Walton counties;
Second - Franklin, Gadsden, Jefferson, Leon, Liberty, and Wakulla counties;
Third - Columbia, Dixie, Hamilton, Lafayette, Madison, Suwannee, and Taylor counties;
Fourth - Clay, Duval, and Nassau counties;
Eighth - Alachua, Baker, Bradford, Gilchrist, Levy, and Union counties; and
Fourteenth - Bay, Calhoun, Gulf, Holmes, Jackson, and Washington counties.

The *middle* region consists of the following judicial circuits:

Fifth - Citrus, Hernando, Lake, Marion, and Sumter counties;
Sixth - Pasco and Pinellas counties;
Seventh - Flagler, Putnam, St. Johns, and Volusia counties;
Ninth - Orange and Osceola counties;
Tenth - Hardee, Highlands, and Polk counties;
Twelfth - DeSoto, Manatee, and Sarasota counties;
Thirteenth - Hillsborough county; and
Eighteenth - Brevard and Seminole counties.

The *southern* region consists of the following judicial circuits:

Eleventh - Dade county;
Fifteenth - Palm Beach county;
Sixteenth - Monroe county;
Seventeenth - Broward county;
Nineteenth - Indian River, Martin, Okeechobee, and St. Lucie counties; and
Twentieth - Charlotte, Collier, Glades, Hendry, and Lee counties.

The qualifications for the regional counsel remained the same. The regional counsel must be and must have been for the preceding five years, a member in good standing of the Florida Bar. The nomination process was amended to require the Supreme Court Judicial Nominating Commission (JNC) to nominate candidates, rather than have the elected public defenders nominate candidates. During the summer of 1997, the JNC submitted to the Governor qualified candidates for each appointment as regional counsel. The Governor appointed three capital collateral regional counsels from the nominees. The Governor may reject the nominations and request the JNC to submit three new nominees for each position. All appointments must be confirmed by the Senate. The three appointees have not been confirmed, to date.

The appointment as regional counsel is for a term of three years. Following a tenure as regional counsel, the person may not run for or accept appointment to any state office for two years.

Capital collateral counsel assistants are hired at the discretion of each regional counsel. An assistant must be a member in good standing of the Florida Bar, with not less than three years experience in the practice of criminal law. The 1997 amendments increased the minimum qualifications for an assistant to also require prior employment to include at least five felony jury trials, five felony appeals, five capital postconviction evidentiary hearings, or any combination of at least five such proceedings. The competency standards for private counsel and court-appointed counsel for conflict cases are the same. These enhanced standards should comply with the Federal Antiterrorism and Effective Death Penalty Act, which provides for expedited federal habeas review and other federal court reforms for states which follow the federal guidelines. Both paid and volunteer attorneys who provide legal representation to an individual sentenced to death may

receive pro bono service hours for their work because the Legislature recognizes that the handling of capital cases is a public service and the Legislature wants to reward this service.

The three offices are independent of each other but the administrative functions are consolidated and administered by the Justice Administrative Committee. The duties of the regional counsel remain the same as in previous years, except that each office must provide quarterly reports detailing the number of hours worked by the investigators and legal counsel per-case and the amounts per-case expended during the preceding quarter in investigating and litigating capital collateral cases. The President of the Senate, the Speaker of the House of Representatives, and the Commission on the Administration of Justice in Capital Cases are to receive the quarterly reports. To date, no reports have been submitted.

A conflict of interest arises when the interests of the death row inmates are so adverse or hostile that they cannot all be counseled by the same regional counsel office without a conflict of interest. In such cases, the capital collateral regional counsel submits an application to the sentencing court. The court must designate one of the other regional counsels to handle the case unless a conflict would still exist and then, as the last resort, appoint one or more private attorneys who are members of the Florida Bar.

The Justice Administrative Commission still administers the funds to be paid to appointed counsel; however, a statutory rate not exceeding $100 an hour was established by the 1997 Legislature.

The 1997 Legislature reiterated and specified that the regional counsel and the assistants must timely comply with all provisions of the Florida Rules of Criminal Procedure in capital collateral litigation, including any requests for records. A provision now requires any records requests to be approved by the regional counsel. The McDonald Commission heard testimony on this issue and determined that abuses of the public records process by CCR lead to unwarranted delays. The Florida Supreme Court recently adopted Rule 3.852 to address these abuses.

The McDonald Commission reported that it was not able to get an accurate picture of the number of hours and money spent in representing death row inmates because CCR did not keep accurate records of time expended on legal services in state courts. The commission’s ability to make intelligent choices about workload and the agency’s performance was hindered by this fact. Therefore, the 1997 legislation created the Commission on the Administration of Justice in Capital Cases for the purpose of reviewing the administration of justice in capital collateral cases. Specifically, the commission is required statutorily to receive relevant public input, review the operation of the offices of the capital collateral regional counsels, and advise and make recommendations to the Governor. Additionally, the commission is to receive complaints regarding the practice of any office of regional counsel and refer any complaint to the Florida Bar, the Florida Supreme Court, or the Commission on Ethics, whichever is appropriate.

Members of the newly created commission include two members of the Senate, one from each party, appointed by the President of the Senate; two members of the House of Representatives, one from each party, appointed by the Speaker; and two members chosen by the Governor. The

four-year terms of the six members are staggered, with the Governor's initial appointees serving the entire four years. The members are required to select a Chair to serve a one year term. The commission must meet at least quarterly or at the discretion of the chair and they are eligible to receive per diem and travel expenses to be paid by their appointing entity. To date, the commission has met on several occasions and has taken testimony from the regional counsels and the Attorney General's Office on the progress made by the newly enacted changes.

The Attorney General acts as co-counsel of record in capital collateral proceedings. It was reported by the McDonald Commission that most of the delays in death cases occur in the initial 3.850 stage of the case. By authorizing co-counsel, the state attorney of record has the benefit of the Attorney General's expertise and assistance if needed to prevent delays in the process.

Section 924.051, F.S., requires collateral or postconviction relief to be filed less than one year after the judgment and sentence in a capital case, unless there is newly discovered evidence or a change in the law. This provision is in response to the commission's recognition that a cause of delay in death penalty cases has been the filing of successive postconviction motions. This provision informs the Florida Supreme Court that the Legislature considers successive postconviction motions to be disfavored and to be narrowly construed.

The court having jurisdiction over a death-sentenced offender can determine the indigency of the defendant pursuant to s. 27.52, F.S. If the court finds that the offender is either nonindigent or indigent but able to contribute, the court may assess attorney's fees and costs against the defendant. Such liability may be imposed in the form of a lien against the defendant's property.

Finally, in the interest of promoting justice and integrity with respect to capital collateral representation, the 1997 Legislature recommended that the Florida Supreme Court adopt a rule that incorporates the provisions in s. 924.055, F.S., which limit the time for postconviction proceedings in capital cases (as passed by the 1996 Legislature). That is, all postconviction motions and petitions that challenge the judgment, sentence, or appellate decision must be filed within one year after the date the Supreme Court issues a mandate on a direct appeal or the United States Supreme Court denies a petition for certiorari, whichever is later; the circuit court shall conduct all necessary hearings and render a decision within 90 days after the date the state files a response to a postconviction motion that challenges the judgment or sentence; the Supreme Court shall render a decision within 200 days after the date a notice is filed appealing an order of the trial court or an extraordinary writ is filed in a postconviction proceeding; and a convicted person must file any petition for habeas corpus in the federal district court within 90 days after the date the Supreme Court issues a mandate in a postconviction proceeding. This rule is intended to reduce delays in the appellate process.

If, during representation of two or more indigent persons, the CCRC determines that the interests of those persons are so adverse or hostile that they cannot be counseled by the CCRC without a conflict of interest, the sentencing court shall, upon application by the CCRC, appoint one or more members of the Florida Bar to represent one or more of these persons.

The appellate process in death sentence cases has been outlined by the Attorney General's Office, along with the number of defendants at each stage of the process.

STAGES OF CAPITAL PROCEEDINGS
(current 2/9/98)

TRIAL, DIRECT APPEAL & CLEMENCY	*STATE COLLATERAL ATTACK*	*FEDERAL COLLATERAL ATTACK*	*REPETITIVE PROCEEDINGS*
1 **TRIAL**	5 **RULE 3.850 MOTION FOR POST CONVICTION RELIEF IN TRIAL COURT** (**76** defendants without bona fide 3.850 motion filed -- **30** without any motion filed; **46** with only shell motions filed) (**88** defendants have original Rule 3.850 motions pending -- **16** are Supreme Court remands to trial court)	7 **PETITION FOR WRIT OF HABEAS CORPUS IN FEDERAL DISTRICT COURT** (**24** defendants -- **21** with petitions filed; **3** without)	10 **REPETITIVE LITIGATION, WARRANTS & CLEMENCY**
2 **DIRECT APPEAL TO THE FLORIDA SUPREME COURT** (**79** defendants)		8 **APPEAL OF DENIAL OF PETITION FOR WRIT OF HABEAS CORPUS TO ELEVENTH CIRCUIT COURT OF APPEALS IN ATLANTA** (**9** defendants)	Defendants with pending **repetitive** 3.850 motions in circuit court (**7**)
3 **PETITION FOR CERTIORARI TO THE U.S. SUPREME COURT** (**27** defendants -- **15** with petition filed; **12** awaiting filing of petition)	6 **APPEAL OF DENIAL OF RULE 3.850 MOTION & STATE LAW PETITION FOR WRIT OF HABEAS CORPUS BROUGHT BEFORE FLORIDA SUPREME COURT** (**61** defendants have collateral appeals pending -- **8** repetitive)	9 **PETITION FOR WRIT OF CERTIORARI TO U.S. SUPREME COURT** (**4** defendants)	Defendants with pending **repetitive** 3.850 appeals to Florida Supreme Court (**8**)
4 **CLEMENCY** (Must be filed within 1 year after sentence upheld) * not CCRC cases			Defendants with pending death warrant (**4**)
			Defendant pending clemency (**1**)
106 defendants total	**225** defendants total	**37** defendants total	**20** defendants total

D. Effect of the Anti-Terrorism and Effective Death Penalty Act of 1996

In 1996, Congress passed significant federal habeas corpus reform as part of the "Anti-Terrorism and Effective Death Penalty Act of 1996." The reforms included filing deadlines, increased deference to state court decisions, a prohibition against successively raising the same claim, and timetables for courts to follow. The new federal law only applies to cases brought by prisoners who reside in states that provide indigent inmates with competent counsel for state collateral motions. A federal district court has held that Florida does not qualify for the benefits of this CS because it has not been demonstrated that counsel appointed to represent inmates in collateral proceedings meet standards in the CS. *Hill v. Butterworth*, 10 F.L.W. Fed D447 (N.D. Fla. 1997). However, recent statutory changes have required new standards for competency of counsel and the state may qualify for the expedited federal procedures in light of these changes.

E. Justice Administration Commission

Section 43.16, F.S., creates the Justice Administration Commission within the Judicial Branch of Florida. The headquarters are located in Tallahassee. The commission consists of two state attorneys and two public defenders who serve for two years. The commission employs an executive director and any personnel deemed necessary for the efficient performance of the commission. The commission provides administrative services and assistance, mainly of the accounting nature, to the state attorneys and public defenders, the office of capital collateral representative (renamed capital collateral regional counsel), and the Judicial Qualifications Commission.

III. Effect of Proposed Changes:

Chapter 27, Florida Statutes, is titled "State Attorneys, Public Defenders; Related Offices." The chapter is divided into four "parts," each dealing with offices within the criminal court system. A purely technical aspect of this CS directs the Division of Statutory Revision to designate part IV of chapter 27 as "Capital Collateral Representation."

The Registry

The statutory section dealing with the recently restructured Capital Collateral Regional Counsel is amended to create a statewide registry of attorneys who would be eligible and available to represent death row inmates in capital collateral proceedings. The executive director of the Commission on Justice in Capital Cases would compile and maintain the registry. The CS sets forth the procedure to be used by the executive director for maintaining the registry. The registry must have at least 50 qualified names on it and, if that number drops below 50, the executive director must notify the chief judge of each judicial circuit by letter and request the prompt submission of the names of at least three private attorneys. The executive director must then send an application to those attorneys so that the attorney may register for appointment. If necessary, the executive director would be authorized to advertise in legal publications and other appropriate media. By September 1 of each year, and as necessary thereafter, the executive director shall provide to the Chief Justice of the Supreme Court, the chief judge and state attorney in each judicial circuit, and the Attorney General a current copy of the registry.

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 of such proceedings. The judge who appoints private counsel must make specific findings that the attorney "has high ethical standards."

Furthermore, the attorney who applies for inclusion on the registry must certify that he is currently counsel of record in not more that four such proceedings and that he "intends to

continue such representation under the terms and conditions set forth in s. 27.711 until the sentence is reversed, reduced, or carried out."

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. Additionally, 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.

Certain limitations are placed on private counsel who are appointed pursuant to this section. An attorney may not represent more than five 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 claim ineffective assistance of counsel in these proceedings; an attorney may not represent the death-sentenced defendant during a retrial, a resentencing proceeding, a proceeding commenced under chapter 940 (executive clemency), a proceeding challenging a conviction or sentence other than the conviction and sentence of death for which the appointment was made, or any civil litigation other than habeas corpus proceedings.

Definitions

Section 27.711, F.S., is created to include definitions, a fee schedule, and expectations of employment as an attorney in such proceedings.

A capital defendant is defined in the CS as "the person who is represented in postconviction capital collateral proceedings by an attorney appointed" pursuant to the criteria set forth in this legislation.

"Executive director" means the executive director of the Commission on the Administration of Justice in Capital Cases.

Postconviction capital collateral proceedings is defined to mean "one series of collateral litigation of an affirmed conviction and sentence of death, including the proceedings in the trial court that imposed the capital sentence, and appellate review of the sentence by the Supreme Court, any certiorari review of the sentence by the United States Supreme Court, and any authorized federal habeas corpus litigation with respect to the sentence...." The term also includes language specifying that an attorney is not to file "repetitive or successive collateral challenges to a conviction and sentence of death which is affirmed by the Supreme Court and undisturbed by any collateral litigation."

Pay Schedule

The attorney would be paid by Justice Administrative Commission in stages upon full performance of the duties as follows:

$100 per hour, up to a maximum of $2,500 upon accepting the appointment and filing the notice of appearance;

$100 per hour, up to a maximum of $20,000 after timely filing in the trial court the capital defendant's complete original motion for postconviction relief and upon submitting to the Justice Administrative Commission an affidavit stating that such a motion fully raises all issues to be addressed by the trial court;

$100 per hour, up to a maximum of $10,000 after the trial court issues a final order granting or denying the defendant's motion for postconviction relief;

$100 per hour, up to a maximum of $4,000 after timely filing in the Supreme Court the defendant's brief(s) 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;

$100 per hour, up to a maximum of $20,000 after the appeal of the trial court's denial of the defendant's motion for postconviction relief and the defendant's state petition for writ of habeas corpus become final in the Supreme Court;

$100 per hour, up to a maximum $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

$100 per hour, up to a maximum $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.

The attorney may hire an investigator for $40 per hour, up a maximum of $15,000 to assist in the appeal.

Additionally, the attorney is entitled to a maximum of $5,000 for miscellaneous expenses, such as transcript preparation, expert witnesses, and copying.

Case Backload

It is the intent of this legislation to alleviate the backload of the CCRC's capital cases which are ripe for the appellate process to begin yet do not have an attorney assigned to them. A private attorney will be appointed by the trial court that sentenced the defendant if the Attorney General notifies the executive director of the Commission on the Administration of Justice in Capital Cases of one of the following events:

- 91 days have lapsed since the Supreme Court issued a mandate on a direct appeal;

- the U.S. Supreme Court has denied a petition for certiorari (whichever of these two is later); *or*
- a person under sentence of death who was previously represented by private counsel is currently unrepresented in a postconviction capital collateral proceeding.

Without question, there were 30 defendants who qualified for appointment of private counsel under the provisions of this CS as of February 9, 1998. There are 46 more defendants who have filed Rule 3.850 motions; however, according to the Office of the Attorney General, these are only generic "shell" motions which do not contain specific facts about the case and, therefore, these cases should also be eligible for appointment of private counsel.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

It is not clear from the language in the CS whether the state will be fully responsible for the fees incurred pursuant to this legislation or whether "any of its political subdivisions" will also incur expenses involved with the implementation of this legislation. If an argument can be made that a "political subdivision" is required to spend funds or to take action requiring expenditure based on the language created in this CS, this CS may fall under Article VII, Section 18 of the Florida Constitution, which relates to local government mandates. However, the legislation's provisions may fall under a constitutional exemption because it relates to criminal law.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The CS provides for the hourly rate and maximum compensation of court-appointed defense counsel in a capital case. The Florida Supreme Court has recognized that it is within the legislature's province to appropriate funds for public purposes and to resolve questions of compensation. *State ex rel. Caldwell v. Lee*, 27 So.2d 84 (Fla. 1946). However, the Court has also held that a statute establishing maximum fees is "unconstitutional when 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). Therefore, a statute that is flexible in terms of allowing a court to appropriate funds above the statutory cap in cases involving unusual or extraordinary circumstances will not interfere with the defendant's constitutional right to assistance of counsel for his defense. *Id.*

Committee Substitute for Senate Bill 1328 specifies that the fee and payment schedule in this CS is the exclusive means of compensating a court-appointed attorney who represents a capital defendant. However, a court-appointed attorney may seek more money from the federal government, as provided in 18 U.S.C. s. 3006A or other federal law, in habeas corpus litigation in the federal courts. Section 3006A of title 18 relates to federal representation of criminal defendants and the payment of fees. In light of the fact the CS does not specifically authorize a judge to allocate money over the statutory fee maximums for cases involving unusual or extraordinary circumstances, a court may find that the defendant's right to assistance of counsel is being interfered with.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The CS provides for the hourly rate of $100 with varying maximum amounts specified for the seven stages of the appeal. According to Gregory C. Smith, Capital Collateral Counsel, Northern Region, this legislation is potentially more costly for the state than the current system. The more experienced attorneys in the Northern Region are paid roughly in the mid $50,000's while the less experienced attorneys are paid in the mid $30,000's to $40,000's per year. Mr. Smith reported that some of the attorneys work a minimum of 160 hours a month.

Committee Substitute for Senate Bill 1328 specifies that the private counsel is authorized to pay an investigator $40 per hour, up to a maximum of $15,000. Mr. Smith informed staff that currently investigators receive about $45 per hour.

Under the provisions of CS/SB 1328, an attorney may receive a total of $66,500 plus $15,000 for investigative expenses. (This figure is assuming that a court has not waived the statutory fee maximums.) Committee Substitute for Senate Bill 1328 provides for the payment of fees for expenses incurred in the appellate process. Those expenses could include such items as travel, per diem, expert witness fees, transcripts, and xeroxing charges. These expenses would vary depending on the complexity of the case but could range between $25,000 to $50,000 per case.

VI. Technical Deficiencies:

None.

VII. Related Issues:

NATIONWIDE POST-CONVICTION STATISTICS

(Compiled by the Florida Attorney General - Feb. 1998)

State and Death Row Count	Method of Counsel	Funding Amount
Alabama (150)	court appointed	Gen.Rev.Fund $20/$40 out/in court Waivable cap $600 per case
Arizona (122)	court appointed (Supreme Court)	$7,500 cap per case ($150,000 funded by legislature)
Arkansas (42)	Volunteer or Pro Bono	none
California (444)	Recruited through Calif. Appellate Project	alternative fee schedule for appointed attorneys, one involving "reasonable hours" at $95 per hr., other setting fee caps of $70,000 to $200,000 per case
Colorado (4)	Public Defender	Gen.Rev. conflict cases $15 - $40 per hour
Connecticut (5)	Public Defender	information requested
Delaware (11)	Public Defender	No separate capital funding
Florida (371)	CCRC (state agency)	$4 million
Georgia (108)	N/A	N/A
Idaho (19)	Public Defender	no separate capital funding
Illinois (172)	Public Defender (Capital Resource Center)	$1.1 million; CRC only supplies support to panel attorneys who actually provide representation at rate of $40 per hour/$26,000 cap per case
Indiana (49)	Public Defender	$4 million (capital & non-capital cases)
Kansas (none presently)	Public Defender	N/A
New Jersey (16)	Public Defender	no separate funding for collateral appeals
New Mexico (3)	N/A	N/A
New York (none presently)	agency, Capital Defenders Office, obligated to provide all representation, including collateral	no separate funding for collateral appeals
North Carolina (154)	court-appointed, on recommendation of state Office of the Appellate Defender	no separate funding for collateral appeals; attorneys are paid $85
Ohio (150)	Public Defender	no separate funding for collateral appeals; if conflict counsel appointed little-followed cap of $300 per case

State and Death Row Count	Method of Counsel	Funding Amount
Oklahoma (128)	central agency, Oklahoma Indigent Defense System, provides all representation to indigent inmates, including collateral matters	if conflict counsel appointed, $20,000 cap per case; last budget for entire agency: $8 million; $1.1 million for capital cases
Oregon (22)	court-appointed	paid through Indigent Defense Fund, administered by state supreme court at rate of $55 per hour
Pennsylvania (201)	state & county public defenders, as well as Indigent Defense Association for federal representation	N/A
South Carolina (71)	attorneys hired by state Office of Indigent Defense	$25,000 cap per case; half of OID's funds, $5.5 million set aside for all capital representation
South Dakota (2)	court-appointed	N/A
Tennessee (102)	agency, Office of the Post-Conviction Defender within Public Defender's Office	last budget = $682,000
Texas (394)	court-appointed	$100 hourly rate, with $10,000 cap per case; $2 million appropriated last year
Utah (10)	volunteer or pro bono counsel	N/A
Virginia (53)	court-appointed from list of qualified attorneys recommended by public defender	no separate collateral funding
Washington (13)	court-appointed by state supreme court	no separate collateral funding
Wyoming (none presently)	N/A	N/A

VIII. Amendments:

None.