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: Public Records Requests in Death Penalty Cases

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

I. Summary:

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

The CS requires postconviction counsel to review the records in the repository and file a written demand for additional agency records within 90 days of appointment. If the agency objects to the demand, the trial court must resolve the dispute within 30 days. The trial court may only order additional records production if it makes specific findings. After that one request, postconviction counsel is prohibited from making any further public records requests. However, in the event postconviction counsel can, through an affidavit, establish that the agency still possesses relevant public records, the trial court may order them produced upon specific findings.

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

This CS creates an unnumbered section of the Florida Statutes, creates s. 119.19, and amends s. 27.207, and s. 27.708 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. Review of the Florida Supreme Court's decision is to the United States Supreme Court by petition for certiorari.

Second, after the direct appeal concludes, *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: (1) ineffective assistance of trial counsel; (2) *Brady* violations, *i.e.*, a due process denial by the prosecution's suppression of material, exculpatory evidence; and (3) newly discovered evidence, for example, post-trial recantation by a principal witness. Since these claims require new fact-finding, Rules 3.850 & 3.851 motions are filed in the trial court which sentenced the defendant to death. Appeals from Rules 3.850 & 3.851 motions are to the Florida Supreme Court. (At this point, CCRC usually will raise the claim of ineffective assistance of appellate counsel by writ of habeas corpus.)

The third and what is intended to be the final stage is federal habeas corpus, a proceeding controlled by 28 U.S.C. § 2254 (a). Federal habeas allows a defendant to petition the federal district court to review whether the conviction of 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. Review of habeas is to the Circuit Court of Appeals and then to the United States Supreme Court.

Under current practice, the Governor will not sign a death warrant until the conclusion of the state post-conviction proceedings and federal habeas review. However, once the Governor signs a death warrant, a defendant will typically file a second 3.850 motion and a second federal habeas petition along with motions to stay the execution.

B. Overview of Public Records Provisions.

Article I, Section 24(a), Florida Constitution, provides that "[e]very person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state ... except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution." Article I, Section 24(c) provides that the legislature may exempt certain records and meetings from the requirements of subsection (a) by general law, providing that such a law must "state with specificity the public

necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law."

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

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

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

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

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

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

A longstanding criticism of the death penalty proceedings is that the process takes far too much time due in large measure to unnecessary delays. In the 1990s, several groups studied the problem. In 1991, a committee chaired by Justice Overton was created to study the Capital Collateral Representative's (CCR) inability to "properly represent all death penalty inmates in postconviction relief cases and because of the resulting substantial delays in those cases." Rule 3.851 was a result of the Overton Committee's work. Rule 3.851 provides a one-year limitation

for the initiation of postconviction proceedings in capital cases. Previously death-sentenced defendants had a two-year limitation under Rule 3.850.

In 1996, former Attorney General Robert Shevin submitted a report on CCR to Florida's Chief Justice. The Shevin Report identified what it called the "Chapter 119 problem." The Report stated:

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

As the report concluded, a major problem with chapter 119 requests was that the trial court that ultimately determined the 3.850 motion had no involvement administering the chapter 119 request; as a result, CCR was required to file "separate civil lawsuits to resolve chapter 119 disputes, resulting in significant delays and time consuming civil litigation." Mr. Shevin went on to recommend that the supreme court enact a "Rule of Discovery in 3.850 proceedings, with expedited time schedules for both requesting and providing public records, for the filing of objections, and for the resolution of disputes by the trial judge who eventually will rule on the 3.850 motion." The supreme court acted on this recommendation by promulgating Rule 3.852, see section "D" below.

In the Fall of 1996 and in early 1997, a commission chaired by former Justice McDonald also studied the problem. The commission's primary recommendation was to break up CCR into three separate and distinct regional representatives having offices in "Northern, Central and Southern Florida." The 1997 Legislature enacted this recommendation. The commission also reported that "[o]ne consistent criticism from the Attorney General, State Attorneys, and attorneys for state agencies is that CCR abuses [the] public records process leading to unwarranted delay." The commission recommended that CCR attorneys be required to sign public records requests, thereby vouching that the material requested is relevant, and that they provide notice to the agencies' legal counsel.

D. Supreme Court Promulgates Rule 3.852.

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

procedures pertaining to the production of public records in capital postconviction proceedings." *Id*.

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

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

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

The 1997 Legislature provided that all requests for records in capital postconviction proceedings must be made in accordance with Rule 3.852, and the request must be approved by the capital collateral regional counsel. § 27.708(3), F.S.

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

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

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

- *Timetables*. Provides deadlines for filing requests for production of public records. A public records request of law enforcement and other affected agencies must be made within 30 days after counsel is designated; within 120 days for a public record belonging to any other agency. Requires that supplemental requests be made within 90 days after the initial production. Requires agency to produce or object within 60 days of the request. Provides that all motions or objections shall be decided by the trial court "on an expedited basis."

- *Waivers*. Failure to comply with the timetables waives the production or objection for purposes of any capital postconviction proceedings. Other requests are precluded, unless it is demonstrated to the trial court that the existence of the records was unknown and the need was unknown when the time periods expired and could not have been known through the exercise of due diligence.

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

E. Supreme Court Tolls Time Limitations in Rule 3.852.

In October 1997, the three offices of the CCRCs moved the Florida Supreme Court to "toll" (suspend) the time limitations under Rule 3.852. *In re Amendment to Florida Rules of Criminal Procedure--Capital Postconviction Public Records Production*-- Rule 3.852, 700 So. 2d 680 (Fla. 1997). The basis for these motions was to allow time for the transition from a single CCR office to three regional offices and to allow sufficient time to hire the necessary lawyers to replace the lawyers who left the prior CCR office. *Id*. The court concluded that it had no choice but to grant a tolling of Rule 3.852 until January 15, 1998 for a total of 43 death-sentenced defendants. *Id*.

On January 15, 1998, after reviewing the schedules and inventories from the CCRCs, the court entered a "blanket tolling of time limitations set forth in rule 3.852 until June 1, 1998, for each of those cases ... for which an extension was requested." *In re Amendment to Florida Rules of Criminal Procedure--Capital Postconviction Public Records Production (Time Tolling)*, No. 92,026 (Fla. Jan. 15, 1998). In entering this order the court stated:

> This tolling will provide an opportunity for the administrative problems to be resolved and will allow the legislature to examine and address the administrative problems currently being experienced by the regional offices as well as the regional offices' contentions that more funding is needed before rule 3.852 can be implemented. *Id*.

Justice Wells dissented from the decision to stay Rule 3.852 until June 1998. Justice Wells made a number of recommendations to resolve the current problem. *Id*. In doing so, Justice Wells took aim at the rule 3.852 and chapter 119 problem. *Id*. Although acknowledging that the rule "has not been fully effectuated" because of the court's granting extensions of time, he stated that the CCRCs were asserting that the rule compels them to file numerous motions to produce records in many state agencies. *Id*. Further, "[i]n some cases, circuit judges report receiving up to 100 motions to compel production of public records." *Id*. Justice Wells stated, "This procedure inhibits successful records production, causes more delays in the circuit courts, and obviously is not working as intended by our rule, or in my view, within the intent of chapter 119." *Id*. Justice Wells recommended the following:

- The legislature should amend chapter 119 and chapter 27 to specify what records are subject to production under chapter 119 in a records request pursuant to a Rule 3.851 proceeding and which records may be requested using resources appropriated for postconviction capital representation.

- Agencies possessing such records should send them to a single repository at a stated time subsequent to notification of a defendant's death sentence.

- The Attorney General should be responsible for notifying agencies and ensuring that such records are timely sent to the repository. *Id*.

Id. Justice Wells acknowledged the Commission on the Administration of Justice in Capital cases, and Judge Miner, a member of the Commission, for crafting the idea of a repository. At a meeting on February 5, 1998, the Commission took testimony on the subject.

III. Effect of Proposed Changes:

What follows is a summary of the CS's effect:

- *Establishment of records repository*. The Secretary of State is required to establish and maintain a central records repository for the purpose of archiving capital postconviction public records. The CS does not specify who should have access to the records at the repository. The department of state may be required to grant access to any individuals seeking to view the records under chapter 119 and article I, section 24, Fla. Const.

- *Submission of records to repository by affected agencies*. Upon notification of the Florida Supreme Court's direct appeal affirmance of a death sentence, the following agencies are to copy, seal, and deliver all records produced in the case: each law enforcement agency involved; the state attorney who prosecuted the case; and the Department of Corrections (DOC). Each agency shall bear the costs of production. These records must be submitted within 90 days of notification.

- *Records gathered early in process*. The intended effect is to collect all relevant records when the case is "fresh" in everyone's mind. One of the chapter 119 problems has been that the production requests come many years after the case was investigated and tried. As a consequence, records are lost and misplaced. The CS is aimed at avoiding this problem by submission of record copies within 90 days of the Florida Supreme Court's direct appeal affirmance of a death sentence.

- *Notification of compliance*. The agencies which are required to submit records to the repository within 90 days are required to notify the Attorney General upon compliance. The agency head or person is to certify that to the best of his or her knowledge all records in his or her possession which were produced in the case have been delivered to the records repository.

- *Submission of records to repository by other agencies*. Within 90 days after the Florida Supreme Court's direct appeal affirmance of a death sentence, defense counsel and the state attorney must notify the Attorney General of the name and address of any person or agency in addition to any person or agency named above which may have information pertinent to the case. The Attorney General shall then notify an identified person or agency who shall have 90 days to certify compliance with records production.

- *Confidential or exempt records*. Any record which is confidential or exempt from chapter 119 must be separately boxed and sealed. Such a box may be opened only for an inspection by the trial court, *in camera*, and in the presence of a representative of the agency claiming the exemption or confidentiality.

- *Additional records requests*. Within 90 days after postconviction counsel has been appointed, counsel shall send a written demand for additional records to each person or agency. Each person or agency must submit the additional records to the repository or recertify the records previously delivered.

- *Agency objections to records demands*. Within 60 days of receipt of written demand, an agency may file an objection and the trial court must hold a hearing and order production of additional records, only if it finds: (1) CCRC made a "timely and diligent search" of records repository, (2) the records are identified with specificity; (3) the records sought are relevant; and (4) the records request is not overbroad or unduly burdensome. These findings are similar to provisions contained in rule 3.852.

- *Attorney affidavit and trial court order required for successive request*. Postconviction counsel is prohibited from making additional requests beyond those requests made within 90 days after appointment. However, upon an affidavit sworn by postconviction counsel, the trial court shall order further production only if it makes the findings set out above.

- *Express prohibition*. Amends chapter 27 to expressly prohibit postconviction counsel from filing public records requests except as provided in the CS.

- *Copy of records in repository*. The capital collateral regional counsel or private counsel shall provide the personnel, supplies, and any necessary equipment used by them, to copy records held at a repository.

- *Dispute resolution*. The trial court is authorized to resolve any dispute that arises under the provisions of this CS, unless the appellate court has exclusive jurisdiction.

- *Interaction with rule 3.852.* This CS requires production of most records within 90 days of a death sentence affirmance on direct appeal and contains various other time provisions for the production of additional records. The CS's framework is at odds with current Rule 3.852,

which contains different requirements and time limitations. Senate Bill 898 repeals Rule 3.852.

- *Court Hearings and Pleadings*. Postconviction counsel must give written notification of each pleading filed and the name of the person filing the pleading to the Commission on the Administration of Justice in Capital Cases and to the trial court assigned to the case. A notice of hearing must be filed with each pleading with the court in a capital case. The CS does not specify whether this provision is intended to include postconviction pleadings or whether it refers only to proceedings at trial.

- *Appropriation*. The CS provides unspecified appropriation to the Secretary of State, sufficient to carry out the provisions of this CS.

- *No retroactive application*. The CS provides that it shall take effect on July 1, 1998. However, it does not specify whether the provisions relating to public records are to effect pending litigation or whether it is to apply only prospectively. Rule 3.852 contains a provision applying the rule to cases that were pending at the time of the rules adoption. The absence of a similar provision in this CS will probably lead to its prospective application.

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:

Article V, Section 2(a), Florida Constitution, provides that "[t]he supreme court shall adopt rules for the practice and procedure in all courts...." While this same constitutional provision states that a rule may be repealed "by a two-thirds vote of the membership of each house of the legislature," the legislature does not have "constitutional authority to enact any law relating to practice and procedure." *In re Clarification of Florida Rules of Practice and Procedure*, 281 So. 2d 204 (Fla. 1973). In determining whether a legislative enactment encroaches on the Supreme Court's rule-making authority, the courts have drawn a "distinction between practice and procedure, which is regulated by the Supreme Court and substantive law which is regulated by the Legislature." *Id*.

"Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. *In re Florida Rules of Criminal Procedure*, 272 So.2d 65, 66 (Fla. 1972)(Adkins, J., concurring). Further, "[t]he term 'rules of practice and procedure' includes all rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution." *Id*. On the other hand, "substantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property." *Id*.

To the extent that provisions of this CS govern the conduct of parties and their counsel through the court process in a postconviction proceeding, it could be held to encroach upon the Supreme Court's rule-making authority. Further, the Supreme Court in adopting rule 3.852 has provided a procedure for public records gathering in postconviction proceedings. While the legislature has authority to repeal this rule, as SB 898 does, it does not have constitutional authority to create procedures effecting the postconviction court proceedings.

Nonetheless, if SB 898 becomes law, the Supreme Court will be presented with the opportunity to adopt new procedural rules regarding public records requests for postconviction proceedings. Any provisions of this CS deemed "procedural" could serve to alert the court to the legislative intent and the public desire. *See Leapai v. Milton*, 595 So. 2d 12 (Fla. 1992). Further, in the past the court has chosen, in certain cases, to simply adopt the procedural portions of a legislative enactment as a rule of court. *See Timmons v. Combs*, 608 So. 2d 1, 2 (Fla. 1992); *Kalway v. Singeltary*, No. 98,724, (Fla. Feb 26, 1998)(adopting statutory time limitations).

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The CS provides that funds sufficient to carry out its provisions are appropriated from General Revenue to the Secretary of State. It is anticipated that the repository will be established in Tallahassee at the state archives in the R.A. Gray Building, thereby minimizing costs. According to the Department of State, this legislation will have a fiscal impact of $74,585 in the first year and $65,533 in the second year.

The CS provides that agencies are to provide copies at their cost. This will result in increased copying and delivery costs. The requirement that the records be indexed will place an additional requirement on existing personnel. This legislation will have an indeterminate, but potentially significant fiscal impact on these state agencies.

VI. Technical Deficiencies:

None.

VII. Related Issues:

CS/SB 898 repeals Rule 3.852, which is the current rule applicable to capital postconviction defendants requesting public records under chapter 119.

VIII. Amendments:

None.

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