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HOUSE OF REPRESENTATIVES
COMMITTEE ON
CRIME AND PUNISHMENT
BILL RESEARCH & ECONOMIC IMPACT STATEMENT

BILL #: HB 3175

RELATING TO: Death Penalty Appeals Reform Act

SPONSOR(S): Representative Crist and others

COMPANION BILL(S): SB 356 (s), S 898(c)

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

(1) CRIME AND PUNISHMENT
(2) CIVIL JUSTICE & CLAIMS
(3) CRIMINAL JUSTICE APPROPRIATIONS
(4)
(5)

I. SUMMARY:

The bill abolishes state court review of criminal cases that occurs after the appeal is complete.

The bill establishes that the capitol collateral regional offices are to represent defendants in collateral motions only in the federal courts.

The bill clarifies that habeas corpus claims in Florida do not apply to criminal cases that have been affirmed on direct appeal.

The bill requires that all findings of ineffective assistance of counsel be referred to the Bar for disciplinary proceedings.

The bill repeals all the Court rules of procedure relating to collateral review.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

As of November of 1997 there were 377 inmates on Florida's death row. According to a study done by the Justice Council, the average time from sentence to execution in Florida is over 14 years for executions occurring in the past two years. Texas is generally considered the most efficient state in resolving death penalty cases, and the process still takes over 9 years in Texas. A lengthy part of the process after the direct appeal has been concluded involves collateral or postconviction motions. While appeals raise challenges as to the fairness of the trial based on the record, collateral or postconviction motions raise challenges that are not based on the record alone such as claims of ineffective assistance of counsel. In federal court postconviction motions are known as habeas corpus. In Florida, postconviction motions are also known as Rule 3.850 motions because that is the rule of procedure that provides for the authority for collateral attacks on the state level. Currently, a majority of Florida's death penalty cases are stalled in the state level collateral review process. As of January of 1997, 215 of the 387 people on death row were awaiting the resolution of a state level collateral attack according to an Attorney General report to the McDonald Commission.

In 1985, Rule 3.850 was amended to require that state level collateral proceedings be initiated within two years after the termination of direct appellate proceedings. Also in 1985 the Office of the Capital Collateral Representative ("CCR") was established in the hope that by giving inmates an attorney, the collateral claims would be raised earlier and more efficiently. Prior to 1985, there was not a statutory right to an attorney, nor was there a time limit for filing a collateral claim. Prior to the creation of CCR, state level collateral review did not usually begin until the governor signed a death warrant. Once the warrant was signed, there would be a rush to find a volunteer attorney who would request a stay of the execution to have time to investigate collateral claims. See Report of the Florida Bar Commission to Study Practical Aspects of Death Sentence Appeals, p. 39. In 1993, the time period for filing collateral motions in a death penalty case was reduced from within 2 years of the final appeal to within 1 year of the final appeal with exceptions for good cause based on inability to file within the time period. Rule 3.851, Fla.Rules.Crim.Pro. Despite these changes, the average length of time from sentence to execution has only become longer. (SEE EXHIBIT "A")

The legislature has passed a number of laws in an attempt to expedite the process in capital cases. Section 924.055, Florida Statutes, imposes the following time limits:

1. All postconviction motions must be filed within 1 year after the date the appeal is final.

2. The circuit court shall render a decision within 90 days of the filing of the state's response.

3. The Supreme Court shall render a response to an appeal of the circuit court's ruling on the postconviction motion within 200 days of the filing of the notice of appeal.

4. A convicted person must file any petition for habeas corpus in the district court of the United States within 90 days after the date the Supreme Court resolves a postconviction proceeding.

These time limits have not been very effective as demonstrated by the constantly increasing delays. The courts are reluctant to deprive a person of a right to be heard because a motion was not timely. Furthermore, these time limits may be disregarded by the courts because the legislature has no authority over court procedural court rules and section 924.055, F.S., may be considered procedural.

The attached chart (SEE EXHIBIT "B") which shows the stages of capital proceedings and the number of inmates at each stage was taken from the Attorney General's presentation to the McDonald Commission in January 1997. The average age of a case is figured from the date of sentencing.

B. EFFECT OF PROPOSED CHANGES:

1. The bill prohibits the capitol collateral representative from representing a person in state court.

2. The bill establishes that the capitol collateral regional offices are to represent defendants in habeas corpus proceedings (collateral proceedings) in the federal courts.

3. The bill clarifies that habeas corpus claims in Florida do not apply to criminal cases that have been affirmed on direct appeal.

4. The bill provides that collateral relief for any crime is not available in state court, and prohibits a state court from reviewing a criminal case except pursuant to direct appeal.

5. The bill removes all the statutory language that was passed in order to speed up the collateral review process. For example, the bill removes the provision that prohibits a collateral motion from being considered if the motion is filed more than 1 year after the direct appeal is completed.

6. The bill prohibits any person from working in the field of criminal law for the State if that person has been found ineffective by a court in a criminal matter. An ineffective attorney would also not be able to contract with state or local government to provide legal counsel in criminal matters.

7. The bill requires that all findings of ineffective assistance of counsel be referred to the Bar for disciplinary proceedings.

8. The bill repeals all the Court rules of procedure relating to collateral review.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

N/A

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

N/A

(3) any entitlement to a government service or benefit?

N/A

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

N/A

b. Does the bill require or authorize an increase in any fees?

N/A

c. Does the bill reduce total taxes, both rates and revenues?

N/A

d. Does the bill reduce total fees, both rates and revenues?

N/A

e. Does the bill authorize any fee or tax increase by any local government?

N/A

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

N/A

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

N/A

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

N/A

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

N/A

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

N/A

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

N/A

E. SECTION-BY-SECTION RESEARCH:

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

II. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

See Fiscal Comments

2. Recurring Effects:

See Fiscal Comments

3. Long Run Effects Other Than Normal Growth:

See Fiscal Comments

4. Total Revenues and Expenditures:

See Fiscal Comments

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

See Fiscal Comments

2. Recurring Effects:

See Fiscal Comments

3. Long Run Effects Other Than Normal Growth:

See Fiscal Comments

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

N/A

2. Direct Private Sector Benefits:

   N/A

3. Effects on Competition, Private Enterprise and Employment Markets:

   N/A

D. FISCAL COMMENTS:

The bill will decrease the case loads of all state courts. However, the federal courts could be burdened with more evidentiary hearings that had formerly occurred in the state courts. The lesser burden on the courts should reduce costs to the state by decreasing the need for additional judges, law clerks, and office space. See Section V. for comments relating to the increase in the courts' workload caused by collateral motions.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

N/A

B. REDUCTION OF REVENUE RAISING AUTHORITY:

N/A

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

N/A

IV. COMMENTS:

Habeas Corpus

Habeas corpus is a writ directed to the person detaining another, commanding the production of the prisoner. A person applies for habeas corpus by challenging the legality of the detention.

Article 1, Section 13 of the Florida Constitution and Article 1, Section 9 of the United States Constitution contain identical provisions providing for habeas corpus:

> The writ of habeas corpus shall be grantable of right, freely and without cost....

The writ of habeas corpus originally existed in the United States to prevent arbitrary detention without trial and did not include the ability to reexamine judgments rendered by courts possessing jurisdiction. Felker v. Turpin, 116 S.Ct.

2333 (1996). At common law and until 1867 a judgment of conviction by a court with authority to hear criminal charges against a person was conclusive proof that confinement was legal. U.S. v. Hayman, 342 U.S. 205, 211, 72 S.Ct. 263 (1952). The writ of habeas corpus in the federal courts did not allow collateral attacks which are claims that are not based on the record against a judgement until Congress expanded the scope of habeas corpus in 1867. That legislative expansion of habeas was repealed the following year and reestablished again in 1885. Id. Prior to 1867 habeas proceedings in federal court did not involve fact finding hearings. Habeas Corpus Checklists by Ira P. Robbins p. 14-1.

At common law and until 1944 a federal habeas corpus action had to be brought in the federal district court where the petitioner (inmate) was confined. U.S. v. Hayman, 342 U.S. 205, 72 S.Ct. 263 (1952); Ahrens v. Clark, 335 U.S. 188, 68 S.Ct. 1443 (1948). This rule caused practical problems because the few district courts whose territorial jurisdiction included major prisons were required to handle an inordinate number of habeas corpus actions. The witnesses for these actions were most often in the territorial district of the sentencing judge. Thus in one case an inmate in California alleged that United States Attorneys and a deputy marshal in Texas forced the inmate to plead guilty in the District Court for the Northern District of Texas. The federal habeas corpus procedure, as expanded by statute to allow post-conviction collateral motions, required that hearing take place in California where the inmate was located. Live testimony was required, so the witnesses had to travel from Texas to California. U.S. v. Hayman, 342 U.S. 205, 72 S.Ct. 263 (1952); citing, Walker v. Johnston, 312 U.S. 275, 61 S.Ct. 574 (1941). To resolve this practical problem Congress passed 28 U.S.C.A. Section 2255 in 1944 which required prisoners convicted in federal court to apply for habeas corpus in the sentencing court instead of the court in the territory where the inmate was confined. U.S. v. Hayman, 342 U.S. 205, 72 S.Ct. 263 (1952).

Habeas Corpus in Florida

In 1963 the United States Supreme Court in Gideon v. Wainwright, 371 U.S. 335, held that there is a fundamental right to counsel. Of approximately 8,000 people in Florida prisons 4,065 entered pleas of guilty without the advice of counsel. Immediately after Gideon was decided petitions for habeas corpus increased dramatically and the state courts were faced with the same practical problems that Congress addressed on the federal level back in 1944. However, unlike the federal law, the changes in state law which required that prisoners apply for habeas corpus in the sentencing court were not accomplished by statute. Instead of resolving the problem by encouraging legislation, the Florida Supreme Court adopted Rule 1 of the Florida Rules of Criminal Procedure which is “copied almost verbatim” after 28 United States Code, Section 2255. Roy v. Wainwright, 151 So.2d 825 (Fla. 1963). Rule 1 was made effective on April 1, 1963, exactly two weeks after the United States Supreme Court decided Gideon.

Rule 1, which was “copied almost verbatim” from 28 U.S.C.A. Section 2255, greatly expanded the scope of habeas corpus in Florida. Rule 1 allowed a prisoner to challenge a sentence in state court if:

> ...the sentence was imposed in violation of the Constitution or Laws of the United States, or of the State of Florida, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack...

Rule 1, Fla.Rules.Crim.Pro. [Rule 3.850, the successor to Rule 1 contains slightly broader language]. This expansion of habeas corpus was done by rule instead of statute because it was believed that a rule would be more flexible and because time was of the essence, and because the legislature was not in session. Brown, "Collateral Post Conviction Remedies in Florida," 20 U.Fla.L.Rev. 306 (1968). Florida courts never addressed the issue of whether the court had authority to establish a rule to hear collateral claims of ineffective assistance of counsel.

Notwithstanding the rapid expansion of judicial authority authorized by Rule 1 discussed above, the scope of habeas corpus in Florida had been gradually expanded by the Florida Supreme Court. Early in Florida's history, there were only four legal issues that could be remedied by release of the prisoner or by granting a new trial through habeas corpus. The four grounds for issuing a writ of habeas corpus were as follows:

1. The trial court did not have jurisdiction over the person. A circuit court has jurisdiction over a person if the crime occurred in the same county that the court is located in.

2. The trial court did not have subject matter jurisdiction. The circuit court has subject matter jurisdiction to hear felony violations of state law.

3. The court did not have the power to render the judgment. A sentence above the statutory maximum is an example of a judgement that a court does not have the power to render.

4. Habeas corpus was also available to determine the constitutionality of the statute under which the inmate is being held.

Grebstein v. Lehman, 129 So. 818 (1930); Re Theisen, 11 So 901 (1882); see 28 Fla. Law Jur. 2d at 424 n.2. This bill will likely be declared invalid to the extent that it conflicts with these exceptions to the general rule.

In more recent cases the Florida Supreme Court has allowed habeas corpus to be used for the most obvious and significant violations of law. For instance, in Deal v. Mayo 76 So. 2d 275 (Fla. 1954), habeas corpus was allowed to determine whether a sentence violated the double jeopardy provision in the constitution. See Blackburn v. Cochran, 114 So. 2d 684 (Fla. 1959) (habeas corpus was allowed where an insane person was sentenced without first being restored to sanity); Gideon v. Wainwright, 372 U.S. 335 (1963)(Florida Supreme Court reviewed through habeas corpus whether a person had a right to an attorney). See also State v. State ex rel Cootner, 44 So.2d 96 (Fla. 1950)(the law was settled long ago that habeas corpus would not issue where there was a remedy by appeal or writ of error, unless the charge was wholly void or the statute under

which the charge was filed was void, citing, Lehman v. Sawyer, 143 so. 310; In re Robinson 75 So. 604, Spooner v. Curtis, 96 So. 836).

Aside from the adoption of Rule 1, the Florida Supreme Court's active role in expanding the scope of habeas corpus was most pronounced in the case of Sneed v. Mayo, 66 So. 2d 865 (Fla. 1953), where the Court cited federal law for the following proposition:

> Jurisdiction of the person and of the subject matter is not alone conclusive [and] the jurisdiction of the court to make or render the order or judgment depends upon due observance of the constitutional rights of the accused. 25 Am.Jur., Habeas Corpus, sec. 27, p. 161. See also Palmer v. Ashe, [342 U.S. 134]

In Sneed, the Florida Supreme Court, plainly used federal authority for habeas corpus as expanded by federal statute to justify the expansion of state habeas corpus without statutory authority. The subtle legal and factual wranglings necessary to resolve issues, such as claims of ineffective assistance of counsel, were not contemplated by the Florida courts as being appropriately raised through habeas corpus until Rule 1 was adopted. Of course, rule 1 was adopted after the United States Supreme Court in Gideon required legal counsel for defendants in felony cases. The question the Florida Supreme Court will have to answer is whether the habeas corpus provision in the state constitution requires that the courts hear collateral motions raising rights that did not exist until 1963.

While collateral review may be eliminated by legislation on the federal level, it is possible that the Florida Supreme Court would interpret the habeas corpus provision in the Florida Constitution as requiring that a defendant be allowed collateral review on the state level. The Florida Supreme Court has cited federal law to imply that Rule 1 (now known as Rule 3.850) has a basis in the habeas corpus provisions in both the state and federal constitutions, and thus could not be limited by legislation. In Haag v. State, 591 So.2d 614 (1992), the Florida Supreme Court stated, "[I]n the case of State v. Bolyea, 520 So.2d 562, 563 (Fla. 1988), we recognized that Rule 3.850 [former Rule 1] 'is a procedural vehicle for the collateral remedy otherwise available by writ of habeas corpus.'" However, the Florida Supreme Court's suggestion that Rule 3.850 emanates from the habeas corpus provision in the state constitution is misleading. The Court's opinion in Bolyea is based on an opinion of the United States Supreme Court in Hill v. United States, 368 U.S. 424 (1962) that discusses the history of 28 U.S.C. Sec. 2255 from which Rule 1 was copied:

> It conclusively appears from the historic context in which [28 U.S.C.] Sec. 2255 was enacted that the legislation was intended simply to provide in the sentencing court a remedy exactly commensurate with that which had previously been available by habeas corpus.

Hill 368 U.S. at 427. The U.S. Supreme Court in Hill was relying on its earlier decision in Hayman, supra, and the Court in both Hill and Hayman was not referring to the constitutional scope of habeas corpus, but rather, the Court was referring to federal habeas corpus as it had been expanded by an earlier statute before the enactment of 28 U.S.C. Sec. 2255.

If the Florida Supreme Court is confronted with the issue of whether a statute may eliminate collateral proceedings, the court will be compelled to rule that the statute is unconstitutional to the extent that it impinges on the right to habeas corpus. The court will then have to determine whether the expansion of the scope of habeas corpus as authorized by Rule 3.850 and by case law is grounded in the state constitution's habeas clause. If the court determines that habeas corpus is a living organic right that keeps up with the times, then the portion of the bill abolishing collateral review will be held unconstitutional. On the other hand, if the court follows federal and historical precedent and determines that the expansion of habeas was the result of court generated law or common law, then the statute abolishing collateral review will take precedence and will be upheld. See 1 Fla. Jur. 2d sect. 38 (where statute is inconsistent with common law, the statute controls).

While it is the legislature's prerogative to limit the scope of habeas to what was intended in the state or federal constitution, the legislature can not prevent the court from interpreting habeas corpus as being broader than the writ was originally intended to be. If the Supreme Court decides to give a broad interpretation to the meaning of the habeas corpus provision in the state constitution, then the legislature's only remedy would be to amend the constitution.

Florida Statutes Relating to Habeas Corpus

Florida has a statute relating to the application for writ of habeas corpus that has been on the books for over a hundred years and which makes a writ for habeas corpus available when:

> ...any person detained in custody... shows... probable cause to believe that he or she is detained without lawful authority...

Section 79.01, Florida Statutes. If the Florida Supreme Court ever desired statutory authority to expand the scope of habeas corpus, the authority could have been found in the vague and broad phrase "detained without lawful authority." Detained without authority could be interpreted to mean imprisoned without effective assistance of counsel. Amending this provision to allow for habeas only to the extent required by the state constitution may help convince the Florida Supreme Court to agree that habeas corpus no longer permits the collateral attack of a sentence and judgment unless one of the limited exception exist. Furthermore, there is some authority for the regulation of habeas corpus by statute except for when the statute is substituted for appellate proceedings and bypasses inferior courts. Porter v. Porter, 53 So. 546 (Fla 1910); Jones v. Cook, 200 So. 856 (Fla. 1941); Sullivan v. State, 44 So.2d 96 (Fla. 1950). The habeas statute could also be amended to allow petitions for habeas corpus to be heard by the sentencing court instead of the court in the territory where the person is held so that a fair distribution of these claims is maintained.

Right to Counsel

The bill does not violate the United States Constitution by abolishing the Capitol Collateral Representative for state level collateral attacks . In Murray v.

Giarratano, 492 U.S. 1 (1989), the United States Supreme Court held that indigent death row inmates from Virginia were not entitled to be provided with counsel at state expense for state level collateral proceedings. The Court noted that an indigent person is only entitled to an attorney for the trial stage of a criminal proceeding and for the *initial* appeal:

Postconviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature.... *States have no obligation to provide this avenue of relief*, and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the state supply a lawyer as well.

Pennsylvania v. Finley, 481 U.S. 551, 556-7 (1989). This ruling would appear to apply to representation in collateral proceedings on the federal level as well. Gonin v. Vasquez, 999 F.2d 425 (9th Cir. 1993).

There is Florida authority for the proposition that due process may require that counsel be provided in a collateral proceeding if the claim is meritorious and so complex that counsel is necessary for a fair presentation of the motion. State v. Weeks, 166 So. 2d 892, 897 (Fla. 1964); Graham v. State, 372 So. 2d 1363 (Fla. 1979); Russo v. Wesley, 22 F.L.W. D2489b (5th DCA 1997). Although the Florida Supreme Court decisions in Weeks and Graham precede the United States Supreme Court decision in Murray, supra, it is possible that the Florida Court could hold that failure to provide counsel for state level collateral proceedings such as habeas corpus violates the due process clause in the state constitution even though there is clearly no violation of federal due process. Although the due process clause is identical in both the state and federal constitutions, the Florida Supreme Court may interpret the Florida provision differently. See Haliburton v. Singletary, 514 So.2d 1088 (Fla. 1987)(Interrogation of witness violated Florida's due process clause where United States Supreme Court held that same act did not violate federal due process).

Ineffective Assistance of Counsel

The most common collateral procedure is a claim of ineffective assistance of counsel. The right to counsel which has been interpreted to mean a right to a reasonably effective counsel is a constitutional right which may be taken up on appeal. Strickland, supra. However, the basis for most claims of ineffective assistance of counsel are not apparent on the trial court's record and can not be raised on appeal unless it is made a part of the record. Claims of ineffective assistance of counsel that are not apparent from the record are collateral claims and will not be allowed in state court by the bill.

If the Florida Supreme Court decides that inmates must have a state forum to raise constitutional claims that counsel was ineffective, then the defendant could be given an opportunity to make a record in the trial court before the appeal is resolved. Appellate courts could remand meritorious claims of ineffective assistance of counsel back to the trial court for evidentiary proceedings. Since this claim would now become part of the direct appeal, a defendant would have a right to a separate attorney to avoid a conflict of interest. It is impossible to

predict if the Florida Supreme Court would adopt this type of a procedure, but such an approach could still be more limited and less time consuming than the current practice of beginning the collateral appeal after conclusion of the direct appeal.

Other States

No other state has eliminated collateral review on the state level, however, Arkansas has made a more dramatic attempt to limit collateral review than any other state. In Whitmore v. Arkansas, 771 S.W.2d 266 (Ark. 1989), the Supreme Court of Arkansas determined that post conviction remedies were out of control in both the state and federal systems. As a result, the Court abolished the Arkansas rule of procedure that allowed collateral review of claims such as ineffective assistance of counsel. The court noted that a more limited review would be available through habeas corpus:

Arkansas courts have held that habeas corpus petitions are restricted to questions of whether the commitment is valid on its face or whether the convicting court had proper jurisdiction.

Id. at 267 n.1.

The Arkansas Supreme Court also amended their rules of procedure to require that claims of ineffective assistance of counsel be raised on direct appeal:

> Our action today will cause convicted criminal defendants to assert their claims and defenses on direct appeal rather than to allow such defenses years later,...[because of the new rule] a defendant will have less opportunity to misuse the federal and state systems to develop legal theories that unnecessarily prolong meritless cases.

Id. at 269.

The new rule of procedure required that a judge advise a defendant that he or she had 30 days from sentencing to file a motion for a new trial on the grounds that counsel was ineffective and a hearing on the motion was required to be held before the filing of the notice of appeal. The rule did not require that a separate attorney advise a defendant concerning a potential claim of ineffective assistance of counsel. In the matter of the Abolishment of Rule 37, 770 S.W.2d 148 (Ark. 1989). Fifteen months later the Court reinstated a modified version of the rule to allow collateral motions. It appears that the court reinstated the rule because of numerous comments from various attorneys. In re Post-Conviction Procedure, 797 S.W.2d 458 (Ark. 1990). In 1996, after the post-conviction rule was reinstated, a federal district court in Arkansas declared that a convicted murderer would be released if the trial court did not hear the inmate's claim of ineffective assistance of counsel. The federal district court further declared that the inmate must be provided counsel and the right to appeal to the Arkansas Supreme Court if relief were denied by the trial court. With great reservations, the Arkansas Supreme Court agreed to hear the appeal and give the defendant an attorney for the appeal in order to avoid having the federal court release a convicted murderer:

> There is a clear conflict between the federal action and our case law in that our case law does not allow for an untimely Rule 36.4 petition [for ineffective assistance of counsel] unless the petitioner was not advised at the time of sentencing of his right to proceed under Rule 36.4 ... Appellant was informed of his right to proceed under the rule and should not be heard to complain because he failed to exercise that right ... Again, we are compelled to treat appellant differently because it is the federal courts' view that the Rule 36.4 proceeding was an extension of the trial in the manner of a motion for new trial, making the petitioner entitled under the Sixth Amendment to appointment of counsel.
>
> Id. at 938-939.

In another case where a defendant was sentenced in Arkansas during the period when claims of ineffective assistance of counsel had to be raised on direct appeal, the Eight Circuit Court of Appeals in Robinson v. Norris, 60 F.3d 457 (8th Cir. 1995) held that the trial court's advisement that the defendant could file a motion for ineffective assistance of counsel without an attorney violated the defendant's right to an attorney. The defendant in Robinson did not file a motion for ineffective assistance of counsel within 30 days of the sentence as required by state law. Four years later a federal district court ordered that the defendant be given a hearing on his claim of ineffective assistance of counsel and that an attorney be provided.

The federal courts can not force Florida to provide a forum for claims of ineffective assistance of counsel. However, the Florida Supreme Court may elect to adopt a rule in response to this bill that is similar to the rule that was in effect in Arkansas. If the Florida Supreme Court does adopt a similar rule, then defendants would have to be offered an attorney for the motion for a new trial in which a claim of ineffective assistance of counsel could be raised. The attorney provided could not be the same attorney who did the trial or an attorney who works in the same office as the trial attorney because that would be considered a conflict of interest. One possibility for cases represented by the public defender would be to have adjacent offices represent defendants on motions for new trial based on ineffective assistance of counsel. Of course, these motions would require a face to face meeting between the defendant and counsel, and would be burdensome to the public defender's offices. Furthermore, if trial judges were required to notify all defendants of the availability of a motion for ineffective assistance of counsel and that an attorney would be provided for indigent defendants, then there could be more of these claims. Some of these claims could be limited by legislation divesting the trial court of jurisdiction to hold an evidentiary or legal hearing relating to a collateral attack of a sentence once the notice of appeal is filed unless the hearing is required by either the state or federal constitutions. See Fla.Rule.Crim.Pro (motion for new trial *may* be held within 10 days of the verdict). Such a statute could be upheld if the courts view a limitation on jurisdiction as substantive rather than procedural.

Staff is not aware of any other state attempting to limit the scope of collateral review or habeas corpus. A number of states such as Texas, Arkansas, Mississippi, and Florida have attempted to limit the time periods in which a collateral attack may be raised with varying degrees of success. There are often

exceptions to these time limits which seem to defeat any effort to have finality in death penalty review. A common exception is a claim based on “new evidence” that could not have been reasonably discovered before a timely motion for collateral review was filed. Inmates and their attorneys have great incentive to frame new claims in a manner that requires an evidentiary hearing and a review of the hearing, thus delaying the execution.

Texas

There are a number of reasons that Texas has had considerable success executing the death penalty. It is generally acknowledged that the state and federal judges that handle death penalty cases are less willing to interfere with a jury verdict than judges in other states. The Texas Court of Criminal Appeals is the state's supreme for criminal cases and since the court only handles criminal matters the court may be able to process criminal cases faster than the supreme courts in other states. The Texas legislature has limited the Texas court's ability to engage in rule making, thus preventing the court from providing for more procedures and delaying the final resolution of cases. The Texas Court of Criminal Appeals determines the reasonable compensation for appointed counsel and has discretion to deny reimbursement for certain expenses like investigative expenses and expert fees. Article 11.071, Texas Code of Criminal Procedure.

Article 11.071 of the Texas Code of Criminal Procedure attempts to speed up collateral review, which like in the federal courts is known as habeas corpus by setting forth procedures including the following:

1. Immediately after a defendant is sentenced to death the court must determine whether a counsel should be appointed for indigent defendants for the purposes of a writ of habeas corpus.

2. Application for a writ of habeas corpus must be filed no later than the 45th day after the date the appellee's original brief is filed on direct appeal with the court of criminal appeals.

3. An untimely application for habeas corpus may not be heard unless the application demonstrates that an exception exists, including that the factual or legal basis for the claim was unavailable, or that but for a violation of the United State Constitution no rational juror could have found the inmate guilty.

The purpose of these procedures appears to be to give finality to state proceedings by confining the collateral process so that it runs concurrently with the direct appeal in capital cases. New and additional claims are restricted on the state level, but may still be raised in the federal courts. While these measures have had some success in Texas, the average length of time from the imposition of the sentence to the execution of the death penalty is still approximately 9.5 years, compared to 14.5 years for Florida.

Limitations to Collateral Relief in the Federal Courts

The standard for determining whether habeas corpus relief must be granted is whether the error had substantial and injurious effect or influence in determining the jury's verdict. Brecht v. Abrahamson, 507 U.S. 618 (1993). On occasion, the federal courts may dismiss a claim without determining whether an error had substantial and injurious effect on the verdict. The Supreme Court has interpreted federal statutes to require that a prisoner making successive collateral claims in federal court must first make a colorable showing of factual innocence before the claim will be considered. Kuhlmann v. Wilson, 477 U.S. 455 (1986).

However, claims of actual innocence which are based on newly discovered evidence, without an additional claim that the inmate's constitutional rights were violated, is not a reason for a federal court to grant relief. Herrera v. Collins, 506 U.S. 390 (1993). HB 3175 could remove the only forum for claims of newly discovered evidence if there is also not an additional claim that the United States Constitution was violated.

The bill will increase the federal courts burden for their review of collateral cases. Currently, the federal courts give some deference to findings of fact made by a state court. Since collateral review in state courts is eliminated by this bill, the federal courts could be required to have evidentiary hearing that might have otherwise been performed in state court. However, state hearings that raise issues of both law and fact have to be resolved independently in federal court regardless of whether there was an identical hearing in state court. Townsend v. Sain, 372 U.S. 293 (1963) *citing:* Brown v. Allen, 344 U.S. 443 (1953). The bill would eliminate many repetitive proceedings by requiring that the hearings only be performed on the federal level. Under current law the federal courts can not consider claims for habeas corpus unless all state judicial remedies have first been exhausted. Rose v. Lundy, 544 U.S. 509 (1982). HB 3175 allows the federal courts to hear claims at a much earlier date because they will not have to wait for the resolution of the state level postconviction motions and the appeal of those motions.

Anti-Terrorism and Effective Death Penalty Act of 1996

In 1996 Congress passed significant habeas corpus reform as part of the "Antiterrorism and Effective Death Penalty Act of 1996." The following reforms were included in the act:

1. Deadlines were imposed for the filing of habeas corpus in federal court.
2. Provides for more deference to state court decisions
3. Prohibits successive raising of the same claim in federal courts
4. Establishes timetables for federal courts to act on habeas corpus claims.

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 bill because it has not been demonstrated that counsel appointed to represent inmates in collateral proceedings meet standards required by the bill. Hill v. Butterworth, 10 F.L.W. Fed. D447 (N. Dist. of Fla. 1997). However, since the district court's opinion, Florida statutes have required new standards for the competency of counsel and the state may qualify for the expedited federal procedures. HB 3175 will prevent Florida from qualifying for the benefits of the federal law because state level collateral review will be abolished. Because the federal law is so new, it is not known what the impact will be on federal habeas corpus proceedings.

Access to Courts

Article 1, Section 21 of the Florida Constitution provides:

> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

An argument may be made that the access to the courts provision of the Florida Constitution is violated because HB 3175 "closes the court house door" for lawful claims such as a claim of ineffective assistance of counsel. The Florida Supreme Court in Kluger v. White, 281 So. 2d 1 (Fla. 1973) held that the access to the courts provision applies only to issues that could be raised by statutory law predating the adoption of the Declaration of Rights of the constitution or the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla.Stat. S 2.01 F.S.A." Section 2.01 which was passed in 1829 makes the laws of England "down to the 4th day of July, 1776," in force in this state so long as not inconsistent with the laws of the state or the United States. The Declaration of Rights was adopted in 1885, therefore modern collateral claims such as ineffective assistance of counsel are not protected by the access to the courts provision. However, the Florida Supreme Court in a footnote in Eller v. Shova, 639 So.2d 537 (1993) clarified the ruling in Kluger to mean that there is a right to access to the courts for common law claims in existence when the 1968 constitution was adopted because the provision "differs significantly from its 1845 counterpart." See Agency for Health Care v. Associated Industries of Florida, 678 So.2d 1239 (Fla. 1996) (Klurger interpretation of access clause quoted with no clarifying reference).

If a preexisting right of access is abolished by the bill, then the Florida Supreme Court may still hold the bill to be constitutional if either:

> 1. There is a reasonable alternative to protect that preexisting right of access. (The alternative is provided in Federal Court or on the direct appeal) **or**
>
> 2. There is an overwhelming public necessity for the change. (Such as the abuse of the judicial system with frivolous claims and the loss of public trust).

Eller Id. at 542.

Reduction in Court's Caseload

Judge Moran, the chief judge of the Fourth Judicial Circuit for Clay, Duval, and Nassau counties has written a letter to Chief Justice Kogan expressing grave concern about the increasing number of collateral motions that is causing a substantial backlog in his circuit. The letter explained that for year 93-94 there were 404 of these motions and now there are over 1,000 per year. Judge Moran further stated that:

> ...not only has there been an overwhelming increase in the number of post-conviction motions being filed in this Circuit, but the amount of time required to review and rule on these motions has also substantially increased because only a very few can be resolved solely on procedural grounds - and even those now tend to require resolution of claims intended to circumvent the procedural bar...

The Judge concluded his letter to the Chief Justice by noting, "It is absurd that the finality of even a guilty plea is now a thing of the past." The bill, if upheld by the Florida Supreme Court, will relieve the state courts of this burden that is often the result of frivolous claims.

Ex Post Facto

Both state and federal constitutions contain prohibitions against ex post facto laws (i.e., laws which criminalize, or punish more severely, conduct which occurred before the existence of the law). See, Article I, Section 9 of the Florida Constitution; and Article I, Section 10 of the United States Constitution. The Florida Supreme Court has not delineated a difference between the ex post facto provisions of the Florida and United States Constitutions. The Florida Supreme Court and the United States both use the following test to determine if there is an ex post facto violation:

> In evaluating whether a law violates the ex post facto clause, a two-prong test must be applied: (1) whether the law is retrospective in its effect; and (2) whether the law alters the definition of criminal conduct or increases the penalty by which a crime is punishable.

Gwong v. Singletary, 683 So. 2d 112 (Fla. 1996), citing, California Dep't of Corrections v. Morales, 514 U.S. 499, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995).

The first part of the test is satisfied because the bill is retrospective in its effect for those crimes committed before the effective date. The bill does not alter the definition of criminal conduct, and it probably does not increase the death penalty which can not be increased to a higher degree than death. However, there will be an argument that the punishment is increased by denying a person the opportunity to be released or have a new trial because of a claim of newly discovered evidence or a claim of ineffective assistance of counsel.

In Gwong, supra, the Florida Supreme Court held that a regulation that retroactively denied prisoners the ability to earn discretionary gain-time was an illegal ex post facto law. The court explained that the loss of the "mere expectancy" of incentive gain-time was ex post fact because, "a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed." Id. at 112. It would be a much further leap of logic to postulate that a person entered into a plea agreement because of the availability of collateral review.

Both the United States Supreme Court and the Texas Supreme Court have held that a retrospective change in the method of execution does not violate the Ex Post Facto Clause:

> We conclude in light of these holdings that execution by lethal injection may be imposed upon a defendant even though death by electrocution was the mode of execution authorized by law at the time of the commission of capital murder, at the time of his trial, and even if he had been previously sentenced to die by electrocution. The statute under consideration did not change the penalty of death for capital murder, but only the mode of imposing such penalty.

Ex parte Kenneth Granviel, 561 S.W. 2d 503 (Tex. App. 1978), citing Malloy v. South Carolina, 237 U.S. 180 (1915) (footnoted omitted). In a similar manner, the punishment for capital murder is not and can not be increased by the bill.

Procedural changes in the law are not ex post facto laws even if the change causes a disadvantage to a defendant. Dobbert v. Florida, 432 U.S. 282, 293 (1977)(statute altering method of deciding whether the death sentence should be imposed held not to violate ex post facto). Similarly, HB 3175 imposes procedural changes, and therefore, the bill should not be considered an ex post facto law.

V. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VI. SIGNATURES:

COMMITTEE ON CRIME AND PUNISHMENT:
Prepared by: Legislative Research Director:

J. Willis Renuart J. Willis Renuart