

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/CS/SB 2054

SPONSOR: Senate Judiciary Committee and Senator Burt

SUBJECT: Capital collateral representation -- registry of attorneys

DATE: April 16, 1999                      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Gomez</u>	<u>Cannon</u>	<u>CJ</u>	<u>Favorable/CS</u>
2.	<u>Forgas</u>	<u>Johnson</u>	<u>JU</u>	<u>Favorable/CS</u>
3.	<u>Mannelli</u>	<u>Hadi</u>	<u>FP</u>	<u>Fav/3 amendments</u>
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

**I. Summary:**

The Capital Collateral Regional Counsel (CCRC) represents all death-sentenced inmates on collateral actions challenging the legality of the judgement and sentence in the state and federal courts. The 1998 Legislature created a statewide registry of private criminal defense attorneys to supplement the CCRC system and serve as a “backup” by alleviating any case backlog. This bill makes various technical, clarifying, and substantive changes to the attorney registry statute. Among the highlights:

- ▶ Increases from \$10,000 to \$20,000 the cap on fees an attorney is entitled to receive after the trial court issues a final order granting or denying the capital defendant’s motion for postconviction relief. This increase is designed to adequately compensate an attorney for work done in preparing for and conducting a postconviction hearing.
- ▶ Creates a new fee category which authorizes payment to the attorney for \$100 per hour, up to a maximum of \$10,000 after the trial court issues an order pursuant to a remand from the Supreme Court, which directs the trial court to hold further proceedings on the capital defendant’s motion for postconviction relief. Such a proceeding is not routine and it is not expected that many of the registry attorneys will seek payment under this provision.
- ▶ Increases from \$5,000 to \$15,000 the cap on miscellaneous expenses, such as the cost of preparing transcripts, compensating expert witness, and copying documents.
- ▶ Provides that the court shall monitor the performance of registry attorneys to ensure that the capital defendant is receiving quality representation.
- ▶ Provides that the attorney registry provisions apply to private counsel appointed due to a conflict of interest for the CCRC pursuant to s. 27.703, F.S.

This bill takes effect on July 1, 1999.

This bill substantially amends the following sections of the Florida Statutes: 27.703, 27.710, 27.711.

**II. Present Situation:**

**A. Overview of death penalty proceedings**

After a defendant has been sentenced to death, he or she is entitled to challenge the conviction and sentence in three distinct stages. First, the public defender or private counsel is required to file a *direct appeal* to the Florida Supreme Court. An appeal of the Florida Supreme Court's decision on the direct appeal is to the United States Supreme Court by *petition for certiorari*.

Second, if the U.S. Supreme Court rejects the appeal, *state postconviction* proceedings or *collateral review*, begins. The Capital Collateral Regional Counsel (CCRC) represents defendants in postconviction proceedings.

State postconviction proceedings are controlled by Rules 3.850 and 3.851, Florida Rules of Criminal Procedure. Unlike a direct appeal which challenges the legal errors apparent from the trial transcripts or record on appeal, a postconviction proceeding is designed to raise claims which are collateral to what transpired in the trial court. Consequently, postconviction proceedings usually involve three categories of claims:

- ▶ ineffective assistance of trial counsel,
- ▶ *Brady* violations, *i.e.*, a due process denial from the prosecution's suppression of material, exculpatory evidence, and
- ▶ newly discovered evidence, for example, post-trial recantation by a principal witness.

Since the consideration of these claims require new fact-finding, Rules 3.850 & 3.851 motions are filed in the trial court which sentenced the defendant to death. Appeals from Rules 3.850 & 3.851 motions are to the Florida Supreme Court. (At this point, the CCRC, in a writ of habeas corpus, usually will raise the claim of ineffective assistance of appellate counsel for the direct appeal.)

The third and what is intended to be the final stage is federal habeas corpus, a proceeding controlled by 28 U.S.C. s. 2254 (a). Federal habeas allows a defendant to petition the federal district court to review whether the conviction or sentence violates or was obtained in violation of federal law. Federal habeas is limited to consideration of claims previously asserted in direct appeal or in state postconviction proceedings. Appeals of federal habeas is to the Circuit Court of Appeals and then to the United States Supreme Court.

Finally, once the Governor signs a death warrant, a defendant will typically file a second Rule 3.850 motion and a second federal habeas petition along with motions to stay the execution.

## **B. Capital Collateral Regional Counsel**

As described above the Capital Collateral Regional Counsel (CCRC) represents all death sentenced inmates on collateral actions challenging the legality of the judgement and sentence in the state and federal courts. s. 27.702(1), F.S. There are three CCRC offices which function independently -- Northern Region (Tallahassee), Middle Region (Tampa), and Southern Region (Miami). s. 27.701, F.S.

The CCRC represents defendants sentenced within his or her region. In the event that a CCRC has a conflict of interest with a client, the sentencing court may designate another CCRC or private counsel to represent the defendant. s. 27.703, F.S. Subsection (2) of s. 27.703, F.S., provides for payment of the private counsel of up to \$100 per hour but does not incorporate the fee schedule contained in s. 27.711, F.S.

The CCRCs are appointed by the Governor from a list of three qualified candidates selected by the Supreme Court Judicial Nominating Commission. s. 27.701, F.S. The CCRCs serve 3 year terms and are subject to confirmation by the Senate. *Id.* The 1997 Legislature created the regional offices. ch. 97-313, L.O.F. Prior to 1997, one capital collateral representative represented all death sentenced inmates.

Each CCRC is required to provide a quarterly report to the Legislature's presiding officers and the Commission on the Administration of Justice in Capital Cases. The report details the number of hours worked by investigators and legal counsel per case and the amount per case expended during the preceding quarter in investigating and litigating capital collateral cases. s. 27.702 (4), F.S. The 6 member Commission (its members are appointed by the presiding officers and the Governor), is charged with reviewing the administration of justice in capital collateral cases and the operation of the CCRCs. s. 27.709 (2), F.S.

## **C. Attorney registry for postconviction representation**

The 1998 Legislature created a statewide registry of private criminal defense attorneys to supplement the CCRC system and serve as a "backup" by alleviating any case backlog. ss. 27.710 and 27.711, F.S. Backlog cases are those which are ready for the postconviction process to begin, yet no attorney is assigned to the case.

*Attorney appointment.* The executive director of the Commission on the Administration of Justice in Capital Cases compiles and maintains the statewide attorney registry. Under s. 27.710 (5), F.S., an attorney from the statewide registry is appointed by the trial court that sentenced the defendant when it is notified by the executive director. The executive director is authorized to notify the trial court when he or she has been notified by the Attorney General of one of the following events:

- ▶ 91 days have lapsed since the Supreme Court issued a mandate on a direct appeal or the U.S. Supreme Court has denied a petition for certiorari (whichever of these two is later);  
*or*
- ▶ a person under sentence of death who was previously represented by private counsel is currently unrepresented in a postconviction capital collateral proceeding; *or*

- ▶ the trial court issues an order finding that 1 year and 1 day have elapsed since the period for filing a postconviction motion commenced, and the defendant's complete original motion has not been filed in the trial court.

*Attorney qualifications.* To be eligible for the registry, an attorney must meet the qualifications specified in s. 27.704 (2), F.S., for private counsel who represent death-sentenced defendants in capital collateral proceedings. That is, the attorney must have at least 3 years experience in the practice of criminal law, and must have participated in at least five felony jury trials, five felony appeals, or five capital postconviction evidentiary hearings or any combination of at least five such proceedings.

*Attorney limitations.* Certain limitations are placed on attorneys who are appointed pursuant to the registry statute:

- ▶ an attorney may not represent more than 5 capital defendants at any one time,
- ▶ an attorney may not file repetitive or frivolous pleadings that are not supported by law or facts,
- ▶ an attorney may not represent the death-sentenced defendant during a retrial, a resentencing proceeding, or a proceeding commenced under ch. 940 (executive clemency),
- ▶ an attorney may not represent the death-sentenced defendant in a proceeding challenging a conviction or sentence other than the conviction and sentence of death for which the appointment was made, or
- ▶ an attorney may not represent the death-sentenced defendant in any civil litigation other than habeas corpus proceedings.

*Attorney contract.* Immediately after appointment by the trial court that sentenced the defendant to death, the attorney must file a notice of appearance with the trial court indicating acceptance of the appointment. s. 27.711 (2), F.S. The attorney must specify that he will represent the defendant throughout all postconviction capital collateral proceedings or until released by order of the trial court. *Id.* Additionally, the attorney must enter into a contract with the Comptroller. s. 27.710 (4), F.S. The executive director of the Commission on the Administration of Justice in Capital Cases develops the form of the contract and the Comptroller functions as contract manager and enforces performance of the terms and conditions of the contract. *Id.*

*Fee and Payment schedule.* Section 27.711 (4), F.S., provides a fee and payment schedule. Upon approval by the trial court, and after certain stages in litigation are complete, a registry attorney is entitled to payment by the Comptroller, as follows:

- ▶ \$100 per hour, up to a maximum of \$2,500 upon accepting the appointment and filing the notice of appearance,
- ▶ \$100 per hour, up to a maximum of \$20,000 after timely filing in the trial court the capital defendant's complete original motion for postconviction relief,
- ▶ \$100 per hour, up to a maximum of \$10,000 after the trial court issues a final order granting or denying the defendant's motion for postconviction relief,

- ▶ \$100 per hour, up to a maximum of \$4,000 after timely filing in the Supreme Court the defendant's briefs that address the trial court's final order granting or denying the defendant's motion for postconviction relief and the state petition for writ of habeas corpus,
- ▶ \$100 per hour, up to a maximum of \$20,000 after the appeal of the trial court's denial of the defendant's motion for postconviction relief and the defendant's state petition for writ of habeas corpus becomes final in the Supreme Court,
- ▶ \$100 per hour, up to a maximum of \$2,500 at the conclusion of the defendant's postconviction capital collateral proceeding in state court and after filing a petition for writ of certiorari in the U.S. Supreme Court, and
- ▶ \$100 per hour, up to a maximum of \$5,000 if the U.S. Supreme Court accepts for review the defendant's collateral challenge of the conviction and sentence of death. This payment shall be full compensation for representing the defendant throughout the certiorari proceedings before the U.S. Supreme Court.

In addition, the attorney is authorized to hire an investigator for \$40 per hour, up to a maximum of \$15,000 to assist in the defendant's representation. s. 27.711 (5), F.S.

Finally, the attorney is entitled to a maximum of \$5,000 for miscellaneous expenses, such as transcript preparation, expert witnesses, and copying. s. 27.711 (6), F.S.

### III. Effect of Proposed Changes:

This bill makes various technical, clarifying, and substantive changes to the postconviction attorney registry statute created by the 1998 Legislature in ss. 27.710 and 27.711, F.S., as follows:

- ▶ Specifies that the executive director of the Commission on the Administration of Justice in Capital Cases shall notify the trial court if an appointed attorney fails to execute a contract within 30 days after the date the contract is mailed to the attorney.
- ▶ Clarifies that a registry attorney may designate another attorney to assist him or her so long as the designated attorney meets the attorney qualifications under the statute (see above for description of qualifications).
- ▶ Clarifies an ambiguity in s. 27.711 (4) (a), F.S., by deleting a reference to "retainer fee" and providing that the registry attorney is entitled to fees up to \$2,500 for work done in the early stages of the litigation. This provision does not increase the attorney fees currently authorized for such work.
- ▶ Authorizes the court to pay an attorney for work performed in negotiating for a court hearing or other disposition which in turn makes a post conviction motion unnecessary. Although the state rarely agrees to a resentencing hearing in a death case, it happened

recently in a case handled by a registry attorney. This provision clarifies that it is not necessary for an attorney to actually file a post conviction motion if the parties otherwise dispose of the case.

- ▶ Increases from \$10,000 to \$20,000 the cap on fees an attorney is entitled to receive after the trial court issues a final order granting or denying the capital defendant's motion for postconviction relief. This increase is designed to adequately compensate an attorney for work done in preparing for and conducting a postconviction hearing.
- ▶ Increases from \$4,000 to \$20,000 the fee cap for work done in preparing the appellate briefs to the Supreme Court which address the trial court's order denying or granting the postconviction motion. At the same time, it decreases, from \$20,000 to \$4,000 the fee cap for work done (preparing and delivering the oral argument), after the Supreme Court decides the appeal. These changes merely reverse the fee caps for appellate representation and will not result in a net increase in fees paid to registry attorneys. These changes are designed to modify the payment schedule so that it accurately reflects that the bulk of the attorney's work is done in preparing the appellate briefs and not in preparing the oral argument.
- ▶ Creates a new fee category which authorizes payment to the attorney for \$100 per hour, up to a maximum of \$10,000 after the trial court issues an order pursuant to a remand from the Supreme Court, which directs the trial court to hold further proceedings on the capital defendant's motion for postconviction relief. Such a proceeding is not routine and it is not expected that many of the registry attorneys will seek payment under this provision.
- ▶ Increases from \$5,000 to \$15,000 the cap on miscellaneous expenses, such as the cost of preparing transcripts, compensating expert witness, and copying documents. Provides that an attorney is entitled to payment in excess of the \$15,000 cap if the court finds that extraordinary circumstances exist.
- ▶ Provides that an attorney who is actively representing a capital defendant is entitled to a maximum of \$500 per fiscal year for tuition and expenses for continuing legal education that pertains to the representation of capital defendants.
- ▶ Specifies that an attorney who withdraws from a case must deliver all files, notes, documents, and research to the successor attorney within 15 days after notice from the successor attorney. The successor attorney shall bear the cost of delivery.
- ▶ Provides that the court shall monitor the performance of registry attorneys to ensure that the capital defendant is receiving quality representation. Provides that the Comptroller, the Department of Legal Affairs, the executive director of the Commission on the Administration of Justice in Capital Cases or any interested persons may advise the court of any circumstances that could affect the quality of representation offered by a registry attorney.

- ▶ Clarifies that an attorney working on a pending case who incurs expenses prior to the bill's effective date, will be entitled to payment up to the \$15,000 cap on miscellaneous expenses.

The bill also amends s. 27.703 (2), F.S., to provide that all appointments of private counsel under s. 27.703, F.S., shall be in accordance with the attorney registry provisions contained in ss. 27.710 and 27.711, F.S.

This bill shall take effect on July 1, 1999.

**IV. Constitutional Issues:**

**A. Municipality/County Mandates Restrictions:**

None.

**B. Public Records/Open Meetings Issues:**

None.

**C. Trust Funds Restrictions:**

None.

**D. Other Constitutional Issues:**

Section 27.711 (4), F.S., provides for the hourly rate and maximum compensation of registry attorneys. In *Makemson v. Martin County*, 491 So.2d 1109 (Fla. 1986), the Florida Supreme Court held that a statute which set a maximum fee limitation for compensation to attorneys who were appointed by the court to represent indigent criminal defendants was constitutional, on its face. However, the Court stated that such a statute may be "unconstitutional when applied in such a manner as to curtail the court's inherent power to ensure the adequate representation of the criminally accused." *Id.* According to the Court, "statutory maximum fees, as inflexibly imposed in cases involving unusual or extraordinary circumstances, interfere with the defendant's sixth amendment right 'to have the assistance of counsel for his defense.'" *Id.*; (citation omitted).

Consequently, where unusual or extraordinary circumstances exist, the fees caps established by s. 27.711 (4), F.S., and increased by the provisions of this bill, do not prevent a court from ordering payment above the maximum authorized.

**V. Economic Impact and Fiscal Note:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

Private criminal defense attorneys who are appointed to represent death-sentenced defendants from the statewide registry will experience a positive impact from the fee increases contained in this bill.

**C. Government Sector Impact:**

Currently, there is \$500,000 appropriated for the statewide attorney registry. The payment schedule contained in s. 27.711 (4), F.S., is a tiered maximum fee cap which currently authorizes a registry attorney to collect a total of up to \$64,000 in attorney fees (assuming that the registry attorney seeks payment for the maximum amount authorized at each stage in the litigation) and \$5,000 for miscellaneous costs. This bill would increase the total maximum amount for attorney fees to \$84,000 per case and \$15,000 for miscellaneous expenses. **Note:** Although, the bill provides a total increase of \$20,000 for attorney fees, the \$10,000 authorized for a remand hearing will have a minimal impact. As stated above, such a proceeding is not routine and it is not expected that many of the registry attorneys will seek payment under this provision.

The total impact of these increases is difficult to determine since the number of attorneys who will seek payment up to the maximum amounts authorized is unknown. Also, this bill specifies that the court can exceed that amount in extraordinary cases. However, the Public Safety and Judiciary Conference Committee has recommended an additional \$400,000 for FY 1999-2000.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

#1 by Fiscal Policy:

Renames the "Commission on the Administration of Justice in Capital Cases" as the "Commission on Capital Cases" and changes references thereto.

#2 by Fiscal Policy:



Specifies procedures that must be followed if an private attorney is allowed to withdraw or is otherwise removed from representation of a capital case.

#3 by Fiscal Policy:

Deletes reference to the “Commission on the Administration of Justice in Capital Cases.”

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

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