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HOUSE OF REPRESENTATIVES
COMMITTEE ON
CRIME AND PUNISHMENT
ANALYSIS

BILL #: HB 2039

RELATING TO: Death Penalty Appeals Reform Act

SPONSOR(S): Representative Crist

COMPANION BILL(S): S1558(s)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:
(1) CRIME AND PUNISHMENT
(2) JUDICIARY
(3) CRIMINAL JUSTICE APPROPRIATIONS
(4)
(5)

I. SUMMARY:

HB 2039 seeks to restore finality in capital cases by revising procedures and requiring that death-penalty postconviction legal challenges be resolved within one year after the Florida Supreme Court upholds the sentence on appeal. The bill accomplishes this goal of limiting postconviction legal challenges to one year from the resolution of the appeal by requiring that postconviction legal actions in a capital case must be filed, considered and resolved within strict time limitations, including the following:

1. Within 15 days after imposing a sentence of death, a trial court must appoint postconviction legal counsel to represent the defendant;

2. Within 30 days after the Florida Supreme Court upholding a death sentence, the defendant's postconviction lawyer must file the postconviction motion in the trial court. The bill requires all postconviction motions or amendments to pending postconviction motions to be dismissed if these challenges are filed in violation of this time limitation. The bill further provides that state funds may not be expended for the preparation or consideration of any postconviction motion filed in violation of this time limitation. [It is anticipated that the sponsor of the bill will offer an amendment will require the postconviction motion to be filed within 6 months of the filing of the initial brief on appeal. This is an earlier time deadline which will require the collateral attorney to work on the postconviction motion while the appeal is being decided.]

3. Within 90 days after the Florida Supreme Court upholds the death sentence, the defendant must file any postconviction claim that the defendant's lawyer on appeal provided incompetent ["ineffective"] legal representation.

4. Within 30 days after the state responds to the defendant's postconviction appeal, the trial court must conduct an evidentiary hearing.

5. Within 10 days after that hearing, the trial court must grant or deny the appeal.

6. Within 90 days after the trial court rules on the postconviction appeal, the Florida Supreme Court must rule on the case or return it to the trial court for factual findings.

The bill further provides that the defendant waives any legal claim filed in violation of the time limitations, and such claims are deemed denied as a matter of law. The bill prohibits the filing of any legal claim in a postconviction proceeding that could have been raised at trial or on appeal, and requires that any such claim be denied as a matter of law. The bill also requires the defendant to demonstrate that but for the alleged collateral error the outcome of the trial or the sentence would have been different before a court may grant relief to a person sentenced to death.

The bill states legislative findings concerning the "unjustifiable" increase in delays in capital cases.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Florida has executed 43 people sentenced to death since 1972 with a current death row population of 375 as of March 25, 1999. Delays in the execution of persons sentenced to death in Florida have significantly increased since the reinstatement of the death penalty in 1972. From 1994 to 1998 these delays have averaged 13.98 years, an 80% increase from the 7.74 year average delays during 1979 to 1983. The most 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. In Florida, executed convicted murderers have filed an average of eight postconviction appeals in state and federal courts.

Numerous reform efforts have not succeeded in reducing delays in death-penalty cases. Legislation and court rules require that state postconviction appeals be resolved within a certain time. The state courts, however, continue to allow death-sentenced convicted murderers to delay filing postconviction appeals, usually on the basis of alleged inadequate legal resources. Recent legislative reform efforts have attempted to promptly provide people sentenced to death with postconviction legal representation to facilitate timely-filed postconviction appeals. These reforms could result in fewer delays in the future.

The Florida Legislature has appropriated over $35.5 million dollars, since fiscal year 1987-88, to provide postconviction legal representation to indigent death-sentenced convicted murderers. This expenditure is not required by the United States Constitution. A previous commission found that Florida had the most comprehensive program in the nation for providing this representation.

Other states have capital punishment have laws that significantly restrict postconviction appeals. Virginia, which has executed 59 death-sentenced people since 1976 with a current death-row population of 40, has imposed an absolute time limit on postconviction appeals. Texas, which has executed 163 death-sentenced convicted murderers, requires that postconviction review begin immediately after a death sentence is imposed. That state also imposes strict time limitations. Missouri also imposes strict time limitations on postconviction appeals, and allows the sentencing court to set execution dates, as does Texas. Missouri has executed 32 convicted murderers, including nine in the last two years, and has 87 convicted murderers sentenced to death awaiting execution.

Current Florida law requires that postconviction legal challenges must be filed and decided within certain time limits, but no legal mechanism exists to enforce those time limits. As of November 13, 1998, 256 out of the 387 convicted murderers sentenced to death were sentenced over five years ago. *182 of these cases were awaiting the resolution of state postconviction judicial review.* This stage of judicial review is also the process that appears most amenable to improvement by the legislature. [See, *"Interim Report on Reducing Delays in Capital Cases,"* Appendix 4.]

A capital case usually progresses through the following stages:

1. Trial in the state circuit court where crime occurred;

2. First, or "direct" appeal, to the Florida Supreme Court;

3. Appeal to the United States Supreme Court ("Petition for Certiorari");

4. Requests for clemency to the Governor and Cabinet;

5. "Postconviction" motion filed in the circuit court where crime occurred, usually claiming that defendant's original trial lawyer was "ineffective" among other arguments [Florida Rule of Criminal Procedure 3.851 "Motion for Postconviction Relief"];

6. Appeal of Postconviction Motion from circuit court to Florida Supreme Court, and petition for Writ of Habeas Corpus filed in the Florida Supreme Court;

7. Petition for Writ of Habeas Corpus in the federal District Court where crime occurred;

8. Appeal from denial of Writ of Habeas Corpus from federal District Court to federal Eleventh Circuit Court of Appeals in Atlanta, if permitted;

9. Appeal of denial of Writ of Habeas Corpus from federal court of appeals to United States Supreme Court, if permitted;

10. Repetitive ("successive") postconviction appeals in state and federal courts.

11. Executive clemency provides a person sentenced to death with additional avenues to assert actual innocence.

There are numerous reasons for the delays in the postconviction stage of judicial review, including litigation over public records requests. Other delays are caused in the sentencing courts, which may not hear the postconviction appeals for months, or even years. The state attorney which prosecuted the defendant must respond to any postconviction appeal, and this also requires time. Witnesses must be located and evidence must be reviewed. The attorneys often amend their arguments, and additional time is usually requested to develop new arguments and investigate new claims. Postconviction appeals can raise ten to twenty arguments, many of which attempt to revisit issues that were or could have been resolved at trial or during the first appeal. At least one state funded Capital Collateral Regional Counsel (CCRC) has acknowledged that the longer a case is delayed, the more issues are discovered to argue on behalf of the death-sentenced convicted murderer. [1]

Regardless of the reasons for the delays, the current time span of fourteen years between sentencing and execution in capital cases has generated calls for further reforms. In a recent Florida Supreme Court opinion reviewing the death penalty of an inmate convicted in 1974, Justice Wells strongly expressed his position that the process needs to be changed, stating that ". . . I do again state my view that such an extended time period to finally adjudicate these cases is totally unacceptable and is this Court's and the State's prime responsibility to correct." Knight v. State, __ So.2d __ [Case No. 87,783] (Fla. November 12, 1998).

In Witt v. State, 387 So.2d 922, 925 (Fla.), cert. denied, 449 U.S. 1067, (1980), the Florida Supreme Court recognized the need for finality in criminal cases, and the limits of postconviction judicial review:

> It has long been recognized that, for several reasons, litigation must, at some point, come to an end. In terms of the availability of judicial resources, cases must eventually become final simply to allow effective appellate review of other cases. *There is no evidence that subsequent collateral review is generally better than contemporaneous appellate review for ensuring that a conviction or sentence is just.* Moreover, an absence of finality casts a cloud of tentativeness over the criminal justice system, benefiting neither the person convicted nor society as a whole. Id at 925. [Emphasis Supplied.]

In Swafford v. State, 679 So.2d 736 (Fla. 1996), however, Justices Kogan, Anstead and Shaw joined [now Chief] Justice Harding's statement, expressing another view:

> . . . I recognize that the postconviction process still may appear inordinately long to the general public in some cases. However, neither public perception nor the reality of a lengthy postconviction process justifies foreclosing meritorious claims of newly discovered

[1]Committee staff interviewed attorneys who represent the state and defense in postconviction proceedings during work on the interim project on death-penalty delays.

> evidence. While finality is important in all legal proceedings, its importance must be tempered by the finality of the death penalty. Id.

Review of Florida's Capital Punishment Laws, Procedures, and Reform Efforts since 1972

In 1972, the United States Supreme Court in Furman v. Georgia, 408 U.S. 238 (1972), issued the most significant decision of this century relating to the death penalty. The Court in Furman held that the manner in which the State of Georgia determined whether the death penalty would be imposed was arbitrary and therefore a violation of the Eight Amendment's prohibition of cruel and unusual punishment. No state was in compliance with the Court's decision, and any state that wished to retain the death penalty had to rewrite their procedures relating to how the trial courts determine whether to sentence a person to death. The Florida Legislature responded to the decision by authorizing new death-penalty laws consistent with the Court's newly-announced requirements for imposing capital punishment: Chapter 72-724, Laws of Florida, which became effective December 8, 1972, and was upheld by the Florida Supreme Court in 1973 in *State v. Dixon,* 283 So.2d 1 (1973). Three years later, the United States Supreme Court upheld Florida's revised capital punishment laws in Proffit v. Florida, 428 U.S. 242 (1976).

a.) The Spenkellink Case

John Spenkellink was executed on May 25, 1979, for the murder of Joseph Szymankiewicz. Spenkellink was the first person executed in Florida under the new law passed after *Furman*, and the execution was carried out in less than *six years* after the sentence of death was imposed, despite the defendant's repeated appeals.

By today's standards, the delays in the Spenkellink case would be considered relatively short. At that time, however, the delays caused by the defendant's repeated, "last-minute" filings of postconviction litigation significantly concerned two Justices of the Florida Supreme Court.[2] Justice Alderman concurred in the denial of the last postconviction motion because the motion was without merit and because is was filed too late, stating:

> *Spenkellink has abused the writ of habeas corpus and judicial process in general by these last-minute, frivolous attempts to stay the inevitable execution by the filing of matters which should have been raised, if at all, long before the death warrant was signed ...* A death row inmate who deliberately withholds one of two or more arguable points for collateral relief at the time he files his first petition, in an attempt to thwart the judicial process and to gain a temporary stay of execution, should not be entitled to consideration of any such late-filed petitions.
>
> Spenkellink v. Wainwright, 372 So. 2d. 927, 929 (Fla. 1979.) (Alderman, Adkins, J.J., concurring specially; Emphasis supplied.)

Justice Alderman then quoted United States Supreme Court Justice Rehnquist to further stress the importance of finality in death penalty cases:

> There must come a time, even when so irreversible a penalty as that of death has been imposed upon a particular defendant, that the legal issues in the case have been sufficiently litigated and relitigated so that the law must be allowed to run its course. If the holdings of our Court . . . are to be anything but dead letters, capital punishment when imposed pursuant to the standards laid down in those cases is constitutional; and when the standards expounded in those cases and in subsequent decisions of this Court bearing on those procedures have been complied with, the State is entitled to carry out the death sentence. Indeed, just as the rule of law entitles a criminal defendant to be surrounded with all

[2] Spenkellink's attorneys filed nine separate pleadings in state and federal courts during the two months before the execution.

> the protections which do surround him under our system prior to conviction and during trial and appellate review, the other side of that coin is that when the State has taken all the steps required by that rule of law, its will, as represented by the legislature which authorized the imposition of the death sentence, and the state courts which imposed it and upheld it, should be carried out. Spenkellink, 372 So.2d at 929-930. [Citations omitted.]

The delays and postconviction appeals in the Spenkellink case established the pattern in capital punishment cases in Florida.

b.) Florida Attorney General's Proposal to Reduce Federal Litigation

In 1981 by Florida Attorney General Jim Smith recommended postconviction reforms which addressed the apparent abuses occurring in collateral litigation in the federal courts. He recommended the following three basic changes to federal law:

1. A three-year statute of limitations in habeas corpus cases.

2. A prohibition of evidentiary hearings in the federal courts to resolve factual disputes previously resolved in a hearing in state court.

3. A legal standard of review in federal court of state factual findings based on the ruling in *Jackson v. Virginia,* 443 U.S. 307, 324 (1979), which stated that a habeas corpus petitioner would be entitled to relief "if it is found that upon the record evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." Id.

General Smith urged the Congress to reform collateral proceedings in federal court and limit the scope of federal habeas corpus review. He noted that the United States Supreme Court in its recent holdings had attempted to limit federal collateral review of state criminal cases, but the primary responsibility for change was with Congress:

> Congress is the appropriate body to define the limits of federal habeas corpus review of state court judgements. This legislative body must address the abuses and assist the Court by clarifying its intent. . . . If the Congress does not recognize its responsibility, then Congress, not the Court, must take the blame for the lack of finality of judgements and the continuance of current abuses.

See, Smith, "Federal Habeas Corpus--A Need for Reform", Vol. 73, The Journal of Criminal Law and Criminology, No. 3, p. 1050.

In 1995, Congress adopted several significant reforms of federal collateral review, some of which were proposed by Attorney General Smith. *See*, Public Law 104-132, the "Antiterrorism and Effective Death Penalty Act of 1996." 110 Stat. 1214. These reforms include a one-year time requirement for the filing of a petition for habeas corpus, and significant limitations on federal court review of state-court factual findings in state criminal cases. The federal law also imposes strict limits on "successive" or subsequent postconviction appeals in the same case, and on appeals of rulings made by the federal district courts.

c.) Amendment to Florida's Rules of Criminal Procedure in 1985.

On Nov. 30, 1985, the Florida Supreme Court adopted restrictions for postconviction relief which were opposed by the Florida Bar, but supported by the Florida Attorney General Jim Smith. The restrictions were passed as an amendment to the Florida Rule of Criminal Procedure 3.850, and upheld by the federal courts in Whiddon v. Duggar, 894 F.2d. 1266 (11th Cir. 1990). The Supreme Court's amendment to the rule included the following reforms:

1. An amendment to prohibit new postconviction motions filed in Florida more than two years after the conclusion of the direct appeal unless:

a. The facts upon which the claim is predicated were unknown to the movant or his attorney and could not have been ascertained by the exercise of due diligence; *or*

b. The fundamental constitutional right asserted was not established within the period provided and has been held to apply retroactively.

2. A provision preventing state courts from granting postconviction relief on grounds which could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgement and sentence.

3. A provision providing for the dismissal of successive or repetitive postconviction motions if the judge finds: (1.) that the motion fails to allege new grounds for relief, and that there was a prior resolution of the issue raised on the merits, or (2.) when new or different grounds are alleged, the court may dismiss the motion if the court finds that the failure to raise the new issue at an earlier date constituted an abuse of the procedure.

See, The Florida Bar In Re Amendment To the Rules of Criminal Procedure, 460 So. 2d. 907 (Fla. 1984.) Litigation in death penalty cases did not decrease despite these restrictions of judicial review.

d.) Creation of the Office of the Capital Collateral Representative

In 1985, the Florida Legislature enacted another significant reform in state postconviction proceedings when it created the Office of the Capital Collateral Representative to represent indigent death-row inmates in collateral actions, ["CCR"] "...so that collateral [postconviction] legal proceedings.... may be commenced in a timely manner...." Section 27.7001, Florida Statutes. Chapter 85-332, Laws of Florida, section three.

For the first time, Florida attempted to ensure that all death-row inmates could obtain legal representation to challenge their convictions and sentences after the Florida Supreme Court and United States Supreme Court upheld those convictions and sentences. Since the creation of the CCR (and its successors), the state has appropriated over $35 million dollars to provide collateral legal representation to indigent persons sentenced to death to file postconviction legal challenges to their convictions and sentences. Very few, if any states match the resources that Florida has allocated to the CCR and its successors. The law creating the CCR was not mandated by the United States Supreme Court. In fact, since 1987, the United States Supreme Court has twice ruled that the states are not required to provide collateral legal representation to state prisoners. Murray v. Giarratano, 492 U.S. 1, 8 (1989); Pennsylvania v. Finley, 481 U.S. 551 (1987).

e.) Reform of the Florida Rules of Criminal Procedure in 1987

In In Re Florida Rules of Criminal Procedure, Rule 3.851, 503 So.2d 320, (Fla. 1987), the Florida Supreme Court created Florida Rule of Criminal Procedure 3.851, which was intended to stop the last-minute flurry of appeals filed within hours of a pending execution.

The rule states that:

> (a) When a death warrant is signed for a prisoner and the warrant sets the execution for at least sixty days from the date of signing, all motions and petitions for any type of postconviction or collateral relief shall be filed within thirty days of the date of signing. Expiration of the thirty-day period procedurally bars any later petition unless it is alleged (1) that the facts upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence prior to the end of the thirty-day period, or (2) the fundamental constitutional right asserted was established after the thirty-day period expired and has been held to apply retroactively. Id.

This new rule did not modify or expand the two-year time limit provided in Rule 3.850, for initial filings of postconviction appeals.

f. The Florida Bar Commission, 1989

These reforms did not educe delays in death-penalty cases. In 1989, the average interval delay in the two executions that year was 8.67 years, up from 5.43 years In 1979. In response to these increasing delays, the Florida Bar created the "Commission to Study Practical Aspects of Death Sentence Appeals" on May 23, 1989. Florida Bar President Rutledge Liles stated in his letter of appointment to the members of that Commission that "I would like the commission to address the issues of delay in the execution of sentence in capital cases. I do not feel the public truly understands the process and the importance of the various procedural safeguards under our law. On the other hand, there is considerable frustration surrounding the seemingly inordinate delays in executing sentence." May 23, 1989, Letter from Florida Bar President Liles, *Report of the Commission to Study Practical Aspects of Death Sentence Appeals,* March 1991. The people that Mr. Liles appointed were for the most part judges and attorneys familiar with both sides of the collateral review process.

In 1989 executions were occurring 40% sooner than executions after occurring from 1994 until 1998. However, the Commission recognized even then that a "substantial majority of the public favors capital punishment and undoubtedly considers the [8.67 year] delay in execution [of death sentences] excessive." *Report of the Commission to Study Practical Aspects of Death Sentence Appeals,* March 1991, page 2. The Commission noted that an "average time of more than eight years is a long time to wait for the death penalty to be carried out." Id., p. 4.

The Commission found substantial delays in those death cases in which the Governor had not signed a death warrant, and fairly insignificant delays in those cases in which a warrant was signed. Id., p. 11. Some cases in which a warrant had not been signed languished in the circuit courts as long as 30 months. Other cases in which warrants had been signed had been completely resolved in less than one month after the appeal had been filed. Id., pages 10-11.

The Commission's majority report ultimately recommended that:

1. The state continue allowing persons sentenced to death to file postconviction [collateral] appeals in state court;

2. The two-year limitation on state postconviction appeals be reduced to a one-year time limit for state postconviction appeals;

3. Any death warrant signed by the Governor within this one-year time limit be "stayed" or delayed, until the one-year time limit is reached;

4. The Florida Supreme Court impose time limits on the circuit courts for resolving capital postconviction claims;

5. The Florida Supreme Court Require special education programs for trial judges assigned to capital cases;

6. The Office of the Capital Collateral Representative be "adequately funded";

7. The "appropriate authorities" adopt experience guidelines for state-provided lawyers in capital cases, based on American Bar Association Standards. *Id.,* pages 14-19.

Two members of the commission dissented, recommending the elimination of state collateral appeals.

Mr. Larry Spaulding, who was then the Capital Collateral Representative and a Commission member, advised that adequate funding of the agency would require at least $3.4 million dollars and include 50 full-time employees. The agency then had the responsibility to represent approximately 190 persons sentenced to death. *Id.,* p. 32-33. In fiscal year 1996-97, the office of the Capital Collateral Regional Counsels received $4.9 million dollars and represented approximately 230 cases as of December 6, 1998.

g.) The Florida Supreme Court Committee on Postconviction Relief, 1989

The same year that the Florida Bar Commission issued its final report, the "Florida Supreme Court Committee on Postconviction Relief," chaired by Florida Supreme Court Justice Ben Overton, issued

its report. In his submission of the Committee's report to then Chief Justice Shaw, Justice Overton noted that "as expressed in your order creating the Committee, the *credibility of the judiciary is adversely affected by the untimely manner in which these matters are considered and resolved by the court system*." *Letter of Florida Supreme Court Justice Overton,* May 31, 1991, attached as Appendix 7. [Emphasis Supplied.]

Justice Overton and the Committee recommended the following guidelines for the timely filing and resolving of postconviction appeals in the state and federal courts:

1. One year to file the initial [postconviction] pleading in the state court system.

2. 270 days for the state court system to resolve the issues.

3. 60 days to file the initial pleading in the federal court system.

4. 270 days for the federal courts to resolve the issues.

Id., page 2.

Justice Overton explained how the committee arrived at the time guidelines:

> [T]hese periods of time were considered by a majority of the committee to be a postconviction relief proceedings without the threat of a death warrant. In suggesting these guidelines, the Committee was not singling out the death penalty process *since time standards have already been adopted by the Court for almost every type of case in the judicial process.* Id. [Emphasis Supplied.]

The recommendation included an understanding that the Governor would withhold signing the death warrant for a period of two years and eight months "after the death penalty has been affirmed on the merits[,]" to allow the person sentenced to death to file the initial postconviction motion and have it resolved by the courts.

The Florida Supreme Court Committee made other recommendations, including:

1. That specific counsel should be identified for every person sentenced to death within 30 days of the date the death sentence is upheld by the Florida Supreme Court or United States Supreme Court, whichever is later; and

2. That the state courts should monitor and coordinate death penalty postconviction proceedings to assure that there are no unjustified delays.

h.) Reform of the Florida Rules of Criminal Procedure in 1993

Two years after the Florida Supreme Court Committee on Postconviction Relief issued its report, the Florida Supreme Court adopted the recommendations of the Committee and Justice Overton to require that postconviction motions be filed within one-year from the date the direct appeal became final. In re Rule of Criminal Procedure 3.851 (Collateral Relief after Death Sentence Has Been Imposed), 626 So.2d. 198 (Fla. 1993). The Florida Supreme Court agreed to the new rule by a one-vote margin. The following exceptions and restrictions applied to the one year time period:

1. The rule was contingent upon a finding that a person sentenced to death will have counsel assigned and available to begin addressing the prisoner's postconviction issues within 30 days after the judgment and sentence become final.

2. The Court reserved the power to suspend the rule and stay any proposed execution if the governor signed a death warrant before the expiration of the time limitation.

3. The one year time period does not preclude the right to amend or to supplement pending pleadings pursuant to these rules.

4. The rule provides for extensions that may be granted by the Supreme Court of Florida for the filing of postconviction pleadings if the prisoner's counsel makes a showing of good cause for counsel's inability to file the postconviction pleadings within the one-year period. Id at 198.

The Court adopted the rule only after assurances by the Legislature that increased funding would be provided to the Office of the Capital Collateral Representative, stating: “In the event the Capital Collateral Representative is not fully funded and available to provide proper representation for all death penalty defendants, the reduction in the time period would not be justified and would necessarily have to be repealed, and this Court will forthwith entertain a petition for the repeal of the rule.” Id at 199. In addition to these qualifications to the one year time limitation, the governor agreed that no death warrants would be issued during the initial round of state and federal collateral review. Id at 199.

Justice Overton, writing for the majority in favor of the new rule, addressed the reasonableness of the one year period for filing postconviction motions:

> The one-year period is clearly a reasonable time in which to commence postconviction relief proceedings. This time period in which to initiate postconviction relief proceedings for a death penalty prisoner, who has counsel ready and available to represent him or her, is consistent with the recommendations of The Florida Bar's Special Commission, chaired by John F. Yetter, Professor of Law, Florida State University, and the Criminal Justice Task Force Report to Governor Lawton Chiles dated February 27, 1991. It also gives a defendant twice as long as the six-month period suggested in the Powell Committee Report. See Ad Hoc Comm. on Federal Habeas Corpus in Capital Cases, Judicial Conference of the United States, Comm. Report and Proposal 1 (1989) (chaired by [United States Supreme Court] Justice Lewis Powell).There is no "plain" constitutional violation as asserted by my colleague. Not only is this one-year period more than adequate, it is also consistent with the views of other objective entities. Id., at 200.

Despite increased funding appropriated by the state to provide postconviction legal representation to persons sentenced to death, in part to implement this rule, delays have increased. From 1994 through 1998, those delays averaged 13.98 years. From 1989 until 1993, just before the Supreme Court adopted the above rule, those delays averaged 10.4 years. Thus, since the adoption of the Florida Supreme Court rule, delays have increased by 34%. These delays occurred even though funding to provide postconviction legal representation for death row inmates increased from $1.614 million dollars in fiscal year 1988-89 to $4.506 million dollars in fiscal year 1997-98, a 79% increase.

i.) Legislative Reforms In 1996

In 1996, the Legislature passed Section 924.055 (1), Florida Statutes, to reduce delays in capital cases by imposing statutory time limits on the filing of postconviction motions and on the amount of time the courts have to rule on the issue. The statute imposes the following requirements:

1. Postconviction motions must be filed in the state courts within *one year* of the conclusion of the appeal, and no exceptions are provided.

2. Circuit courts must rule on a postconviction appeal within *90 days* after the state responds to the appeal.

3. The Florida Supreme Court must resolve any postconviction appeal filed in that court within *200 days*.

The legislation did not provide a mechanism to require the courts to comply with the time periods for resolving postconviction motions. This legislation does include a provision to encourage a death row inmate to file prompt motions instead of waiting until the last moment:

> If any court refuses to grant relief in a collateral postconviction proceeding, the convicted person has 90 days in which to seek further collateral review. Failure to

> seek further collateral review within the 90-day period constitutes grounds for issuance of a death warrant ... Section 922.095, Florida Statutes.

In 1996 the Legislature also amended Chapter 922, Florida Statutes, to provide that death warrants will remain in full force and effect until the execution occurs. Section 922.06, Florida Statutes. This legislation further required the Governor to reinstate a death warrant within 10 days after receiving notification by the Attorney General that a court-ordered stay has been "lifted or dissolved." Id.

These judicial and legislative reforms have failed to reduce the increasing and significant delays in capital cases. To date, staff is unaware of any postconviction appeal being resolved within the time limits of the Florida Rule of Criminal Rule 3.851 or Section 924.055, Florida Statutes.

j.) The McDonald Commission Report, 1997

Frustration with increasing delays and reports of litigation abuses by the Office of the Capital Collateral Representative led to the creation of another study commission known as the "McDonald Commission," named after former Florida Supreme Court Chief Justice Parker Lee McDonald, who was appointed by Governor Chiles. Representative Victor D. Crist and Senator Locke Burt also served on the Commission. See *"Joint Agreement To Appoint A Commission To Study Postconviction Representation of Indigent Death Row Inmates,"* signed by Governor Chiles, Senate President Jennings, and House Speaker Webster, on December 16, 1996. [See, *"Interim Report on Reducing Delays In Capital Cases,* December 1998, Appendix 8.]

The agreement to create the McDonald Commission contained several WHEREAS clauses including one declaring "that the reforms undertaken by the Legislature and Supreme Court in 1993 and 1996 . . have failed and [this failure has] resulted in excessive delays in the administration of justice in capital cases." Id. The Commission was charged to "review the entire subject of postconviction representation of indigent death row inmates and the attached legislation." Id. The attached legislation referred to a draft bill which would have privatized the office of the Capital Collateral Representative, effective 2000. The draft bill also would have imposed significant limitations on repetitive postconviction appeals.

After receiving extensive testimony, the Commission made the following factual findings:

1. CCR has refused or failed to represent at least 14 eligible, indigent death-row inmates, despite a substantial increase in the budget . . . in the last fiscal year. . . .[A]s of January 10, 1997, CCR has *failed to file a single, initial postconviction pleading since April 15, 1996*. This failure occurred despite a . . . staff of one lawyer per six clients, with support investigators and staff [emphasis supplied;]

2. The State of Florida currently provides the most comprehensive system [in the nation] for providing legal services to already convicted death row inmates . . . ;

3. The . . . mission of CCR has been to both represent individual clients *and to cause a dismantling of the death penalty. . . ;*

4. [B]ased on CCR's lack of institutional integrity, Florida should consider other models of postconviction representation.

Report, Commission for the Review of Post-Conviction Representation, Feb. 13, 1997, pages 2-3, attached as Appendix 9.

The McDonald Commission recommended several reforms to the Legislature, including:

1. The consideration of creating three separate and distinct regional capital collateral counsels, which will be located in Northern, Central, and Southern Florida;

2. The creation of a Joint Legislative Committee on the Administration of Justice in Capital Cases to review the Regional Counsel's budget expenditures and management;

3. That the Florida Supreme Court should incorporate by rule the time lines contained in section 924.055, Florida Statutes; and

4. That the Legislature limit repetitive postconviction motions to newly discovered evidence claims and changes in the law.

The Commission also recommended that the Legislature consider assigning Public Defenders to represent death row inmates on postconviction motions. The Commission offered the following reason for this recommendation:

> Public Defenders currently provide trial and appeal representation to indigent criminal defendants. The attorneys employed in these offices are experts in criminal law. The Public Defenders are experienced in every aspect of criminal-defense representation and would be qualified to represent death-sentenced inmates. Some have provided collateral representation to convicted inmates.

Report, pages 5-8.

k.) 1997 Death Penalty Legislation

In 1997, the Legislature reorganized the Office of Capital Collateral Representative into three regional, independent offices known as the Capital Collateral Regional Counsel, and adopted some of the Commission's other recommendations. Chapter 97-313, Laws of Florida. This legislation also created the "Commission on the Administration of Justice in Capital Cases" to review the operations of these new offices.

The 1997 law also states that any "motion for postconviction relief in a capital case *may not be considered if the motion is filed more than one year after the judgment and sentence became final",* unless certain extenuating circumstances existed. These exceptions were very narrowly defined to include only newly discovered evidence and a change in constitutional law. Section 924.051(6)(b)(1), Florida Statutes.

l.) 1998 Death Penalty Legislation

In 1998, the Legislature passed several reforms in an attempt to expedite the filing of postconviction appeals by authorizing the utilization of private legal counsel. When the offices of the Capital Collateral Regional Counsel fail to timely represent persons sentenced to death, the new law required the appointment of private legal counsel. Chapter 98-197*,* Laws of Florida. This reform established a detailed payment schedule and time limitations for the performance of legal representation in a capital postconviction proceeding. This reform may already be providing more timely capital postconviction legal representation. See*, "More Private Bar Involvement Speeds Death Penalty Appeals,"* The Florida Bar News, Nov. 15, 1998. When the Capital Collateral Regional Counsel failed to timely file a notice of representation for multiple murderer Danny Rolling, this law authorized appointment of private counsel.

The Legislature also amended Chapter 119, Florida Statutes, in an attempt to reduce delays caused by public records requests. Chapter 98-198, Laws of Florida; Section 119.19, Florida Statutes. This reform required that the state attorney who prosecuted the capital defendant and each law-enforcement agency involved in that prosecution must provide copies of all public records, except those filed in the trial court, "which were produced in the investigation or prosecution of the case." Section 119.19 (3)(b), Florida Statutes. Other state agencies and private individuals possessing records are also required to provide copies to the Secretary of State for storage in a repository. This law created a detailed schedule and procedure for the production of public records to capital postconviction attorneys. The legislation imposed limits on the any additional demands for public records in capital cases. Section 119.19 (9)(a), Florida Statutes.

m.) Effect of Reform Measures

People sentenced to death are currently allowed to file postconviction appeals beyond statutory time limits, and the length of time from imposition of the death penalty to the actual execution has steadily

increased. See, In Re Rule of Criminal Procedure 3.851 and Rule 3.850, 708 So. 2d. 912 (Fla. 1998) (Wells, J., dissenting.). Death row inmates continue to file multiple postconviction motions challenging their convictions and sentences, and some of this litigation has lasted over a decade. See Groover v. State, 703 So. 2d. 1035 (Fla. 1998) (First postconviction motion filed in 1986; Court resolved *eighth* postconviction action in 1998.); Mills v. State, 684 So.2d. 801 (Fla. 1986) (Seven postconviction actions filed In state court in addition to similar actions in federal court.); Lambrix v. State, 698 So.2d. 247 (Fla. 1996)(extensive postconviction review recited). While the reforms adopted in 1997 and 1998 may yet reduce postconviction delays, the evidence to date has indicated that earlier reforms have not succeeded.

POSTCONVICTION REVIEW IN OTHER STATES WITH EFFECTIVE CAPITAL PUNISHMENT LAWS

Virginia

Virginia has executed a higher percentage of its death row inmates than any other state. As of March 25, 199, Virginia had 36 people on death row. Virginia has executed 62 people since 1976, including 13 executions in 1998. Florida has executed 43 people sentenced to death since 1979, with a death-row population over ten times larger than the death-row population in Virginia. Five more executions are scheduled in Virginia before the end of April, 1999.

The most substantial difference between Virginia and Florida regarding capital postconviction appeals is that Virginia by statute imposes an absolute time limit on such appeals, *with no exceptions*. The state statute, which is also the procedure for state habeas, provides that postconviction motions must be filed within sixty days of the final appellate decision by the federal courts, or within 120 days of the appointment of counsel. The only remedy for newly discovered evidence demonstrating innocence beyond the time limits allowed is executive clemency.

Virginia also requires defendants to file postconviction motions directly with the state supreme court. The trial court, which sentenced the inmate to death, has authority to conduct an evidentiary hearing only if directed to do so by the state supreme court.

Texas

Texas has executed 171 people sentenced to death since 1982, including seven executions in 1999 as of March 25. Four more executions are scheduled before the end of April, 1999. The most executions in Florida in one year is eight. There have been 64 executions in Texas since January 1, 1997, more than the total number of executions in Florida in the past twenty years. There are 453 people sentenced to death in Texas currently incarcerated awaiting execution.

The effectiveness of the capital punishment laws in Texas may be the result of several factors. Article 11.071 of the Texas Code of Criminal Procedure attempts to speed up collateral review, which, as 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 to file 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. One 90-day extension for good cause shown is permitted.

3. A postconviction motion filed in violation of the time restrictions may not be heard unless (1) the factual or legal basis for the claim was unavailable when a timely motion could have been filed, and (2) that but for a violation of the United States Constitution no rational juror could have found the inmate guilty or voted in favor of the sentence of death.

This rule of procedure was passed by the Texas legislature and subsequently upheld by Texas' highest court of criminal appeals against claims that the rule violated the following state and federal constitutional provisions: separation of powers, habeas corpus, ex post facto, equal protection, due process, and Texas' access to the court provision. Ex parte Davis, 947 So.2d 216 (Tx. 1996) 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. The average length of time from the imposition of the sentence to the execution of the death penalty is approximately 9.5 years, compared to 13.98 years in Florida since 1994.

The Texas Court of Criminal Appeals is the state's highest court for criminal cases and hears all capital appeals, including postconviction appeals. This court hears only criminal matters, which may allow it to resolve death-penalty cases expeditiously. The Texas legislature has also limited this court's authority to engage in rule making, which may reduce the number of procedures and delays in capital 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.

Another aspect of Texas capital sentencing law is the setting of execution dates. A death warrant in Texas is issued by the convicting court and is not dependent on an act of the Governor signing a death warrant. In fact, the Governor's power to commute a sentence of death is limited. Article 43.141, Texas Code of Criminal Procedure states that: "The first execution date may not be earlier than the 91st day after the date the convicting court enters the order setting the execution date. A subsequent execution date may not be earlier than the 31st day after the date the convicting court enters the order setting the execution date."

Missouri

The state of Missouri also has very strict time restrictions on postconviction motions. Missouri has a far smaller death-row population than Florida, with 87 people sentenced to death awaiting execution, but the state executed nine offenders in the last two years. Five people sentenced to death were executed in Florida during that same period. Missouri has executed 35 people sentenced to death since 1976. [Death Penalty Information Center, March 25, 1999.]

The Missouri Supreme Court Rules of Criminal Procedure, Rule 24, provides the exclusive procedure for most postconviction claims, including claims of ineffective assistance of counsel. Rule 24 requires collateral motions to be filed within 90 days of the final decision of the appellate court. Failure to file a timely motion constitutes a complete waiver of any right to file a future claim. While successive collateral motions are prohibited in Missouri, extremely limited habeas corpus claims may be made directly to the state supreme court without any time restrictions. Petitions for habeas corpus are only granted for claims that the trial court did not have jurisdiction or that the sentence exceeded the maximum authorized by statute. Habeas corpus proceedings are limited to determining the facial validity of confinement. Sections 532.350 and 532.440, Missouri Statutes.

The Missouri Attorney General's death penalty division informed staff that the Missouri Supreme Court *always* summarily denies untimely claims of ineffective assistance of counsel. The Missouri Supreme Court in Simmons v. White, 866 S.W.2d 443 (Mo. 1993), rejected a petition for habeas corpus even though the court admitted that the evidence supporting the conviction as a persistent offender was inadequate. The court summarized the purpose of habeas corpus for convicted offenders in Missouri as follows:

> A person who has suffered criminal conviction is bound to raise all challenges thereto timely and in accordance with the procedures established for that purpose. To allow otherwise would result in a chaos of review unlimited in time, scope, and expense. In accordance with our previous decisions, habeas corpus is not a substitute for appeal or post-conviction proceedings. Habeas corpus may be used to challenge a final judgment after an individual's failure to pursue appellate and post-conviction remedies only to raise jurisdictional issues or in circumstances so rare and exceptional that a manifest injustice results. Id. at 446.

The Missouri law is particularly significant because habeas corpus is restricted to the same degree as it was in Florida earlier in this century.

Missouri law also provides that the court imposing the death sentence shall set the execution date. In fact, Missouri law requires the sentencing court to "state the conviction and judgment and appoint a day on which the judgment must be executed, *which must not be less than thirty nor more than sixty*

days from the date of judgment, and must direct the sheriff to deliver the defendant, at a time specified in said order, not more than ten days from the date of judgment, to the chief administrative officer of a correctional facility of the department of corrections, for execution." Section 546.680, Missouri Statutes.

That state's law further provides that " [w]henever, for any reason, any convict sentenced to the punishment of death shall not have been executed pursuant to such sentence, and the cause shall stand in full force, the supreme court, or the court of the county in which the conviction was had, *on the application of the prosecuting attorney*, shall issue a writ of habeas corpus to bring such convict before the court. . . ." Section 546.700, Missouri Statutes. The prosecuting attorney has the lawful authority to essentially require the court to set another execution date after all appeals are exhausted: "[u]pon such convicted offender being brought before the court, they shall proceed to inquire into the facts, and if no legal reasons exist against the execution of sentence, such court shall issue a warrant to the director of the department of corrections, for the execution of the prisoner at the time therein specified, which execution shall be obeyed by the director accordingly." Section 546.710, Florida Statutes.

B. EFFECT OF PROPOSED CHANGES:

HB 2039 would establish absolute time limitations in death-penalty "postconviction" appeals in capital cases in order to reduce delays. Since 1994, delays in cases resulting in execution have averaged well over 13 years. The last execution in Florida was one year ago, when Daniel Remeta was executed on March 31, 1998.

As noted in the Present Situation section, postconviction appeals are required by rule to focus on limited issues, because a person sentenced to death has already had an opportunity to raise legal issues before trial, during trial, and on the first "direct" appeal to the Florida Supreme Court and United States Supreme Court. A postconviction, or "collateral" appeal should be a limited inquiry, as it attempts to overturn a presumptively-valid death sentence that has previously been upheld by the Florida Supreme Court and usually the United States Supreme Court. In Florida, however, postconviction appeals have become far more time consuming than the actual trial and initial appeal, which should be the central focus in a criminal case. This is not the case in states such as Texas and Virginia, where delays such as occur in Florida are generally not permitted.

The bill requires the person sentenced to death to "demonstrate by clear and convincing evidence that but for the alleged collateral [postconviction] error, the outcome of the trial or the penalty phase would have been different." The bill prohibits the consideration of any claim that "could have been raised at trial or, if properly preserved, on direct appeal." Any claim in violation of this prohibition is deemed denied as a matter of law "and may not be considered by any state court."

HB 2039 attempts to eliminate the excessive delays in capital cases in Florida by imposing absolute time limitations and by limiting postconviction appeals in state court. The bill allows a person sentenced to death to file one **timely** "round" of postconviction appeals in state and federal courts. The bill still allows the death-row inmate an opportunity to file a postconviction appeal in the trial court, the Florida Supreme Court, the federal district court, and possibly the federal appeals court and the United States Supreme Court. These appeals are in addition to the trial and direct appeal in which the defendant's death sentence was upheld. However, the bill requires postconviction review on the state level to meet absolute time deadlines. If the time deadlines are not met, then the death-sentenced person's legal challenge to his or her conviction must be denied by operation of law and all arguments in support of overturning the sentence shall be considered waived. HB 2039 authorizes a 30-day extension of time for good cause shown for the delay.

The bill requires that postconviction legal actions in a capital case must be filed, considered and resolved within strict time limitations, including the following:

1. **Within 15 days after imposing a sentence of death**, a trial court must appoint postconviction legal counsel to represent the death-sentenced convicted murderer;

2. **Within 30 days after the Florida Supreme Court upholding a death sentence**, the defendant's postconviction lawyer must file the postconviction appeal in the trial court. [This time

limitation is expected to be revised by an amendment requiring the postconviction appeal to be filed within six months of the filing of the defendant's brief on the first, "direct", appeal.]

3. **Within 90 days after the Florida Supreme Court upholds the death sentence**, the defendant must file any postconviction claim that the defendant's lawyer on appeal provided incompetent ["ineffective"] legal representation.

4. **Within 30 days after the state responds to the defendant's postconviction appeal,** the trial court must conduct an evidentiary hearing.

5. **Within 10 days after that hearing,** the trial court must grant or deny the appeal.

6. **Within 90 days after the trial court rules on the postconviction appeal,** the Florida Supreme Court must rule on the case or return it to the trial court for factual findings.

7. If the Florida Supreme Court remands the postconviction appeal to the trial court for further findings, that court must make those findings within **30 days.** The Florida Supreme Court must render a decision within **60 days** after receiving those findings.

In cases where the death-sentenced person is represented by private counsel, the bill authorized payment of those hours incurred by the counsel, not to exceed the maximum amounts defined in Section 27.711, Florida Statutes.

The bill imposes the same time limitations to capital postconviction cases already in progress when the bill becomes law. The person sentenced to death must file the postconviction appeal "within 180 days" after the bill becomes law. It allows the court to grant one postponement of 30 days in the case. The bill requires all findings and rulings within the same time limitations as set forth for postconviction cases filed after the bill becomes law. As in cases filed after the effective date, claims of inability to meet the time limitation or claims made for public records do not constitute grounds for delay. The bill declares that any postconviction motions filed in violation of the time limitations must be deemed denied as a matter of law. In cases where the death-sentenced person is represented by private counsel, the bill authorized payment of those hours incurred by the counsel, not to exceed the maximum amounts defined in Section 27.711, Florida Statutes.

HB 2039 clearly states in several sections that no state resources, which would include court resources, could be expended in filing or considering a postconviction appeal in violation of the provisions of the act. The bill states that no claim of a postconviction attorney to meet the deadlines shall constitute grounds for delay. Claims for additional public records shall not constitute grounds for delay under the bill.

The bill also declares that no state employee or contracting party with the state may file a second round of postconviction appeals in a capital case. HB 2039 prohibits the use of state resources for a second postconviction appeal. The bill requires the Attorney General to notify the Speaker of the House and the President of the Senate and the Commission on the Administration of Justice in Capital Cases regarding any attempt by a state employee, contracting party, or any other person receiving state compensation, to file a second postconviction appeal in a capital case.

HB 2039 repeals Florida Rule of Criminal Procedure 3.851. It also repeals Florida Rule of Criminal Procedure 3.850 to the extent that the rule is inconsistent with the act.

This bill attempts to significantly reduce delays in capital cases by expediting the postconviction judicial review process. If the bill passed, and if the time limitations in the act were followed by the courts, the bill would reduce delays. Today, state postconviction review in capital cases generally lasts for several years after a person's death sentence has been upheld by the Florida Supreme Court.

As previously noted, as of November 13, 1998, 256 convicted murderers sentenced to death in Florida were sentenced over five years ago. 182 of these cases were awaiting the resolution of state postconviction judicial review. This stage of judicial review is also the process that appears most amenable to improvement by the legislature. [See, *"Interim Report on Reducing Delays in Capital Cases,"* Appendix 4.]

Currently, the courts have not required persons sentenced to death to significantly comply with time limitations provided in general law or in court rules. Although the law purports to impose a one-year time limitation on the filing of the postconviction appeal in the trial courts, the Florida Supreme Court has waived this limitation for death-sentenced persons. Furthermore, even when this time limitation is met, the death-sentenced person often "reserves" the right to file amendments to his or her postconviction appeal, raising more legal arguments or factual claims. This results in further delays in postconviction appeals. Other significant causes of delay are public-records litigation.

HB 2039 attempts to impose effective time limitations on the filing and consideration of postconviction appeals, and to expedite the process by requiring the person challenging their death sentence to immediately raise all postconviction arguments after the death sentence is imposed. This would essentially establish two parallel appeal avenues that the death-sentenced person could pursue. The death-sentenced person's "direct" appeal lawyer would challenge the jury verdict and sentence in the Florida Supreme Court, while the person's postconviction lawyer would attempt to convince the trial court that collateral issues, such as the trial lawyer's competence, required a new trial or penalty phase. This process would more effectively utilize the time required by the Florida Supreme Court for the direct appeal, by requiring that all postconviction appeals be simultaneously filed and considered.

This type of parallel judicial review is currently utilized in Texas and Missouri, although the time limitations are not identical. The Texas law requires the death-sentenced person to file a postconviction appeal sooner than HB 2039 would require. The Missouri law imposes similar time limitations to the procedures provided in HB 2039.

There are substantial advantages of utilizing the same time period for direct and postconviction judicial review. The postconviction claims are filed and heard when the trial and sentencing are recently completed, ensuring that all arguments are raised while the facts of the case are fresh within the witnesses' memory and the evidence is not stale. HB 2039 requires the state attorney to provide the postconviction lawyer with the documents and discovery filed in the case. The death-sentenced person's postconviction lawyer does not have to recreate a record of a case that is several years old. Most importantly, allegations against the person's defense-trial attorney can be raised and resolved quickly, rather than years after the trial.

The other significant advantage would be the increased finality in criminal judgments and sentences in capital cases. A prompt direct and postconviction judicial review would enhance the reliability and certainty that a death sentence would not be endlessly challenged for five, ten, or fifteen years in the state courts. Judicial review of capital cases in state court could be completed within a more reasonable time which would also provide more assurance to victims' families and the people of the state that justice was provided in capital cases.

The disadvantage for requiring parallel direct and postconviction judicial review could be that the person sentenced to death may prevail in his direct appeal to the Florida Supreme Court, rendering the postconviction proceedings moot. Many death-penalty cases are reversed by the Florida Supreme Court or returned to the trial court for a new trial or sentencing proceeding. However, this does not necessarily mean the postconviction proceedings were futile or a waste of resources. For example, if the postconviction lawyer promptly convinces the trial court that a new trial is required, it could save judicial resources that would have been expended by the Florida Supreme Court in deciding the direct appeal. Furthermore, the postconviction lawyer could indirectly provide assistance to the death-sentenced person's direct appeal lawyer, resulting in an advantage to the person challenging his sentence. This benefit could be limited, however, if the postconviction lawyer chose to later challenge the direct appeal lawyers' efforts.

The resources expended by the state in responding to postconviction claims, even in cases where the sentence is overturned on appeal, could also be utilized by the state attorney or the Attorney General, if the case is returned to the trial court for a new trial or sentencing proceeding. Furthermore, if the defendant successfully obtains a life sentence, rather than death, he or she is still likely to file a postconviction appeal. Thus, the postconviction judicial review would have been required anyway, rendering the proceeding useful to the courts, the defendant, and the state.

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 ANALYSIS:

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

III. FISCAL ANALYSIS & 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:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

   See Fiscal Comments.

2. Direct Private Sector Benefits:

   See Fiscal Comments.

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

   See Fiscal Comments.

D. FISCAL COMMENTS:

Fiscal impact.

HB 2039 would require the trial court to appoint a postconviction lawyer within 15 days after the court sentenced the defendant to death. To ensure that the death-sentenced person is provided prompt postconviction legal representation, the bill authorizes the trial court to appoint private counsel or the office of a Public Defender who did not represent the defendant during the trial.

That attorney then has to research, investigate and file the postconviction appeal within 30 days after the Florida Supreme Court upholds the death sentence. [An amendment by the sponsor is expected to revise this deadline, and require the postconviction appeal to be filed within 180 days of the date the initial brief is filed.] Currently, Florida Rule of Criminal Procedure 3.851, and Section 924.055, Florida Statutes, requires these appeals to be filed **within one year** after the death sentence becomes final. This current time limit is not enforced in those cases in which the state agencies representing the defendant claim they cannot meet the deadline. In practice, the courts often allow the death-sentenced person to amend their postconviction appeals, as well, further delaying the process and avoiding the time limitation. [See, In Re Rule of Criminal Procedure 3.851 and Rule 3.850, 708 So. 2d. 912 (Fla. 1998) (Wells, J., dissenting.).]

Providing postconviction legal representation to indigent persons sentenced to death does impose a fiscal impact on the state. In 1985, the Florida Legislature created the Office of the Capital Collateral Representative to represent indigent death-row inmates in collateral actions, "...so that collateral [postconviction] legal proceedings.... may be commenced in a timely manner...." Section 27.7001, Florida Statutes. In fiscal year 1987-88 , the Legislature appropriated **$1.411 million dollars** for this program. This fiscal year the Legislature appropriated **$6.26 million** dollars for the postconviction representation of approximately 235 death-row inmates, including $500,000 for private legal representation. Since fiscal year 1987-88, the Florida Legislature has appropriated over $35 million dollars to provide lawyers for death-sentenced persons to file postconviction appeals. Florida has done more to provide capital postconviction legal representation than any other state in the nation, according to the McDonald Commission Report.

There will be some additional fiscal impact of HB 2039 by providing postconviction legal representation in every case in which a death sentence is imposed, before the Florida Supreme Court upholds the death sentence. However, if the courts follow the time limitations of HB 2039, and postconviction appeals are not allowed to linger in the courts for years, the fiscal impact of HB 2039 could be minimal. For example, if HB 2039 required that twice as many attorneys be appointed in postconviction capital cases, but those cases were resolved much faster, the state agencies providing that representation would not be expending the same resources per case. If the law imposed an absolute time limit, after which the state agency could not expend resources, it is expected that the agency would not expend the same time and resources on the case. Rather than pursuing public records for years and years, for example, the state agency would promptly review the trial record soon after the death sentence was imposed, make the limited postconviction arguments legitimately available to the agency, and take no further action. This expedited process could result in substantial savings which could in turn balance out the additional costs required in appointing postconviction lawyers sooner in the judicial process. Staff is unable to quantify the precise fiscal impact, however.

The Department of Legal Affairs indicates that the bill does not have an impact on that agency.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill is exempt from the requirement of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise the revenues in the aggregate.

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

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

Contracting Private Attorneys

In 1998, the Legislature enacted further reforms to expedite the filing of postconviction appeals in capital cases, by authorizing the utilization of private legal counsel. When the offices of the Capital Collateral Regional Counsel fail to timely represent a death-sentenced convicted murderer, the new law required the appointment of private legal counsel. Chapter 98-197, Laws of Florida. This law established a detailed payment schedule and time limitations for the performance of legal representation in a capital postconviction proceeding. [See attached fee schedule.] This reform may already be providing more timely legal representation. See, *"More Private Bar Involvement Speeds Death Penalty Appeals,"* The Florida Bar News, Nov. 15, 1998;

When the Capital Collateral Regional Counsel failed to timely file a notice of representation for convicted mass murderer Danny Rolling, this law authorized appointment of private counsel. In the Rolling case, the use of private legal counsel greatly expedited the postconviction legal appeals process. The Capital Collateral Regional Counsel's office failed to timely provide legal representation to Rolling. That office claimed it could not take on the Rolling case and file any postconviction appeal until December 2001. Based on typical delays in these cases, that office would not have likely filed the appeal until the year 2002.

Under the 1998 privatization law, the Rolling case was removed from the state agency and private attorney Baya Harrison was appointed on August 27, 1998. On November 13, 1998, in less than three months, Mr. Harrison filed a postconviction appeal on behalf of Rolling. Had this case not been assigned to private counsel, it would have remained in legal limbo for at least another three years, while the courts waited for Rolling to be provided postconviction legal counsel. To staff's knowledge, no postconviction appeal has been filed as promptly as the Rolling pleading was filed by Mr. Harrison. In fact, Mr. Harrison has filed another postconviction motion almost as promptly as he filed the Rolling appeal. Mr. Harrison was appointed to represent Warfield Wilke on August 27, 1998, and filed the postconviction appeal on January 8, 1999.

As of February 1, 1999, 94 attorneys had agreed to represent indigent death-row inmates in capital cases. These lawyers average over 17 years of legal experience. Approximately 40 cases have been assigned to private counsel under the 1998 legislation, and another 17 cases have been assigned to private counsel by the Capital Collateral Regional Counsel. Approximately 225 other death-sentenced convicted murderers have been assigned to these three state agencies for postconviction legal representation. The following indicates how privatizing private attorneys may be cost effective:

1. It now costs approximately $25,000 per case per year for the state agencies to provide postconviction capital legal representation;

2. Capital postconviction cases take approximately seven years for resolution, during which time the state agencies are responsible for those cases, equaling $175,000 per case.

3. Private legal representation of capital postconviction cases costs cannot exceed $84,000 per case, regardless of delays in the courts.

The three Capital Collateral Regional Counsel recently provided staff with annual statistics regarding their significant work products representing indigent convicted murderers sentenced to death in postconviction legal proceedings. The Northern Regional Counsel's office reported the following significant legal actions in fiscal year 1998-99:

1. Three final postconviction appeals in circuit court;

2. Five evidentiary hearings conducted;

3. Four oral arguments in the Florida Supreme Court

4. Eight briefs filed in the Florida Supreme Court;

5. Three postconviction appeals in the lower federal courts;

6. Three briefs filed in the federal appeals court and one oral argument;

7. One brief filed in the United States Supreme Court.

This work was performed by a state agency employing nine attorneys that have essentially completed 28 significant legal "steps" in the capital postconviction process. [This is not to imply that other work was not performed by these attorneys. This analysis is based on certain "landmark" steps during the postconviction process.] This roughly equates to approximately three significant legal actions per lawyer [Oral arguments are generally not nearly as time consuming as preparing a brief or postconviction appeal, but the arguments will be considered a significant legal action for purposes of this informal analysis.] . This "ratio" holds fairly consistent with the Middle Regional Counsel.

One private attorney alone, Baya Harrison, has filed two postconviction appeals in circuit court, usually the most time-consuming step in this process, in less than five months, at less cost than the state agency expends which also provides this service. Of course, not all private attorneys are as productive or efficient as Baya Harrison appears to be in this legal specialty. However, his performance demonstrates that attorneys can provide prompt postconviction legal representation to indigent convicted murderers sentenced to death, at much less cost than that service is now provided by state agencies.

The recent privatization of this service has demonstrated that with the proper fee schedules and with payment based solely on performance, attorneys can and will meet strict time limitations and provide prompt and professional legal representation. Thus, under HB 2039, there is cause to believe that, even if the state agencies do not or cannot meet time limitations, private attorneys can and will meet those time limitations.

The following is a summary of the constitutional issues that may be raised by the bill:

Habeas Corpus

The most serious legal challenge that may be raised against legislation limiting a death-sentenced person's ability to file postconviction motions is whether such a law would be a violation of the habeas corpus provision in the Florida Constitution. 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 provides:

The writ of habeas corpus shall be grantable of right, freely and without cost. It shall be returnable without delay, and shall never be suspended unless, in case of rebellion or invasion, suspension is essential to the public safety.

Article 1, Section 9 of the United States Constitution in part provides:

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

History of Habeas Corpus in Federal Court

The writ of habeas corpus originally existed in the United States to prevent arbitrary detention without trial. The Writ did not authorize the review of 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 authorize collateral attacks [postconviction motions] against a judgement and sentence 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.

In Felker the Court reviewed the history of habeas in order to demonstrate that habeas may be regulated by statute without violating the Constitution:

It was not until 1867 that Congress made the writ generally available in "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States...And it was not until well into this century that this Court interpreted that provision to allow a final judgment of conviction in a state court to be collaterally attacked on habeas. See, e.g., *Waley v. Johnston*, 316 U.S. 101...Id. S.Ct. at 2340.

At common law, and until 1944, a federal habeas corpus action had to be brought in he 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 then 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 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, 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.

The scope of habeas corpus in Florida had been gradually expanded by the Florida Supreme Court before the adoption of Rule 1. Early in Florida's history, there were only four legal issues that could be remedied by 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 county in which the court is located.]

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. The statute under which the inmate is being held is unconstitutional.

Grebstein v. Lehman, 129 So. 818 (1930); Re Theisen, 11 So 901 (1882); see 28 Fla. Law Jur. 2d at 424 n.2.

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 relating to how habeas corpus is not limited to jurisdictional issues:

> Jurisdiction of the person and of the subject matter is not alone conclusive [as to whether an inmate should be released for filing a petition for habeas corpus, 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)(emphasis added).

In Sneed, the Florida Supreme Court plainly relied on 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.

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, perhaps even for successive postconviction motions, on the state

level. The Florida Supreme Court has cited federal law to imply that the state rule of procedure for postconviction motions 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 relies on a quote from 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 Florida's modern postconviction rule of procedure, 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 United States Supreme 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. In other words, the Florida Supreme Court relied on a statement made by the United States Supreme Court to authorize the state rule for postconviction motions. However, the federal case relied upon actually stands for the opposite conclusion, namely, that postconviction motions are not permitted without statutory authority.

Florida Statutes Relating to Habeas Corpus

Florida has a statute relating to the application for writ of habeas corpus 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," which dates back to 1822 when Florida was a territory. "Detained without authority" could be interpreted to mean imprisoned without effective assistance of counsel, for example.

Authority for the regulation of habeas corpus by statute is mixed. Generally, the authority of the courts to hear any issue is established by the constitution not the legislature, but the legislature does have some control over the court's ability to hear issues such as when a new crime or a new cause of action is created. If the court's ability to hear postconviction motions has been expanded beyond the requirements of the habeas corpus provision in the state constitution, then the legislature may restrict the court's ability to hear postconviction motions. Statutes are controlling over court created laws, 1 Fla. Jur. 2d sect. 38, and court rules of procedure may be repealed by a two-thirds vote of the legislature. However, there are limits to how much the legislature may restrict or regulate habeas corpus. For example, the Florida Supreme Court in Sullivan v. State, 44 So.2d 96 (Fla. 1950), stated that "the legislature could not alter the scope of habeas corpus." But that statement related to an attempt by the legislature to use habeas corpus as a vehicle to bypass the lower courts. The court's statement also presumes that habeas corpus, as it existed at the time of the opinion, was within the parameters of its constitutional meaning.

In Kalway v. Singletary, 708 So.2d 267 (Fla. 1998), the Florida Supreme Court upheld a statutory 30 day time limit on when an inmate may file a court action challenging prisoner disciplinary proceedings. The late-filed court action in Kalway was a writ of mandamus which, like habeas corpus, is an old common law writ. The Florida Supreme Court held that the statute limiting court action did not violate the separation of powers clause. In other words, any interference with the authority of the court was not sufficient to be unconstitutional. The court in Kalway noted that the two branches of government can work hand-in-hand to promote the public good or implement the public will. To further support the authority of the legislature to implement the 30 day time restriction in Kalway, the court quoted another case where the Florida Supreme Court deferred to the legislature in a matter relating to the constitutional right to appeal:

[W]e believe that the legislature may implement this constitutional right [to appeal] and place reasonable conditions upon it so long as they do not thwart the litigants' legitimate rights. Of course, this Court continues to have jurisdiction over the practice and procedure relating to appeals.

Kalway v. Singletary, 708 So.2d 267 (Fla. 1998); quoting Amendments to the Florida Rules of Appellate Procedure, 685 So.2d 773 (Fla. 1996).

State Right to Petition for Habeas Corpus

If the Florida Supreme Court is confronted with the issue of whether a statute may limit collateral proceedings, the court may rule that the statute is unconstitutional to the extent that it impinges on the right to habeas corpus. The court would 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 Florida Supreme Court determines that the meaning of the constitutional provision has expanded in the last 40 years, then the court may determine that the bill violates the habeas corpus provision in the state constitution. 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 limiting collateral review will take precedence and should 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 broadly interpreting habeas corpus beyond the original intent of the people of Florida. If the Supreme Court decided 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 submit a proposed constitutional amendment to the voters to overrule the court, as the 1998 Legislature did when it approved HJR 3505 for submission to the voters. That proposed amendment was overwhelmingly approved and now limits the Florida Supreme Court's authority to review the constitutionality of capital punishment methods. The 1982 Legislature also submitted a proposed state constitutional amendment to the voters to limit the Florida Supreme Court's authority to invalidate searches and seizures by law enforcement officers. That proposed amendment was also approved by the voters.

As discussed in part III, other states, including Virginia, Texas, and Missouri have been successful in placing strict restrictions on state habeas. Texas does have a provision in its constitution providing that "the Legislature shall enact laws to render [habeas corpus] the remedy speedy and effectual." However, Virginia, and Missouri do not have similar provisions in their constitutions, and their restrictions on Habeas Corpus are among the most restrictive in the country.

Right to Counsel

In State ex rel. Butterworth v. Kenny, 714 So.2d 404 (Fla. 1998), the Florida Supreme Court held that a defendant does not have a constitutional right to representation in postconviction relief proceedings even when the defendant is sentenced to death. The Court in Kenny noted that there is a statutory right to representation to ensure meaningful access to the courts and to ensure that the death penalty process is lawful. The Florida Supreme Court has followed the lead of the United States Supreme Court which has spoken very clearly on this issue:

> 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.

Murray v. Giarratano, 492 U.S. 1, 8 (1989), *quoting*, Pennsylvania v. Finley, 481 U.S. 551, 556-7 (1989).

There is legal authority in Florida 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. Akers, __ So.2d __ (Fla. 1998). However, the Florida Supreme Court in Weeks and Graham relied on a federal circuit court decision for the proposition that the United States Constitution's Fifth Amendment due process clause may impose a right to counsel in meritorious postconviction motions. That federal decision is no longer good law, and the states have absolutely no federal obligation to provide counsel for postconviction motions. Murry v. Giarratano, 492 U.S. 1 (1989).

The Florida courts have never faced a statute that unequivocally prohibited the courts from appointing counsel funded by the State. However, the recent Florida Supreme Court in Russo indicates that a statute

that completely precludes the court from appointing state funded attorneys would be unconstitutional as mandated by Weeks and Graham. Of course, Weeks and Graham rely on an interpretation of the federal constitution. If the Florida Supreme Court were to hold a statute directly on point to be unconstitutional, the Court would have hold that the identical due process clause in the state constitution is broader than the federal constitution's due process clause. It is possible that the Florida Court could hold that the state constitution provides more rights than the federal constitution even though the language is the same. 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).

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 could be violated by attempts to limit state postconviction judicial review because such limits would "close the court house door" for lawful claims. 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 of the State of Florida, or where such right has become a part of the common law of the State pursuant to Section 2.01, Florida Statutes. 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, and 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, 630 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 legislation, then the Florida Supreme Court may still consider the legislation constitutional if either:

1. There is a reasonable alternative to protect that preexisting right of access, such as further review in the federal courts; **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.

An argument can be made that strict limits on the filing of postconviction motions would meet both of the above requirements.

Ex Post Facto

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 109, 112 (Fla. 1996), cert. denied, --- U.S. ----, 117 S.Ct. 1018, 136 L.Ed.2d 894 (1997), citing, California Dep't of Corrections v. Morales, 514 U.S. 499, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995).

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, limiting available state postconviction review, or placing absolute time limits on state collateral review should not be considered an ex post facto law. See Johnson v. State, 536 So.2d 1009 (Fla. 1988)(application of two-year bar for filing of postconviction motions does not violate ex post facto where inmate was given two years to file motions after the rule was promulgated). However, an argument would likely be raised that such limits would somehow increase punishment by retroactively limiting a death-sentenced person's opportunity to raise such claims.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON CRIME AND PUNISHMENT:

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