

STORAGE NAME: h2187.cp

DATE: March 30, 1999

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
CRIME AND PUNISHMENT
ANALYSIS**

BILL #: HB 2187

RELATING TO: Capital Collateral Representation

SPONSOR(S): Committee on Crime & Punishment

COMPANION BILL(S): CS/SB 2054(I)

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

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I. SUMMARY:

The Capital Collateral Regional Counsel (CCRC) represents defendants who have been sentenced to death in postconviction proceedings attacking the legality of the judgment and sentence in state courts and federal courts. In 1998, the legislature created a statewide registry of private criminal defense attorneys to provide representation to indigent defendants in postconviction proceedings when CCRC is unable to do so in a timely manner. HB 2187 makes several changes to the amount of compensation which an attorney appointed from the registry is entitled to receive, as follows:

- Amends section 27.711 to provide that an attorney is entitled to be paid up to \$20,000 rather than \$10,000 after the trial court issues a final order granting or denying the defendant's motion for postconviction relief.
- Provides that the attorney is entitled to be paid a maximum of \$20,000, rather than \$4,000, after timely filing in the Supreme Court the defendant's brief that addresses the trial court's final order granting or denying the defendant's motion for postconviction relief or petition for writ of habeas corpus. Provides that the attorney is entitled to a maximum of \$4,000, rather than \$20,000, after the appeal of the trial court's denial of the defendant's motion for post-conviction relief and the defendant's state petition for writ of habeas corpus become final in the Supreme Court.
- Creates a new section which provides that the attorney is entitled to \$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 defendant's motion for postconviction relief.
- Provides that an attorney who represents a capital defendant is entitled to a maximum of \$15,000 rather than \$5,000 for miscellaneous expenses and \$500 dollars for the costs of continuing legal education. If extraordinary circumstances exist, the attorney is entitled to payment in excess of \$15,000 for miscellaneous expenses.

The section also provides that an attorney withdrawing from a capital case shall deliver all files to the successor attorney within 15 days after notice from the successor attorney. The section also provides that the court shall monitor the performance of assigned counsel to ensure that the defendant is receiving quality representation.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Overview of Appeals in Capital Cases

A defendant who is convicted of a crime in which the death penalty is imposed receives a direct appeal of his or her sentence and conviction to the Florida Supreme Court. Art. V, Section 3(b)(1). At this stage, a capital defendant is represented by the public defender's office, if the defendant is indigent, or by a private attorney. If the Florida Supreme Court affirms the capital defendant's conviction and sentence, a defendant can appeal that decision to the United States Supreme Court by filing a petition for writ of certiorari. If the Supreme Court refuses to hear the defendant's appeal, a defendant is entitled to begin state postconviction proceedings.

State postconviction proceedings are controlled by Florida Rules of Criminal Procedure 3.850 and 3.851. Postconviction proceedings, also known as collateral review, usually involves claims that the defendant's trial counsel was ineffective, claims of newly discovered evidence and claims that the prosecution failed to disclose exculpatory evidence. A rule 3.850 or 3.851 motion is filed in the trial court where the defendant was tried and sentenced. Often, the trial court conducts an evidentiary hearing on the defendant's claims. If the trial court denies the motion for postconviction relief, the defendant then is entitled to an appeal of this denial to the Florida Supreme Court. Generally, the Capital Collateral Regional Counsel (CCRC) represents a indigent capital defendant in postconviction proceedings.

After state postconviction motions have been completed, a capital defendant is entitled to file a petition for writ of habeas corpus in federal court. The federal court reviews whether the conviction or sentence violates federal law. Federal habeas is limited to consideration of claims previously asserted on direct appeal or in state postconviction proceedings. The most common issue raised is whether the defendant's trial counsel was ineffective.

Capital Collateral Regional Counsel

Section 27.701 establishes Capital Collateral Regional Counsel and provides that the office is to represent persons convicted and sentenced to death in postconviction proceedings unless a court appoints or permits other counsel to appear on a defendant's behalf. The statute creates three regional CCRC offices which are located in Tallahassee, Tampa and Miami.

Registry of Private Attorneys

In 1998, the legislature created a statewide registry of private criminal defense attorneys to supplement the CCRC system. The private registry is intended to alleviate the backlog of capital postconviction cases - cases that are ready for the postconviction process to begin yet no attorney has been assigned to the case. The executive director of the Commission of the Administration of Justice in Capital Cases compiles and maintains the statewide attorney registry.

In order to qualify for the registry, an 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.

Appointment of Private Attorneys:

The executive director is authorized to notify the trial court that the court must immediately appoint an attorney selected from the registry to represent a capital defendant after being notified by the Attorney General of one of the following events:

- Ninety-one days have elapsed since the Supreme Court issued a mandate on a direct appeal, or the Supreme Court of the United States has denied a petition for certiorari, whichever is later;
- 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 has issued an order finding that a year and a day have elapsed since the commencement of the period for filing a motion for post-conviction relief under s.924.055(2) and the defendant's complete original motion for postconviction relief has not been filed in the trial court.

Sec. 27.710(5), F.S.

Attorney Contract

Each attorney who is appointed by the court to represent a capital defendant from the registry must enter into a contract with the comptroller. By signing the contract, the attorney certifies that he or she intends to continue the representation under the terms and conditions of the contract until the sentence is reversed, reduced, or carried out or until released by the trial court. Section 27.710(4).

Fee and Payment Schedule

Section 27.711(4), F.S. provides a fee and payment schedule for attorneys appointed from the private registry. Upon approval by the trial court, and after certain stages of litigation are complete, an attorney from the registry list 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 become 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.

B. EFFECT OF PROPOSED CHANGES:

HB 2187 amends section 27.710 to provide that if an attorney appointed to represent a defendant in a capital collateral proceeding fails to execute the contract within 30 days after the date the contract is mailed to the attorney, the executive director of the Commission on the Administration of Justice in Capital Cases shall notify the trial court. The section also provides that an attorney appointed to represent a defendant in capital collateral proceedings may designate another attorney to assist him or her if the designated attorney meets the necessary qualifications.

Fee and Payment Schedule

HB 2187 makes several changes to the amount of compensation which a capital collateral attorney is entitled to receive, as follows:

- Clarifies an ambiguity in s. 27.711(4) 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 ultimately makes a postconviction motion unnecessary. Although the state rarely agrees to resentencing in a capital 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 postconviction motion if the parties otherwise dispose of the case.
- Amends section 27.711 to provide that an attorney is entitled to be paid up to \$20,000 rather than \$10,000 after the trial court issues a final order granting or denying the defendant’s motion for postconviction relief.
- Provides that the attorney is entitled to be paid a maximum of \$20,000, rather than \$4,000, after timely filing in the Supreme Court the defendant’s brief that addresses the trial court’s final order granting or denying the defendant’s motion for postconviction relief or petition for writ of habeas corpus. Provides that the attorney is entitled to a maximum of \$4,000, rather than \$20,000, after the appeal of the trial court’s denial of the defendant’s motion for post-conviction relief and the defendant’s state petition for writ of habeas corpus become final in the Supreme Court. These changes would make the payment schedule reflect the fact that the bulk of the attorney’s work is done in preparing the appellate brief and not in preparing for oral argument.
- Creates a new section which provides that the attorney is entitled to \$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 defendant’s motion for postconviction relief.
- Provides that an attorney who represents a capital defendant is entitled to a maximum of \$15,000 rather than \$5,000 for miscellaneous expenses. Upon approval by the trial court when extraordinary circumstances exist, the attorney is entitled to payment in excess of \$15,000 for miscellaneous expenses. Such funds must be drawn from a separate budget allocation.
- 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.

Withdrawing Attorney

The section also provides that an attorney withdrawing from a capital case shall deliver all files to the successor attorney within 15 days after notice from the successor attorney. The successor attorney is to bear the cost of transmitting the files.

Court Monitoring Performance of Attorney

The section also provides that the court shall monitor the performance of assigned counsel to ensure that the defendant is receiving quality representation. The court also is to receive and evaluate allegations that are made concerning the performance of the assigned counsel. The Comptroller, the Department of Legal Affairs, the executive director of the Commission on the Administration of Justice in Criminal Cases or any interested person may advise the court of any circumstance that could affect the quality of representation including false and fraudulent billing, misconduct, failure to

meet continuing legal education requirements, solicitation to receive compensation from the criminal defendant and failure to file appropriate motions in a timely manner.

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?

No.

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

No.

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

No.

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?

No.

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

No.

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

No.

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

No.

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

No.

3. Personal Responsibility:

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

No.

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?

No.

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

No.

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?

No.

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:

Section 27.710, 27.711.

E. SECTION-BY-SECTION ANALYSIS:

Section 1: Provides that if an attorney appointed in a capital case fails to execute the contract within 30 days after the date the contract is mailed to the attorney, the director of the Commission on the Administration of Justice in Capital Cases shall notify the trial court. Also provides that an appointed attorney may designate another attorney to assist him or her if the designated attorney meets specific qualifications.

Section 2: Increases the maximum amount of compensation that a private attorney is entitled to in several instances for representation of a capital defendant.

Section 3: Provides for an effective date of July 1, 1999.

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:

See fiscal comments.

2. Recurring Effects:

See fiscal comments.

3. Long Run Effects Other Than Normal Growth:

See fiscal comments.

C. **DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

1. Direct Private Sector Costs:

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:**

HB 2187 will not have a fiscal impact on the Department of Corrections. However, because several changes have been made to the maximum amount of compensation which an appointed attorney is entitled to receive, the bill may increase the costs of representation of capital defendants to the State. Under the current statute, if the maximum amounts that an appointed attorney is entitled to receive at each stage of the proceedings are added, the total payment would be \$64,000 plus an additional \$5,000 in miscellaneous expenses. The bill provides for a maximum payment of \$84,000 plus \$15,000 in miscellaneous expenses.

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

A. **APPLICABILITY OF THE MANDATES PROVISION:**

HB 2187 does not require local governments to expend funds or to take any action requiring the expenditure of funds. Therefore, it is exempt from the provisions of Article VII, Section 18 of the Florida Constitution.

B. **REDUCTION OF REVENUE RAISING AUTHORITY:**

HB 2187 does not reduce anyone's revenue raising authority.

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

HB 2187 does not reduce the state tax shared with counties and municipalities.

V. COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

This bill began as PCB 04 from the Committee on Crime and Punishment. The PCB was amended to conform it to the Senate companion. Currently, there are two different statutory provisions relating to the appointment of private counsel in capital postconviction cases. Section 27.710 provides for a registry of private attorneys which are appointed to represent a capital collateral defendant if CCRC is unable to represent the defendant in a timely manner. Section 27.703 provides that when there is a conflict of

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interest that prevents a CCRC office from representing a defendant, an attorney from one of the other CCRC offices should be appointed to represent the defendant. If that office also cannot provide representation, the section provides that a private attorney should be appointed. The amendment changes section 27.703 to provide that, effective July 1, 1999, any private attorney appointed in a capital collateral case will be appointed in accordance with section 27.710. This would require any private attorney in a capital collateral case to be appointed from the registry and subject them to the pay schedule and other restrictions of section 27.710. The amendment was adopted by the committee and the PCB, as amended, became HB 2187.

VII. SIGNATURES:

COMMITTEE ON CRIME AND PUNISHMENT:

Prepared by:

Staff Director:

Trina Kramer

J. Willis Renuart