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 13, 1998 Revised: _____ _____ _____ _____

Subject: Death Penalty Appeals Reform Act

| | Analyst | Staff Director | Reference | Action |
|---|---|---|---|---|
| 1. | Erickson | Miller | CJ | Favorable/CS |
| 2. | | | JU | |
| 3. | | | WM | |
| 4. | | | | |
| 5. | | | | |

## I. Summary:

Committee Substitute for Senate Bill 356, the “Death Penalty Appeals Reform Act of 1998," repeals various rules providing for or relating to state postconviction remedies, requires that any claim challenging the legality of a judgment or sentence be raised in the direct appeal, limits presentation of habeas claims, and restricts capital collateral representation to federal postconviction proceedings.

This CS substantially amends the following sections of the Florida Statutes: 27.7001, 27.701, 27.702, 27.704, 27.707, 27.708, 79.01, 924.051, 924.055, and 924.066.

## II. Present Situation:

### A. The Appellate and Postconviction Process In Death Sentence Cases

An offender’s judgment of capital conviction and death sentence are 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, L.O.F.; 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. This motion is one to vacate, set aside, or correct a sentence, and is 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 Appeals 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 [3.850] 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.

> 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 Appeal 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 after 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 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.

Last session, the Legislature 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 and who is unable to secure counsel due to indigency, or who is determined by a state court of competent jurisdiction to be indigent, 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 that

the CCRC representation commence upon termination of direct appellate proceedings in state or federal court.

Instead of one office with one capital collateral representative, three offices were created, each located in newly drawn regions of the state, and each having a capital collateral regional counsel (regional counsel) to administer the office. The three regions were divided upon 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, and 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 consistent. 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 must give approval for an expert witness to be called prior to the expert testifying in court. This corresponds to the procedure in criminal litigation whereby the circuit judge must approve expert witnesses.

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.

**D. Requests Under Public Records Act Now Controlled By Rule 3.852**

Section 119.07, F.S., the Public Records Act, requires every custodian of public records to permit inspection and examination of the records by any person desiring access to the records at reasonable times, under reasonable conditions, and under the supervision of the custodian (or a designee). The custodian is required to furnish copies of the records upon payment of any fee required by law, or if no fees are statutorily prescribed, upon payment of actual duplicating costs. Section 119.07(9), F.S., provides that the provisions of s. 119.07, F.S., are not intended to expand or limit the provisions of Rule 3.220, Fla.R.Crim.P., regarding the right and extent of discovery by the state or by a defendant in a criminal prosecution.

Last session, the Legislature amended s. 119.07(9), F.S., to provide that the public records law is also not intended to expand or limit the right or extent of discovery under Rule 3.220 in *collateral* proceedings. The Legislature also provided that the public records law "may not be used by any inmate as the basis for failing to timely litigate any postconviction action." s. 4, Ch. 96-290, Laws of Florida [amending s. 119.07(9), F.S. (1996 Supp.)].

However, in April 1996, the Florida Supreme Court promulgated a new rule of criminal procedure, Rule 3.852, relating to public record requests made on behalf of capital postconviction defendants. (The new rule was amended in October 1996.) Rule 3.852 requires that discovery on behalf of capital postconviction defendants be directed to the trial court hearing the postconviction motion. Among other provisions, Rule 3.852 contains various time limitations for requesting the production of public records.

### E. 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 act. 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). 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.

## III. Effect of Proposed Changes:

The following is a summary of the features of SB 356, the "Death Penalty Appeals Reform Act":

- Provides that the Capital Collateral Regional Counsel (CCRC) shall provide legal representation to capital defendants only in *federal collateral proceedings*.

- Provides that the federal petition or motion must be filed within 180 days after the date the Florida Supreme Court issues a mandate on a direct appeal or the United States Supreme Court denies a petition for writ of certiorari, whichever is later.

- Prohibits the CCRC from using state funds to litigate cases in state courts, or from entering into a contract or agreement that would, directly or indirectly, result in the use of state funds for such state litigation.

- Repeals Rule 3.851, Fla.R.Crim.P., relating to capital postconviction proceedings which is used to raise claims of ineffective assistance of counsel and newly discovered evidence, among other claims. A possible effect of this provision is a return to the habeas corpus as the means for collateral review in capital cases, which may result in an increase of habeas claims in those circuit courts situated near state prisons. (See pages 2-3)

- Repeals Rule 3.852, Fla.R.Crim.P., the procedures for public records production in capital postconviction proceedings.

- Prohibits Florida's state courts from reviewing or examining the legality of a judgment or sentence imposed in capital cases by a court of competent jurisdiction, except pursuant to a direct appeal of the judgment or sentence to the court having appellate jurisdiction over that capital case.

- Prohibits petitions for writ of habeas corpus in capital cases after the judgment or sentence has been affirmed on direct appeal.

- Eliminates state collateral proceedings for capital defendants and makes the federal courts the sole forum for capital defendants to present collateral claims by virtue of repealing the judicially-created postconviction remedies, limiting presentation of claims challenging the legality or a criminal judgment or sentence in capital caes to the direct appeal, and limiting the presentation of habeas claims in capital cases.

- Provides that the act shall take effect "July 1 of the year in which it is enacted, except that section 14 (providing for repeal of the rules previously cited) shall take effect only if this act is passed by the affirmative vote of two-thirds of the membership of each house of the legislature."

## 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:

Committee Substitute for Senate Bill 356 precludes state collateral review for capital defendants, thereby precluding the state courts from considering on habeas alleged violations of constitutional rights in capital cases resulting from matters that were not apparent in the trial record or that occurred after the judgment and sentence, such as ineffective assistance of appellate counsel. It may be argued that the Legislature cannot alter the scope of the habeas corpus (to the extent the courts have determined the scope of habeas to include collateral claims) nor limit the court's inherent power to review fundamental error (as it relates to an illegal sentence) at any time.

The Florida Supreme Court has held that it is not within the Legislature's power to alter the scope of habeas corpus or other extraordinary writs. In *Jones v. Cook*, 146 Fla. 253, 200 So. 856, 858-59 (Fla. 1941), the Florida Supreme Court reviewed *inter alia* a statutory provision which authorized an accused person to apply for a writ of habeas corpus to test the deficiency of the charge against the accused. The Court held that this provision could not be given effect "as it runs counter to section 5 of Article V of our Constitution in that it attempts to substitute original habeas corpus proceedings in lieu of appellate proceedings and thereby

authorizes a superior court to review an order of an inferior court in other than appellate proceeding."

"A writ of habeas corpus is a constitutional writ, perhaps the grandest and most precious of all the common-law writs which this Court and the Circuit Courts are expressly authorized to issue, and . . . *the scope of such writs cannot be either contracted or expanded by the legislature*." *Jones v. Cook*, 200 So. at 860 (Chief Justice Bowen, dissenting) [emphasis added]. *See Sullivan v. State ex. rel Cootner*, 44 So.2d 96 (1950), reaching the same conclusion in regard to this statutory provision and citing in support to *Jones*.

Cases discussing legislative attempts to alter the scope of other extraordinary petitions, rewrite rules of procedure, or expand the court's appellate jurisdiction include: *Harrison v. Frink*, 75 Fla. 22, 77 So. 663 (1918) (statute cannot expand certiorari); *American Ry. Express Co. v. Weatherford*, 86 Fla. 626, 98 So. 820 (1924) (statute cannot expand certiorari); *Atlantic Coastline Ry. Co. v. Florida Fine Fruit Co.*, 93 Fla. 161, 112 So. 66 (1926) (statute cannot enlarge the Supreme Court's appellate jurisdiction); *Palmer v. Johnson Construction Co.*, 97 Fla. 479, 121 So. 66 (1927) (statute cannot limit the time in which certiorari may be invoked); *Ex parte Beattie*, 98 Fla. 785, 124 So. 273 (1929) (Legislature cannot change or modify the scope of quo warranto or mandamus); *Brinson v. Tharin*, 99 Fla. 696, 127 So. 313 (1930) (statute cannot expand certiorari or limit the time in which it may be invoked); *Buckwalter v. City of Lakeland*, 112 Fla. 200, 150 So. 508 (1933) (statute cannot divest courts of constitutional jurisdiction to compel performance of duties by mandamus); *In re Clarification of Florida Rules of Practice and Procedure*, 281 So.2d 204 (1973) (Legislature has no constitutional authority to enact any law relating to practice and procedure). But *see Amendments to the Florida Rules of Appellate Procedure*, 685 So.2d 773 (Fla. 1996) (deferring to the Legislature in limited matters relating to the constitutional right to direct appeal); *Kalway v. Singletary*, Case No. 89,724 (February 26, 1998) (Slip. op.) (deferring to the Legislature in limited matter relating to time restriction for filing application for writ of mandamus seeking relief from prison disciplinary action).

While the issue of altering the scope of the habeas corpus is absent from recent case history, there is no indication that the Florida Supreme Court has receded from its earlier decisions in *Jones* and *Sullivan, supra*. However, the Florida Supreme Court has deferred to the Legislature on limited matters affecting direct appeals, *Amendments to the Rules of Appellate Procedure*, *supra*, and extraordinary writ petitions, *Kalway, supra*, and there is a legitimate question as to whether precedent on altering the scope of habeas corpus must be reassessed in light of this recent case law and other case law.

In the *Amendments to the Rules of Appellate Procedure* case, the Court concluded that the Legislature "could reasonably condition the right to appeal upon the preservation of a prejudicial error or the assertion of a fundamental error." 585 So.2d at 774. The Court stated that it believed "that the legislature may implement this constitutional right [to a direct appeal] and place reasonable conditions upon it so long as they do not thwart the litigants' legitimate appellate rights. Of course this Court continues to have jurisdiction over the

practice and procedure relating to appeals." 585 So.2d at 774-775. The question, which staff is unable to answer at this point, is how much, if any, this case bears upon the question of whether the Legislature has any authority to limit collateral claims in capital cases from being heard on state habeas review. Precluding state collateral review altogether in capital cases is significantly more ambitious than placing reasonable conditions on the right to direct appeal. The separation of powers doctrine is implicated if the Legislature attempts to encroach on a power that the Florida Supreme Court determines is solely within the jurisdiction of the judicial branch.

More problematic may be the issue of limiting the court's inherent power to hear fundamental error (as it relates to an illegal sentence) at any time. As an initial matter, the CS does not repeal Rule 3.800, which authorizes a motion to correct an illegal sentence. This motion may be filed at any time. The definition of an "illegal sentence" for purposes of a Rule 3.800 motion is extremely limited. *See Davis v. State,* 661 So.2d 1193 (Fla. 1995); *State v. Callaway,* 685 So.2d 983 (Fla. 1995). The denial of the motion is currently appealable. Consequently, there is a presumably valid judicial rule that authorizes a challenge to an illegal sentence in a capital case, even if it occurs decades after the sentence is imposed, and legislation that precludes any challenge in a capital case to the legality of a sentence after the direct appeal, but does not repeal the rule authorizing such challenge, albeit limited.

In addition to this rule, however, there is the court's inherent power to hear fundamental error. In *Bedford v. State,* 633 So.2d 13, 14 (Fla. 1994), the Florida Supreme Court held that not only may an illegal sentence be corrected at any time but it "may be corrected even after it has been erroneously affirmed."

## V. Economic Impact and Fiscal Note:

### A. Tax/Fee Issues:

None.

### B. Private Sector Impact:

None.

### C. Government Sector Impact:

The impact of CS/SB 356 is largely on the federal government because cases currently heard in Florida's courts would be transferred to federal courts. There will be an increase in federal prosecutor and federal public defender workload, however the fiscal impact is indeterminate.

Staff has asked Judge Joseph W. Hatchett, Eleventh Circuit Court of Appeals, to provide an assessment of the impact of CS/SB 356 on the federal courts. That assessment was not available at the time this analysis was completed.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

### A. Federalism

The approach taken by CS/SB 356 to restrict collateral attack in capital cases to the federal forum appears to contradict federalist principles. "The States . . . have great latitude to establish the structure and jurisdiction of their own courts. In addition, States may apply their own neutral procedural rules to federal claims, unless those rules are preempted by federal law. These principles are fundamental to a system of federalism in which the States share responsibility for the application and enforcement of federal law." *Howlett v. Rose*, 496 U.S. 356, 372 (1990) (citations omitted). *See Royal Caribbean Corp. v. Modesto*, 614 So.2d 517, 519-20 (Fla. 3rd DCA 1992), quoting *Howlett*.

Congress intended in the Anti-Terrorism Act and Effective Death Penalty Act of 1996 to extend greater deference to state court determinations of collateral claims. However, the CS makes federal judges the sole arbiters of collateral claims in capital cases which are currently brought under Rule 3.85.

### B. Effect of Repealed Rules if Law is Declared Invalid

In *State ex rel. Boyd v. Green*, 355 So.2d 789 (Fla.1978), the Florida Supreme Court held that where one section of a law was unconstitutional and another section repealed a rule which was 'so connected and dependent' on the new legislative scheme established by the invalid section, notwithstanding a severability clause, the two sections could not be treated as severable, and the unconstitutionality of the one section invalidated the repeal of the rule in the other section."

Sections 9, 10, and 11 of SB 356 seem to be the most critical sections to the legislative scheme proposed by the CS. If one of them, or all of them, were to be declared unconstitutional, it may be argued that Section 14 (which repeals Rule 3.851, relating to capital postconviction proceedings) is so "connected and dependent" to the invalid section or sections that they cannot be severed and the section repealing the rules is invalidated.

## VIII. Amendments:

None.