STORAGE NAME: h001as1z.cp ****FINAL ACTION****
DATE: January 19, 2000 ****SEE FINAL ACTION STATUS SECTION****

HOUSE OF REPRESENTATIVES
COMMITTEE ON
CRIME AND PUNISHMENT
ANALYSIS

BILL #: CS/HB 1-A

RELATING TO: The Death Penalty Reform Act of 2000

SPONSOR(S): Committee on Crime and Punishment; Representative Crist & Others

TIED BILL(S): HB 3-A

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

(1) CRIME AND PUNISHMENT YEAS 7 NAYS 0
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I. FINAL ACTION STATUS:

Passed by the Legislature. On January 14, 2000, CS/HB 1-A became Chapter 2000-3, Laws of Florida, with the Governor's signature.

II. SUMMARY:

CS/HB 1-A takes three approaches to reforming Florida's capital postconviction process. First, the bill advances the start of the state postconviction process. Second, the bill advances the completion of the postconviction process by creating statutes of limitations on the filing of postconviction claims. Third, the bill defines the duties of state paid postconviction lawyers to file only those actions authorized by statute. Under CS/HB 1-A, the state postconviction process begins while the case is on direct appeal (commonly referred to as a "parallel track" system). CS/HB 1-A requires that postconviction counsel be appointed within 15 days after the imposition of a death sentence. Also, postconviction actions must be filed within 180 days of the filing of the defendant's direct appeal brief. Actions claiming ineffective assistance of direct appeal counsel must be filed within 45 days after a death sentence is affirmed. CS/HB 1-A also makes conforming changes to the laws governing public records in capital cases.

CS/HB 1-A addresses specific areas of the state postconviction process which have contributed to the present average 14 year delay in carrying out death sentences. Changes to these areas include: requiring that postconviction actions must be "fully pled," with no amendments allowed after the filing deadline expires; not allowing public records requests to constitute grounds for delay; prohibiting the raising of claims which could have been raised earlier; and limiting successive postconviction actions to claims of actual innocence.

Perhaps the most serious legal challenge that may be raised against legislation limiting state postconviction actions in death penalty cases is whether such a law would violate the habeas corpus provision of the Florida Constitution. Habeas corpus is a procedural vehicle for persons to raise substantive claims against the legality of their detention. The United States Supreme Court has held that "the states have no obligation to provide postconviction relief." However, state authority to regulate habeas corpus by statute is mixed. The Florida Supreme Court could determine that the state constitution does require state postconviction relief, and that statutes limiting such relief infringe on the state habeas corpus provision. Such a ruling, however, would differ from the position the United States Supreme Court has taken with respect to Congress's ability to limit federal habeas corpus by statute.

III. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1.	Less Government	Yes [x]	No []	N/A []
2.	Lower Taxes	Yes []	No []	N/A [x]
3.	Individual Freedom	Yes []	No [x]	N/A []
4.	Personal Responsibility	Yes [x]	No []	N/A []
5.	Family Empowerment	Yes []	No []	N/A [x]

For any principle that received a "no" above, please explain:

3. This bill's restrictions on the filing of postconviction actions are limitations on the ability of persons convicted and sentenced to death to file repetitive and frivolous postconviction actions.

B. PRESENT SITUATION:

Postconviction Review of Death Penalty Cases

As of December 17, 1999, Florida's death row population was 367. Since 1976, Florida has executed 44 inmates by electrocution. During the same time period, Texas has executed 199 inmates and Virginia has executed 73 inmates. Nationwide, as of December 17, 1999, lethal injection has been the method used in 438 executions, electrocution in 144 executions, the gas chamber in 11 executions, hanging in 3 executions and the firing squad in 2 executions.

Delays in the execution of persons sentenced to death in Florida have significantly increased since the reinstatement of the death penalty in 1972. For executions carried out from 1994 to 1999 delays have averaged nearly 14 years, an 80% increase from the 7.74 year average for executions between 1979 to 1983. People sentenced to death are currently allowed to file postconviction appeals beyond statutory and procedural 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.

The longest part of the process after the direct appeal has been concluded involves "collateral" attacks or "postconviction" actions.[1] While "appeals" raise challenges to the fairness of the trial based on the record, postconviction actions raise challenges to the judgement and sentence that are not based on the record alone, such as claims of ineffective assistance of counsel.[2] In federal court, postconviction actions are prosecuted through habeas corpus. In Florida, postconviction actions are also known as Rule 3.850 motions because that is the rule of procedure regulating state level postconviction actions. There are four grounds to challenge a judgement and sentence under Rule 3.850, they are:

1. That the judgement was entered or the sentence imposed in violation of the Constitution or laws of the United States or the State of Florida.

2. That the court had no jurisdiction to enter the judgment or impose the sentence.

3. That the sentence imposed was more than the maximum allowed by law, or a plea was involuntarily given.

4. That the judgment or sentence is otherwise subject to collateral attack.

The scope of postconviction actions are focused on these narrow 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. In other words, a postconviction action should be a limited inquiry, since it attempts to overturn a presumptively-valid death sentence which has previously been upheld by the Florida Supreme Court. Over time, however, Florida's postconviction actions have become even 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, whose postconviction processes will be discussed later.

Numerous reform efforts have not succeeded in reducing delays in death-penalty cases. [*See* "Other Comments" for a review of Florida's capital punishment laws, procedures, and reform efforts since 1972.] Currently, statutes and court rules require that state postconviction appeals be resolved within a certain time. Nevertheless, persons sentenced to death are allowed to delay filing postconviction claims, or file unsubstantiated "shell" pleadings within the time limits provided by rule of procedure which are then substantially amended or virtually replaced long after a proper and timely postconviction claim should have been filed. Previous legislative reform efforts have attempted to promptly provide persons sentenced to death with postconviction counsel representation to facilitate timely-filed postconviction appeals.

The Florida Legislature has appropriated nearly $42 million dollars, since fiscal year 1989-90, to provide postconviction counsel to indigent persons sentenced to death. Assuming state funding does not decrease for this service, another 9.6 million dollars will be appropriated for the next fiscal year. From fiscal years 1989-90 to 1999-2000, the amount appropriated to represent indigent persons sentenced to death increased by 464%. A

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[1] This analysis will use the term "postconviction action" to describe collateral attacks, postconviction claims or motions.

[2] At the December 1999 meeting of the House Crime and Punishment Committee, it was stated by a representative of the Attorney General's Office that the persons convicted and sentenced to death assert that their lawyer was "ineffective" in every case without exception.

previous commission found that Florida had the most comprehensive program in the nation for providing postconviction representation.[3]

Other states have capital punishment laws that significantly restrict postconviction actions. Virginia, Texas, and Missouri impose strict time limitations on postconviction actions. Missouri has executed 41 persons sentenced to death, including nine in the last year, and has 84 persons sentenced to death awaiting execution.

As of December 17, 1999, 265 out of the 367 inmates on Florida's death row were sentenced over five years ago. Of these cases, 181 were awaiting the resolution of state postconviction judicial review.

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" action filed in the circuit court where crime occurred, always claiming that defendant's original trial lawyer was "ineffective" and raising 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 several reasons for the present delays in the postconviction stage of judicial review. Delays can result from litigation over public records requests, or from sentencing courts which may not hear postconviction actions for several months, or sometimes years. The state attorney who prosecuted the defendant must respond to any postconviction action, 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 actions can commonly raise ten to twenty arguments. Sometimes these actions attempt to revisit

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[3] The commission referred to is the McDonald Commission discussed later.

issues that were or could have been resolved at trial or during the first appeal. In Florida, persons sentenced to death who have been executed filed an average of eight postconviction actions in state and federal courts.

Delay is even inherent in the process intended to accelerate state postconviction review. Under Rule 3.851, an evidentiary hearing is not required on Rule 3.850 motions unless the trial judge determines, in a preliminary hearing, that an evidentiary hearing is necessary. It is not uncommon, however, for the decision of a trial judge not to conduct an evidentiary hearing, to be reversed by the Florida Supreme Court for not having an evidentiary hearing. When this occurs, the case is returned to the trial court to conduct an evidentiary hearing, which sets the process back even farther.

In a 1998 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. (citation omitted). . . . The courts and the State must be able to do better, and any explanation of why we are unable to do so is insufficient." Knight v. State, 721 So.2d 287 (Fla. 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 evidence. While finality is important in all legal proceedings, its importance must be tempered by the finality of the death penalty. Id.

a. Recent Proposals to Florida Rules of Procedure

In March of 1999, Chief Justice Harding established by administrative order a Supreme Court Committee on Postconviction Relief in Capital Cases (referred to as the "Morris Committee"). The Morris Committee was created to assist the Court in identifying inherent delays in the current postconviction process and recommend improvements. Among areas in the current process identified as problematic or where the Morris Committee found unnecessary delays were the following:

1. Unnecessary delay was found between the time a death sentence has been affirmed and the time to commence the one year time limit within which to file a postconviction motion.
2. Conflict with the preparation of motions and the acquisition of public records.
3. The practice of pleading unsubstantiated "shell" pleadings, to circumvent the one year time limit, and then subsequently amending or replacing these “shell” pleadings to raise the actual claims long after the time limit has expired.

The Morris Committee devised proposals to address these issues. Among the key proposals were:

1. To require postconviction counsel to be appointed upon the issuance of the mandate in the direct appeal.
2. To require postconviction motions to be filed within one year after the issuance of the mandate in the direct appeal.
3. To require that postconviction motions be "fully pled" to contain certain items and meet specific restrictions, no longer permitting “shell” pleadings.
4. To prohibit amendment of postconviction motions after the state files its answer to the postconviction motion,
5. To not allow the pendency of unresolved public records requests to encroach on the one year time limit for filing a postconviction motion nor provide a ground to amend a postconviction motion.
6. To place restrictions on successive postconviction motions.
7. To establish a time frame within which the court must determine the need for and conduct evidentiary hearings on postconviction motions.

More recently, however, Judge Philip Padovano from the First District Court of Appeals (a member of the Morris Committee) drafted another rule proposal in anticipation of a Legislative adoption of a “parallel track” system. The key components of this proposed rule are:

1. To place appeals and postconviction claims directly under the supervision of the Florida Supreme Court.
2. To require the Capital Collateral Regional Counsel to be automatically appointed on the day of sentencing.
3. To require postconviction motions to be filed directly in the Florida Supreme Court within one year after the date of sentencing.
4. To require that postconviction motions be "fully pled" to contain certain items and meet specific restrictions, no longer permitting “shell” pleadings.
5. To not allow the pendency of unresolved public records requests to encroach on the one year time limit for filing a postconviction motion.
6. To place restrictions on successive postconviction motions.
7. To provide for a postconviction motion to be remanded to the trial court for an evidentiary hearing (if needed) with directions to the trial court which specify the issues the trial court must address.

The purpose of the Padovano approach in putting postconviction claims directly in the Florida Supreme Court is to eliminate reversals of the lower court for failure to grant evidentiary hearings for postconviction motions. Under the current system, if a decision of a trial judge to deny a postconviction action without an evidentiary hearing, is reversed by the Florida Supreme Court, the process will be delayed by having the case bounce back and forth from the trial court - to the supreme court - back to the trial court - and back to the supreme court.

b. POSTCONVICTION REVIEW IN OTHER STATES WITH EFFECTIVE CAPITAL PUNISHMENT LAWS

(1) Virginia

Virginia has executed a higher percentage of its death row inmates than any other state. As of September 1, 1999, Virginia had 32 people on death row. Virginia has executed 73 people since 1976, including 14 executions in 1999.[4]

The most substantial difference between Virginia and Florida regarding capital postconviction actions is that Virginia imposes an absolute statutory time limit on such actions, *with no exceptions*. The state statute provides that postconviction motions must be filed within sixty days of the earliest of the denial or ruling by the United States Supreme Court in a petition for a writ of certiorari in the direct appeal, or the expiration of the period for filing a timely petition for certiorari if a petition is not filed, 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. [s. 8.01-654.1, Code of Virginia]

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.

(2) Texas

Texas has executed 199 people sentenced to death since 1976, including 35 executions in 1999. The most executions in Florida in one year is eight. There have been 55 executions in Texas since January 1, 1998. There are 458 people sentenced to death in Texas awaiting execution as of September 1, 1999.[5]

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 postconviction claims which like 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 lawyer should be appointed for indigent defendants to file a writ of habeas corpus.

2. An 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 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

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[4] Source: Death Penalty Information Center (www.essential.org/dpic). Death row population current as of September 1, 1999. Execution data current as of December 17, 1999.

[5] Id.

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 the Texas' Court of Criminal Appeals against claims that the rule violated the state and federal constitutional provisions regarding 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) These procedures give finality to state proceedings by confining the postconviction 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 approximately 14 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 actions. 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 the 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.

(3) 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 84 people sentenced to death awaiting execution. The state conducted nine executions last year alone, and 41 since 1976.[6]

Missouri Supreme Court Rule of Criminal Procedure 24, provides the exclusive procedure for most postconviction actions, including claims of ineffective assistance of counsel. Rule 24 requires postconviction actions 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

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[6] Id.

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 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 claims 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, Missouri Statutes.

c. Public Records in Capital Cases

Currently, under s. 119.19, the Secretary of State is required to maintain a records repository for the purpose of archiving capital postconviction public records. Upon issuance of the mandate on direct appeal, the Attorney General is required to provide written notification to the Department of Corrections and to the state attorney who prosecuted the case who then must provide notice to the investigating agencies that were involved in the case. Within 90 days of receiving this notice, the Department of Corrections, the investigating agencies and the state attorney must copy, seal and deliver to the repository all public records which were produced in the case and must certify to the Attorney General that they have produced all of the public records in their possession. The defendant's trial attorney must also provide written notification to the Attorney General of any person or agency which may have information pertinent to the case whom are then required to turn over any public records to the records repository.

Once appointed, the capital collateral regional counsel has 90 days to demand that people and agencies who have already submitted public records to the repository, turn over any additional records in their possession within 90 days. A procedure is provided for the persons or agencies to object to the additional records request. Within 10 days of the signing of a death warrant, more records may be requested.

d. Newly Discovered Evidence

Currently, Florida law allows a prisoner to file a postconviction action any time if it can be shown that the facts upon which the claim is based were unknown to the defendant or his or her attorney and could not have been ascertained by the exercise of due diligence. Sec. 924.051(6)(b)1 and Fla.R.Crim.P. 3.850(b)(1). In capital cases, a defendant must raise a claim of "newly-discovered evidence" within one year of discovery of the evidence.

e. Post Conviction Counsel

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

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

Murray v. Giarratano, 492 U.S. 1, 8 (1989), *quoting*, Pennsylvania v. Finley, 481 U.S. 551, 556-7 (1989). *See also*, Gonin v. Vasquez, 999 F.2d 425 (9th Cir. 1993). The Florida Supreme Court has recently acknowledged that this ruling also applies to representation in collateral proceedings in federal courts as well:

> As CCRC recognized at oral argument, both the United States Supreme Court and this court have held that defendants have no constitutional right to representation in postconviction relief proceedings. . .
>
> . . . once the conviction and sentence become final, the presumption of innocence is no longer present and the defendant, in seeking postconviction relief, acts to “upset the prior determination of guilt.” (Citation omitted).

See, Butterworth v. Kenny, 714 So.2d 404, 407 (Fla. 1998). [*See* Section V, Other Comments - Management of State Resources.]

C. EFFECT OF PROPOSED CHANGES:

For purposes of this analysis, this section will only discuss the major components of the bill. The “Section by Section” part of the analysis will discuss those portions of the bill which are not discussed in this section.

1.. Postconviction Review of Death Penalty Cases

CS/HB 1-A attempts to reduce delays in capital cases in Florida by creating a statute of limitations on the filing of postconviction actions in death penalty cases. (See, s. 924.055(1) in Section 5 of the bill, and s. 924.056(3)(d) in Section 6) The bill provides legislative intent for all appeals and postconviction actions in capital cases to be resolved within 5 years after a death sentence is imposed.

The bill also creates s. 924.058 which restricts capital postconviction actions to one action in the sentencing court, one appeal therefrom in the Florida Supreme Court, and one "original" action to allege ineffectiveness of direct appeal counsel, in the Florida Supreme Court. There is an exception created to these filing limits for successive motions raising claims of actual innocence. (*See* - Successive Postconviction Actions For Newly Discovered Evidence)

Appointment of Counsel

For cases in which the trial court imposes a death sentence on or after the effective date of this act, the bill provides for early appointment of a defendant's postconviction lawyer as follows:

1. **Within 15 days after imposing a death sentence**, a trial court must appoint the office of capital collateral regional counsel or a private postconviction lawyer. (Unless the defendant does not accept a postconviction lawyer)

2. Within 30 days after appointment, the capital collateral regional counsel must file a notice of appearance, or move to withdraw if necessary. If the capital collateral regional counsel moves to withdraw, the court must appoint a private postconviction lawyer.

In addition to appointing a private postconviction counsel upon motion of the capital collateral regional counsel to withdraw, the court must appoint private postconviction counsel if:

1. 30 days has elapsed since the appointment of the capital collateral regional counsel and no notice of appearance has been filed, or

2. a defendant previously represented by private counsel is currently unrepresented.

Currently, under s. 27.710, the year and a day time period to file a postconviction action could expire with no postconviction action filed, before the trial court would appoint a private postconviction counsel.

Postconviction Claims

Under the bill, the filing of "shell" postconviction actions would no longer be sufficient to satisfy time limits for filing postconviction actions. Instead the bill requires that postconviction actions must be "fully pled." Under s. 924.058, a "fully pled" postconviction action shall include:

1. The judgment/sentence under attack;
2. A statement of all issues raised on appeal and their disposition;
3. Whether previous postconviction actions have been filed and their dispositions, if previous claims were filed, the reason the claims in the present motion were not raised in earlier actions must be given;

4. The nature of the relief sought;
5. A detailed factual basis for any claim of error with supporting documentation attached; and
6. A concise memorandum of law for each claim.

As an alternative to this criteria, the bill also defines a fully pled postconviction action as one which complies with any superseding rule of procedure adopted by the Florida Supreme Court.

In addition, postconviction actions must raise all cognizable claims against the judgement or sentence, including claims of innocence, ineffectiveness of counsel, and that the state withheld favorable evidence. However, no claim which could have or should have been raised earlier may be considered by the court. No claims are allowed challenging the effectiveness of the defendant's postconviction lawyer.

For cases where the trial court imposes a death sentence on or after the effective date of the act, the bill establishes the filing of a fully pled postconviction action as the commencement point of postconviction proceedings. All capital postconviction actions which are not "commenced" within the time period provided are barred. The time periods for filing capital postconviction actions are as follows:

1. **Within 180 days after the filing of the defendant's initial brief in the Florida Supreme Court** direct appeal, a fully pled postconviction action must be filed in the sentencing court.

2. **Within 45 days after the Florida Supreme Court issues the mandate** affirming a death sentence in the direct appeal, an action must be filed in the Florida Supreme Court to raise a claim a ineffective assistance of direct appeal counsel.

The pendency of public records requests or litigation, or the failure of postconviction counsel to prosecute claims does not constitute grounds for a court to extend the time limitations provided. In addition, no postconviction action may be amended after the expiration of the above time limits. The time for commencement of postconviction actions may not be tolled for any reason or cause.

For cases where a death sentence was imposed before the bill's effective date, CS/HB 1-A contains provisions to require existing claims to be raised and fully pled by January 8, 2001, unless, with regard to actions now pending, current law or rule provides for an earlier deadline. With regard to existing cases, the bill expressly provides that nothing in the act shall expand the right or time period allowed for the prosecution of capital postconviction claims which have commenced or should have been commenced before the bill's effective date.

Any action filed which does not meet the requirements of being "fully pled," or which raises issues that could have or should have been raised previously, or any actions which are filed after the time limits established by statute have expired, shall not be considered by any state court. The bill further declares the postconviction actions filed in violation of the time limitations are "barred, and all claims raised therein are waived." The Attorney General must deliver to the Speaker of the House and the Senate President a copy on any court pleading or order regarding a violation. Under the bill, the failure to pursue postconviction relief within the statutory time limits shall constitute grounds for issuance of a death warrant, and no claim filed after the time limits have expired shall be grounds for a court to issue a stay of execution.

The Attorney General or prosecuting attorney is given 60 days to reply to a postconviction action.

CS/HB 1-A essentially establishes parallel avenues of review that the defendant could pursue. The *"direct" appeal lawyer* would challenge the jury verdict and sentence in the Florida Supreme Court, while the defendant's *postconviction lawyer* attempts 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 is the same type of parallel judicial review utilized in Texas, although the time limitations are not identical. The Texas law requires the death-sentenced person to file a postconviction action sooner than this bill requires.

The bill provides a timetable with respect to conducting postconviction claim proceedings. Within 30 days after the state responds to the defendant's postconviction action, the sentencing court must conduct a hearing to determine whether an evidentiary hearing (if requested by the defendant) is required. The court then has 30 days to rule if such a hearing is needed, and if so, the court must schedule the hearing within 90 days. If, on the other hand, the court finds that the postconviction action is legally insufficient, or that based on the action the defendant is not entitled to relief, the court must deny the action within 45 days. In addition, in those instances where an evidentiary hearing is ordered, the defendant has 10 days to disclose the names and statements of previously undisclosed witnesses to the state. Upon receipt of this disclosure, the state has 10 days to reciprocate. After the evidentiary hearing, the transcripts of the hearing are transcribed, and upon receipt of the transcripts, the court has 30 days to issue its final order granting or denying postconviction relief.

With respect to the bill's new section 924.058, regarding the number of filings, and the content of postconviction actions, and with respect to the new section 924.059, regarding conducting and reviewing capital postconviction proceedings, the bill provides that such sections shall regulate procedures in capital postconviction actions unless and until such procedures are revised by rule of the Florida Supreme Court.

An appeal of the sentencing court's order may be taken to the Florida Supreme Court within 15 days. The bill directs the Florida Supreme Court to render a final decision granting or denying postconviction relief within 180 days after receiving the record on appeal.

<u>Management of State Resources</u>

The bill provides Legislative intent that no state resources may be expended in violation of the statutory restrictions on postconviction actions. In the event a state employee or party contracting with the state violates the provisions of the act, the Attorney General must deliver to the Speaker of the House and the Senate President a copy on any court pleading or order regarding a violation.

The bill also amends s. 27.702 to restrict the capital collateral regional counsel and private postconviction lawyers to filing only those postconviction actions which are authorized by statute.

<u>Public Records in Capital Cases</u>

The bill advances the public records production process to begin upon imposition of the death sentence, rather than upon issuance of the mandate on direct appeal. This coincides with the accelerated postconviction process contained in the rest of the bill. In addition, the bill moves the storage of confidential records in capital cases from the central records repository, to the clerk of the court in which the capital case was tried. [*See* "Section-by-Section"].

Successive Postconviction Actions For Newly Discovered Evidence

CS/HB 1-A also bars successive postconviction actions unless:

1. The facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for a constitutional error, no reasonable fact finder would have found the defendant guilty of the underlying offense; and

2. The facts underlying the claim must have been unknown to the defendant or his or her attorney and must be such that they could not have been ascertained by the exercise of due diligence prior to filing the earlier postconviction action.

In addition, successive postconviction actions must be "commenced" within 90 days after the facts giving rise to the successive postconviction action were discovered or should have been discovered through the exercise of due diligence.

The criteria numbered 1 and 2 above track almost verbatim the current federal standard for successive postconviction actions as provided in the "Antiterrorism and Effective Death Penalty Act of 1996." *See*, Public Law 104-132, 110 Stat. 1214.

D. SECTION-BY-SECTION ANALYSIS:

Section 1: Providing the title of the bill as the "Death Penalty Reform Act of 2000".
Section 2: Amending s. 27.702, *See* "Effect of Proposed Changes."
Section 3: Amending s. 119.19, requiring the prosecuting attorney to provide written notification to the investigating agencies and the Department of Corrections upon the imposition of a death sentence, or with respect to cases pending on direct appeal awaiting a mandate from the Florida Supreme Court, upon the effective date of this act. Requiring investigating agencies, the prosecuting attorney, and the Department of Corrections to seal and deliver copies of all public records to the records repository within 60 days of receipt of the notice. Requiring that within 60 days after the imposition of death sentence or, for cases were a death sentence has been imposed but the mandate affirming the sentence has not yet been issued, 60 days after the effective date of the act, the defendant's counsel and the prosecuting attorney are to notify the Attorney General of the names and addresses of any additional persons who may have pertinent information about the case. Providing 30 days for a person receiving a public records request to deliver the requested records to the records repository and certify compliance to the Attorney General. Requiring confidential records to be separately boxed and delivered to the clerk of court for the county in which the case was tried. Providing that within 180 days of an attorney being appointed to represent a person sentenced to death, or within 30 days after the mandate affirming a death sentence is issued, whichever is later, the appointed attorney is authorized to request additional

public records, and giving the receiver of the request 30 days to deliver such records to the repository. Providing that public records requests regarding particular named individuals must include specific identifying information with respect to the individual and a description of the person's role in the case and relationship to the defendant. Providing a 25 day time frame for the receiver of the request to raise objections thereto. Providing for a 15 day period for a court to order an agency to produce other additional records when requests for such records meet certain criteria. Requiring the Secretary of State to supply personnel and supplies needed to copy records held at the repository. Prohibiting the provisions relating to public records in capital postconviction proceedings to constitute grounds to expand the time limitations for filing postconviction actions.

Section 4: Amending s. 922.095, *See* "Effect of Proposed Changes."

Section 5: Amending s. 924.055, *See* "Effect of Proposed Changes."

Section 6: Creating s. 924.056, Providing that the defendant must cooperate with postconviction counsel. In any case where the sentencing court finds the defendant is obstructing the postconviction process, the defendant shall not be entitled to any further state paid postconviction counsel. Expands attorney-client privilege to include every attorney working on the defendant's case whether in the direct appeal or collateral actions. Also providing that if a defendant requests, without good cause, that his postconviction counsel be removed the court must notify him that no further state resources will be used for his or her postconviction representation. Requiring the clerk of the court to deliver a copy of the record on appeal to the capital postconviction counsel, the state attorney, and the Attorney General, within 60 days after the sentencing court appoints postconviction counsel. A 30 day extension may be granted for good cause. *See also* "Effect of Proposed Changes."

Section 7: Creating s. 924.057, *See* "Effect of Proposed Changes."

Section 8: Creating s. 924.058, *See* "Effect of Proposed Changes."

Section 9: Creating s. 924.059, providing that if a defendant's mental condition is at issue, the state shall have the defendant examined by an expert of the state's choosing. If defendant does not cooperate with the state expert, the defendant's mental status claims shall be denied. Also requiring transcripts of postconviction evidentiary hearings to be prepared within 30 days. Prohibiting other appeals or motions for rehearing on postconviction actions. Also providing that if the Florida Supreme Court finds that the sentencing court erred in not holding an evidentiary hearing, the case shall be remanded to the sentencing court. In cases which are remanded, jurisdiction is relinquished to the trial court to conduct an evidentiary hearing which must be scheduled within 30 days and concluded within 90 days. *See also* "Effect of Proposed Changes" for a detailed discussion concerning successive postconviction actions.

Section 10: Repealing portions of Rule of Criminal Procedure 3.850 which are inconsistent with the bill, and repealing Rules of Criminal Procedure 3.851 and 3.852.
Section 11: Amending s. 27.710, *See* "Effect of Proposed Changes."
Section 12: Amending s. 27.51, providing for reassignment of appellate public defender when the appellate public defender also served as defendant's trial counsel.
Section 13: Amending s. 27.703, prohibiting the capital collateral regional counsel from accepting appointments or taking any action which will create a conflict of interest within the office. Providing that funds to pay private postconviction counsel will be appropriated to the Comptroller
Section 14: Transfers unexpended funds of a specific appropriation of the Justice Administration Commission to the Administrative Trust Fund within the Department of Banking and Finance and authorizing that Department to expend such funds for contracts with private postconviction lawyers and authorizing funds for two additional positions for fiscal year 1999-2000.
Section 15: Amending s. 27.709, providing for the Commission on Capital Cases to analyze and tract Supreme Court reports on capital postconviction actions to determine statistics and trends. Requiring the Commission to report its findings to the Legislature annually.
Section 16: Amending s. 27.711, requires the registry of private postconviction attorneys to provide billing documentation to Comptroller prior to submission to the court.
Section 17: Creating s. 924.395, providing that the Legislature encourages the courts to impose sanctions on those who abuse the capital postconviction process.
Section 18: Creating s. 922.108, providing that sentencing orders in death penalty cases must not specify the particular method of execution, and that the wording or form of the order shall not provide a grounds for reversal of a death sentence.
Section 19: Repealing s. 924.051(6)(b).
Section 20: Providing legislative findings that centralized case management of capital postconviction actions may reduce delays in capital cases and should be considered. Requesting the Florida Supreme Court to study the feasibility of centralized case management and submit its recommendations to the Legislature before January 1, 2001.
Section 21: Providing a severance clause.
Section 22: Providing an effective date, and providing that Section 10 requires a 2/3rds vote of the membership of each house in order to take effect.

IV. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The following fiscal impact information was supplied by the affected agencies:

	FY 99-00	FY 00-01	FY 01-02
Capital Collateral Regional Counsel - North	1,289,651	2,442,938	2,442,938
Capital Collateral Regional Counsel - Middle	962,040	2,774,481	4,547,455

Capital Collateral Regional Counsel - South	1,071,501	2,402,169	2,245,562
Department of Banking and Finance	60,000	120,000	120,000
Department of State	222,000	147,000	147,000
State Attorneys	495,000	75,000	75,000
Department of Legal Affairs	0	949,271	949,271
Total	3,878,192	8,985,859	10,525,226

In addition the State Courts reported an indeterminate impact and the Public Defenders reported that the impact would be insignificant.

If the increased workload for collateral proceedings, however, is assumed by private attorneys rather that the three Capital Collateral Counsel offices the costs are estimated as follows:

Private Attorneys Fees and Expenses	355,000	4,385,000	4,625,000
Department of Banking and Finance	60,000	120,000	120,000
Department of State	222,000	147,000	147,000
State Attorneys	495,000	75,000	75,000
Department of Legal Affairs	0	949,271	949,271
Total	1,132,000	5,676,271	5,916,271

Any savings that may result from limitations on appeals is not considered in the above analysis.

Please see fiscal comments for a further explanation.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

N/A

2. Expenditures:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

N/A

D. FISCAL COMMENTS:

The primary fiscal impact of the bill results from incurring costs at the beginning of the appeals process that otherwise would not materialize until several years after imposition of the original sentence.

The following key assumptions were used in developing the cost estimates for using private registry attorneys: 1. All 92 current cases currently in the direct appeal phase of the process will have a private attorney appointed during FY 99-00. 2. There will be 25 new death penalty cases during the six months remaining in FY 99-00 from the date the bill takes effect that will all be appointed a private attorney. 3. Twenty-five of the cases currently in the postconviction phase that are assigned to one of the Capital Collateral Counsel offices will be transferred to private attorneys to relieve the workload demands on

the offices brought about by the new timelines. 4. The private attorneys will file Rule 3.850 motions for the 142 new clients they were appointed to represent during FY 2000-01 and they will be paid an average of $30,000 for fees and expenses (current average is $20,000). 5. One hundred of the 142 clients that had 3.850 motions filed during FY 2000-01 will have an evidentiary hearing during FY 2000-01 and the private attorneys will be paid $30,000 for fees and expenses (no average cost information available). 6. All new death penalty cases will be assigned to a private attorney during FY 2000-01 and FY 2001-02. 7. Fifty Rule 3.850 motions will be filed by private attorneys during FY 2001-02 and that the attorneys will be paid $30,000.

The long-term impact once the current backlog of cases has moved through the system will be the impact of providing post-conviction relief to those cases that ultimately are resentenced through the direct appeals process. Currently, about half of all cases are remanded to the trial courts during the direct appeals process. Many of these, however, result in another sentence of death.

Strict enforcement by the Florida Supreme Court of the time limits, postconviction action content requirements, the “no amendment” provision, and the limitation on the number of postconviction actions, could have a substantial positive fiscal impact.

According to the Commission on Capital Cases, the unexpended and unencumbered balance of Specific Appropriation 615 for private counsel is approximately $1.4 million. This would cover the FY 1999-00 estimated costs of hiring private attorneys to assume the additional workload and the additional administrative costs for the Comptroller. The Florida Association of Counties and the Florida Clerks of Courts Association report no direct fiscal impact. All other agencies report that they will be able to cover any additional costs in FY 1999-00 from existing resources.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill is exempt from the requirements 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 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.

VI. COMMENTS:

A. CONSTITUTIONAL ISSUES:

Postconviction Appeals Reform

a. Habeas Corpus

Probably the most serious legal challenge that may be raised against legislation limiting a death-sentenced person's ability to file postconviction actions 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. It is a procedural vehicle for persons to raise substantive claims against the legality of their detention. *See, e.g.* Murray v. Giarratano, 492 U.S. 1, 13 (1989). As a result, habeas corpus, while properly classified as civil actions, have also been recognized as "quasi-criminal" because they are raised in courts with criminal jurisdiction. *See*, Butterworth v. Kenny, 714 So.2d 404, 409-410 (Fla. 1998). 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.

The United States Supreme Court has held that "the states have no obligation to provide postconviction relief." *See* Murray v. Giarratano, 492 U.S. 1, 8 (1989); Pennsylvania v. Finley, 481 U.S. 551, 556-7 (1989). However, the Florida Supreme Court could determine that the state constitutional provision regarding habeas corpus does require state postconviction relief. They could further rule that statutes limiting or foreclosing state postconviction relief unconstitutionally infringe on the state habeas corpus provision. Such a ruling, however, would differ from the position the United States Supreme Court has taken with respect to Congress's ability to restrict federal habeas corpus by statute.

(1) 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 actions] 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).

In 1996 Congress passed significant habeas corpus reform as part of the "Antiterrorism and Effective Death Penalty Act of 1996." *See*, Public Law 104-132, 110 Stat. 1214. The following reforms were included in the act:

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

This federal act applies to cases brought by prisoners residing in states that provide indigent inmates with competent counsel for state postconviction actions.

Prior to passage of this act by Congress, over 80 bills imposing statutes of limitations on federal habeas corpus had been proposed. See, Lonchar v. Thomas, 517 U.S. 330 (1996). In Lonchar v. Thomas, 517 U.S. 330 (1996) the U.S. Supreme Court, described the relationship between the Court's adoption of rules with respect to habeas corpus, and Congress' attempts at passage of statutory reform for habeas corpus:

> We recognize there is considerable debate about whether the present Rule properly balances the relevant competing interests. See, e.g., U.S. Judicial Conference, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal 6, 18-21 (1989) (hereinafter Powell Report) (suggesting a statute of limitations for habeas petitions); American Bar Association, Toward a More Just and Effective System of Review in State Death Penalty Cases 29-30 (1990) (hereinafter ABA Report) (same).

> But, to debate the present Rule's effectiveness is to affirm, not to deny, its applicability. **Moreover, that debate's focus upon Congress also reveals the institutional inappropriateness of amending the Rule, in effect, through an ad hoc judicial exception, rather than through congressional legislation or through the formal rulemaking process.** (Emphasis added, Citations omitted).

While, on the federal level, the authority of Congress to regulate federal habeas corpus is clear, the same can not be said for Florida's legislative authority to regulate, by general law, state habeas corpus.

(2) 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 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 postconviction review, perhaps even for successive postconviction actions, on the state level. The Florida Supreme Court has cited federal law to imply that the state rule of procedure for postconviction actions 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 actions. However, the federal case relied upon actually stands for the opposite conclusion, namely, that postconviction actions are not permitted without statutory authority.

(3) 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.

State 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 determines that the causes of actions available in postconviction actions have expanded beyond the minimum requirements of the state habeas corpus provision, then the Legislature may limit those causes of action available in postconviction proceedings, and place reasonable restrictions on them. 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 procedural 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.

(4) State Right to Petition for Habeas Corpus

If the Florida Supreme Court is confronted with the issue of whether a statute may limit postconviction actions, 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's attempts to limit state postconviction claims 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 state level habeas corpus was the result of court generated law or common law, then the statute limiting postconviction actions will take precedence and should be upheld. *See* 1 Fla. Jur. 2d sec. 38 (where statute is inconsistent with common law, the statute controls).

The Florida Supreme Court could determine that as a statute of limitations CS/HB 1-A is not a restriction on the habeas corpus process, but rather a proper use of legislative authority to regulate unjust delays in initiating this particular class of civil claim.

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 legislature's intended purpose. If the Supreme Court decided to give a broad interpretation to the meaning of the habeas corpus provision in the state constitution, then one remedy available to the legislature 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. 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.

b. Substance and Procedure

It is possible that the Florida Supreme Court could view the time limitations for filing postconviction actions as procedural rather than substantive. Article V Section 2 provides in part that : "The supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, . . ."

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. 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 its previous opinion approving amendments to Florida Rules of Appellate Procedure 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.** (Emphasis added).

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

It should be noted that, like a writ of mandamus, habeas corpus is an old common law writ. The fact is, however, that writs of habeas corpus, (or "postconviction actions" contemplated under this bill) are not "appellate" since they are filed in the trial court, and when filed in the Florida Supreme Court, with respect to challenging the effectiveness of direct appeal counsel, are "original" proceedings. The only appellate part of the postconviction process provided in the bill are those provisions with respect to an "appeal" of the final order of the trial court in the postconviction proceeding.

c. 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) (Kluger 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, the loss of public trust, and need for finality in the criminal justice system).

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.

B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

a. The "Parallel Track" Approach to Postconviction Motions

There are substantial advantages of utilizing the same time period for direct appeal and postconviction 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. A postconviction lawyer would not have to recreate a record of a case that is several years old. Most significantly, with respect to pursuing legitimate claims of innocence, there is less time for "leads" not tracked down by law enforcement agencies during the original investigation to become stale. Also, allegations against the defendant's trial lawyer could 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 appeal and postconviction review would enhance the reliability and certainty that a death sentence would not be challenged for ten or fifteen years in the state courts. Judicial review of capital cases in state court could be completed within a more reasonable time.

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. Also, the postconviction lawyer could indirectly provide assistance to the defendant's direct appeal lawyer, resulting in an advantage to the person challenging his sentence. This benefit could be limited, however, if the postconviction lawyer chooses 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 action. Thus, the postconviction judicial review would have been required anyway, rendering the proceeding useful to the courts, the defendant, and the state.

b. Management of State Resources

A major component of this bill is its approach to limiting postconviction actions which may be filed on behalf of persons sentenced to death by state compensated attorneys. The bill controls the duties of the capital collateral regional counsel and other state compensated postconviction counsel by amending s. 27.702 to require that these lawyers file only postconviction actions authorized by statute. It could be argued that because non-state paid lawyers could file actions not authorized by statute, that the bill's attempt to regulate actions filed by state paid lawyers in this manner raises constitutional questions with respect to equal protection.

The Florida Supreme Court, however, has already rejected a similar assertion made in connection with the statement of legislative intent in s. 27.7001 prohibiting collateral representation in civil litigation and other specified proceedings. In Butterworth v. Kenny, 714 So.2d 404 (Fla. 1998) the Attorney General petitioned the Florida Supreme Court to issue a writ ("quo warranto") to prevent the Capital Collateral Regional Counsel (CCRC) for the Southern and Northern regions from representing death row inmates in federal civil rights lawsuits. CCRC argued that the statutory prohibition on CCRC to represent death row inmates in civil litigation violates their clients' rights to due process and equal protection "because it would constitute an arbitrary application of the law and would prevent it from filing claims that other inmates, if represented by non-CCRC lawyers, could pursue." *Id*. at 408. The Court in Kenny characterized the representation provided in postconviction proceedings as a statutory right created based on the Legislature's deliberation of policy considerations and the allocation of legal resources:

> This **statutory right** to representation acts to ensure meaningful access to the courts in a complex area of the law to ensure that our death penalty process is constitutional. (Emphasis added). . .
>
> In creating CCRC and the right to representation for capital defendants in postconviction relief proceedings, the Florida legislature has made a choice, "based on difficult policy considerations and the allocation of scare legal resources," to limit the representation of CCRC by (1) prohibiting that representation from extending to representation "during trials, resentencings, proceedings commenced under chapter 940, or *civil litigation*," § 27.7001 (emphasis added); and (2) providing that such representation shall be "*for the sole purpose of instituting and prosecuting collateral actions challenging the legality of the judgment and sentence imposed*." § 27.702(1)(emphasis added).

Id. at 408.

In rejecting the argument of the CCRC the Court held:

> We reject CCRC's argument that this limitation on its authority constitutes an arbitrary application of law or a violation of capital defendants' equal protection rights. To the contrary, we conclude that the limitation is a reasonable allocation of resources. . . Certainly, if the legislature can determine whether to provide capital defendants with postconviction counsel, it can place reasonable restrictions on such representation without those restrictions being labeled arbitrary. We find CCRC's equal protection argument to be equally untenable . . .

c. 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).

(1) 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.[7] 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 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 numerous court reviews and motions in the Spenkellink case have become common practice in capital punishment cases in Florida.

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

(2) Florida Attorney General's Proposal to Reduce Federal Litigation

In 1981 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.

(3) 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.

(4) 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.

(5) Reform of the Florida Rules of Criminal Procedure in 1987

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 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.

(6) The Florida Bar Commission, 1989

These reforms did not prevent 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 current practice, however, the Commission recognized in 1989 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.

(7) 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. [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.

(8) 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 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 still increased. From 1989 until 1993, just before the Supreme Court adopted the above rule, delays averaged 10.4 years. From 1994 to 1999, the delays have averaged approximately 14 years. Thus, since the adoption of the Florida Supreme Court rule, delays have increased by 34%.

(9) 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 direct 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 not reduced the increasing 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.

(10) 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.

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.

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.

(11) 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.

(12) 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.

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.

VII. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The Committee on Crime and Punishment amended and adopted a strike-everything amendment to HB 1-A which became CS/HB 1-A. In addition to making technical changes and stylistic changes to HB 1-A, the strike-everything amendment made the following significant changes to HB 1-A:

1. All sections related to changing the method of execution were removed from the bill.
2. The section providing for time limitations for the filing of postconviction actions was rephrased to reflect the intent that the bill impose a statute of limitations on state actions challenging the legality of a capital conviction and sentence.
3. The bill removes the provisions relating to motions for DNA testing and replaces it with provisions relating to successive postconviction actions.
4. The provision relating to creating an exemption from the Administrative Procedures Act for policies and procedures of the Department of Corrections related to executions is deleted.
5. A section is added to transfer unexpended funds from a specific appropriation to implement provisions in the act.

6. Language is added to sections relating to procedural matters which acknowledges the authority of the Supreme Court of Florida to revise the bill's procedures by rule.
7. Language regarding sanctions for state employees who violate the provisions of the bill is removed.

CS/HB 1-A was amended on the Senate floor with a strike-everything amendment which, in addition to technical changes, made the following modifications to CS/HB 1-A:

1. The language in s. 27.702 providing that the capital collateral regional counsel shall file a notice of appearance or move to withdraw within 45 days after a death sentenced is imposed is removed. This change has no impact on the bill's provisions related to the appointment of counsel because other provisions in the bill restate the time of appointment in another way.

2. Allows the capital collateral regional counsel to withdraw from a case within the required time limits for good cause.

3. Deletes language regarding the obligation of the court reporter to complete the transcripts. Also, the obligation of the clerk of the court is changed to require the clerk to provide a copy of the record on appeal within 60 days to the capital postconviction lawyer, the state attorney, and the Attorney General. A 30 day extension is provided for extraordinary circumstances.

4. Provides that in cases were the Florida Supreme Court determines that an evidentiary hearing should have been held in the lower court, jurisdiction shall be relinquished to the lower court to schedule a hearing within 30 days and conclude such hearing within 90 days.

5. There is no specific provision allowing the Attorney General to reply to supplemental postconviction motions is provided. Also, no allowance for an extension of time is provided for the Attorney General to respond to postconviction motions.

6. Prohibits sentencing orders from specifying the method of execution.

7. Repeals s. 924.051(6)(b).

8. Requests the Florida Supreme Court to conduct a study regarding centralized case management of capital postconviction actions.

VIII. SIGNATURES:

COMMITTEE ON CRIME AND PUNISHMENT:

Prepared by:	Staff Director:
David M. De La Paz	David M. De La Paz