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HOUSE OF REPRESENTATIVES
COMMITTEE ON
CRIME AND PUNISHMENT
ANALYSIS

BILL #: HB 1-A

RELATING TO: The Death Penalty

SPONSOR(S): Representative Crist & Others

TIED BILL(S): HB 3-A

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

I. SUMMARY:

HB 1-A changes Florida's method of execution from electrocution to lethal injection for sentences carried out after January 10, 2000. The bills creates an option for defendants sentenced to death to elect electrocution as a means of execution in lieu of lethal injection. Defendants not making any election, will be executed by lethal injection.

Also 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 improves the regulation of state compensated employees in postconviction proceedings, by prohibiting such employees from violating the restrictions on postconviction actions. Under HB 1-A, the state postconviction process begins while the case is on direct appeal. 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. HB 1-A also makes conforming changes to the laws governing public records in capital cases.

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 prohibiting successive postconviction actions. The bill creates a narrow exception to the limit on postconviction actions to authorize motions for DNA testing if certain requirements are met.

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.

II. 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:

1. Methods of Execution

Thirty-eight states currently have the death penalty. Eight of these states have not conducted an execution since 1976. Eleven states authorize electrocution as a method of execution. In addition to Florida, Georgia, Alabama and Nebraska authorize electrocution as the sole method of execution. Thirty-four states authorize lethal injection as a method of execution. Twelve of those states authorize an alternative method of execution. Arizona, Delaware, Arkansas, Maryland, Kentucky and Tennessee authorize a choice of methods for offenses that occurred before a specified date and lethal injection for offenses that occurred after the specified date.

a. Florida's Death Penalty Statutes

Section 775.082(1), provides that "[a] person who has been convicted of a capital felony shall be punished by death. . ."

Florida's current method of execution is electrocution. [s. 922.10] In the event that electrocution is held to be unconstitutional, the method of execution changes to lethal injection. [s. 922.105]

b. Historical Background

Florida began using the electric chair in 1924 when it was thought to be a more humane method of execution than hanging.

In 1997, in the case of Jones v. Butterworth, 701 So.2d 76 (Fla. 1997), the Florida Supreme Court, in a 4-3 vote, held electrocution in Florida's electric chair did not constitute cruel or unusual punishment. The Court stated:

> In order for a punishment to constitute cruel or unusual punishment, it must involve "torture or a lingering death" or the infliction of "unnecessary and wanton pain." Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422 (1947). As the Court observed in Resweber: "The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely." Id. at 464, 67 S.Ct. at 376. There was **substantial evidence** presented in this case that executions in Florida are conducted without any pain whatsoever, and this record is entirely devoid of evidence suggesting deliberate indifference to a prisoner's well-being on the part of state officials. (Emphasis added).

Id. at 79.

The challenge in Jones was based on a malfunction which took place during the execution of Pedro Medina on March 24, 1997 when a flame was observed emitting from the headpiece of the electric chair. Before reaching their ruling, however, the Florida Supreme Court ordered the trial court to conduct two separate four day hearings regarding the circumstances surrounding the malfunction to determine whether execution in Florida's electric chair, "in its present condition" was cruel or usual punishment. Significant findings of fact and conclusions of law were made by the trial court which where upheld by the Florida Supreme Court. As restated by the Florida Supreme Court some of these findings and conclusions were:

- [That] Medina's brain was instantly and massively depolarized within milliseconds of the initial surge of electricity. He suffered no conscious pain.
- All inmates who will hereafter be executed in Florida's electric chair will suffer no conscious pain.
- Florida's electric chair, in past executions did not wantonly inflict unnecessary pain, and therefore did not constitute cruel or unusual punishment.
- Florida's electric chair as it is to be employed in future executions . . . will result in death without inflicting wanton, and unnecessary pain, and therefore will not constitute cruel or unusual punishment.

Justice Harding, while agreeing with the majority that Florida's electric chair was not cruel or unusual punishment, wrote a separate concurring opinion encouraging the Legislature to amend s. 922.10, to provide that a death sentence may be executed either by electrocution or by lethal injection. Justice Harding, wrote: "I believe that such an amendment would avoid a possible 'constitutional train wreck' if this or any other court should ever determine that electrocution is unconstitutional." Id. at 80. Justice Harding pointed out that in the event a future Court holds electrocution unconstitutional, the Court may be forced to commute the death sentences of all those death row inmates to life. In explaining this possibility Justice Harding stated:

> While I do not predict such an event, I do have some concern that if execution by electrocution were ever declared unconstitutional by this or any other court, we might find ourselves in the same situation as the Anderson court. Section 775.082(1), Florida Statutes (1995), provides that a person convicted of a capital felony shall be punished either by death or life imprisonment. In turn, section 922.10 currently provides but one method by which a death sentence shall be executed: electrocution. Thus,

> our only alternative might be to impose life sentences on all inmates who have been sentenced to die by means of electrocution. No doubt, this result would be contrary to the intent of the people of Florida, who have determined through the legislature that the death penalty is an appropriate punishment for certain crimes.

Id. at 80.

In fact, in the Jones opinion five out of the seven justices on the Florida Supreme Court publicly urged the Legislature to adopt a lethal injection alternative to electrocution.

In order to avoid the possibility of having death sentences commuted to life the Legislature passed, in 1998, what is now s. 922.105 to replace electrocution with lethal injection as the method of execution if electrocution were held to be unconstitutional.

In addition to creating s. 922.105, the 1998 Legislature approved HJR 3505 to submit a proposed constitutional amendment to the voters which was designed to preserve the death penalty, as well as existing death sentences. That proposed amendment was overwhelmingly approved by the voters in the November 1998 election by more than 72%. The amendment limits the Florida Supreme Court's authority to review the constitutionality of execution methods. [*See*, Section V. Comments - A. Constitutional Issues - "A Savings Clause Analysis."] *See also*, Article I, Section 17, Florida Constitution.

c. Recent Events

More recently, in Provenzano v. Moore, 24 F.L.W. S443a (Fla. 1999), the Florida Supreme Court again revisited the issue of whether electrocution in Florida's electric chair constitutes cruel **or** unusual punishment.[1] The challenge in Provenzano was based on the functioning of the electric chair during the July 8, 1999 execution of Allen Lee Davis. During the execution, blood had dripped from Davis's nose, continued down his face and onto his shirt. As in Jones, the lower court conducted a four day evidentiary hearing with respect to the functioning of the electric chair, to determine whether or not it constitutes cruel or unusual punishment. Once again, significant findings of fact were made by the lower court which where upheld by the Florida Supreme Court. As restated by the Florida Supreme Court some of these findings were:

- During the execution of Allen Lee Davis, the electric chair functioned as it was intended to function. . . .
- Allen Lee Davis did not suffer any conscious pain while being electrocuted in Florida's electric chair. Rather, he suffered instantaneous and painless death once the current was applied to him.
- The nose bleed incurred by Allen Lee Davis began **before** the electrical current was applied to him, and **was not caused whatsoever** by the application of electrical current to Davis. This Court is unable to make a finding regarding the exact cause or situs of the initial onset of the nose bleed because that

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[1] At the time this opinion was issued in September of 1999, the constitutional amendment which passed in November of 1998 was in effect. That amendment altered Florida's prohibition from "cruel **or** usual" punishment to cruel **and** unusual punishment. The cruel and unusual standard applied retroactively. *See* Art. 1. Sec.17, Florida Constitution.

> information was not determined during either of the autopsies performed on Davis' body. (Emphasis added).

The circuit court also made the following conclusion of law:

> Execution by electrocution in Florida's electric chair as it exists in its present condition as applied does not constitute cruel or unusual punishment, and therefore, is not unconstitutional.

Of the findings and legal conclusion of the circuit court, the majority opinion of the Florida Supreme Court in Provenzano stated:

> The record in this case reveals **abundant evidence** that execution by electrocution renders an inmate instantaneously unconscious, thereby making it impossible to feel pain. (Emphasis added).

Despite this "abundant evidence," the ruling in Provenzano was another **4-3** decision upholding electrocution in Florida's electric chair. The four members which made up the majority were Justices Harding, Lewis, Wells, and Quince. Justices Shaw, Anstead and Pariente dissented.

In a concurring opinion with which Justice Lewis also concurred, Chief Justice **Harding** made the following comments and recommendations to the Legislature:

> ". . . I urge the Legislature to offer lethal injection as an alternative method of execution." Provenzano slip opinion at 7.
>
> " . . . I urge the Legislature to revisit this issue and pass legislation giving death row inmates the choice between lethal injection and electrocution as the method of carrying out the death penalty." Provenzano slip opinion at 8.
>
> "It is my view that the Legislature can foreclose many of these claims by simply amending Florida's death penalty statute to provide that death sentences should be carried out by lethal injection unless the defendant requests execution by electrocution." Provenzano slip opinion at 10.
>
> ". . . I believe that the Legislature will only improve death penalty jurisprudence in Florida by amending our state's statute to permit inmates to choose between lethal injection and electrocution. This is the prudent and proper step for the Legislature to take." Provenzano slip opinion at 14.

In a separate concurring opinion in which Justice Quince also concurred, Justice **Wells** made the following comments:

> ". . . in respect to Chief Justice Harding's recommendation as to lethal injection, obviously the legislature can relieve further complications involved with the electric chair issues by changing the method of execution to lethal injection for those crimes committed after the effective date of the legislation. I join in the recommendation to that extent." Provenzano slip opinion at 15.
>
> "A change to lethal injection for inmates may be legally attainable based upon an express waiver by the prisoner of any contest as to the method of execution. However, such a change requires full study and awareness

> by the legislature of the legal issues. Consequently, I do not join those that recommend it without acknowledging the consequent legal issues and that those legal issues will present matters for further litigation. Provenzano slip opinion at 16.

In addition, to her concurrence with Justice Wells' opinion, Justice **Quince** wrote a separate concurring opinion which contained the following footnote with respect to lethal injection:

> "This supposed more ``humane'' method of execution has come under Eighth Amendment attack and I suspect will generate even more litigation over the next few years. See Hunt v. Smith, 856 F. Supp. 251 (D. Md. 1994), aff'd sub nom. Hunt v. Nuth, 57 F.3d 1327 (4th Cir. 1995)." Provenzano slip opinion at 17, footnote 2.

With respect to comments from the dissenting Justices, Justice **Shaw** issued a separate opinion in which Justice Anstead concurred and stated:

> "Execution by gas is to be distinguished from lethal injection, which is generally considered more humane." (Footnote omitted) Provenzano slip opinion at 35 & 36.
>
> ". . . other less cruel methods of execution are available (it has already been approved by the Florida Legislature) and is generally considered more humane." (Footnote omitted) Provenzano slip opinion at 55 & 56.
>
> ". . . the Florida Corrections Commission (footnote omitted) has recommended that Florida switch from electrocution to lethal injection." Provenzano slip opinion at 56.
>
> "Unfortunately . . . the Florida Legislature has failed to heed the state's own experts and switch to the more humane method." (referring to lethal injection) Provenzano slip opinion at 57.
>
> "The State's own preeminent experts in this field -- i.e., DOC's advisory committee -- have recommended that Florida forsake this outdated practice in favor of lethal injection. There comes a time when the Constitution must say 'enough is enough.'" Provenzano slip opinion at 65.

In addition to his concurrence with Justice Shaw's dissenting opinion, Justice **Anstead** wrote a separate dissenting opinion in which Justice Anstead stated:

> "I also commend the opinion of Chief Justice Harding which, while contrary to my own on the constitutional issues in question, makes out a compelling case for abandoning electrocution as a method of enforcing the death penalty." Provenzano slip opinion at 67.
>
> ". . . we know today that the overwhelming majority of death penalty jurisdictions have long since rejected use of the electric chair and have turned to lethal injection as a more humane punishment." Provenzano slip opinion at 69.
>
> "Because we know that lethal injection provides a more humane alternative, . . ." Provenzano slip opinion at 70.

> "We also know, as aptly explained by Chief Justice Harding, that a more humane means of taking life is readily available to the State." (referring to lethal injection) Provenzano slip opinion at 71.

Justice Shaw also concurred in the opinion written by Justice Anstead.

Justice **Pariente** also wrote a separate dissenting opinion in which Justice Anstead concurred which stated:

> "Last year when I joined the Court, I joined with Chief Justice Harding in urging the Legislature to switch to lethal injection." Provenzano slip opinion at 72, footnote 56.

> "No one seriously disagrees that as of the end of the twentieth century, lethal injection is a more humane method of execution and creates far less a spectacle than electrocution." Provenzano slip opinion at 78.

On October 26, 1999, the United States Supreme Court granted a petition for a writ of certiorari in the case of Byran v. Moore, case number 99-6723. The petition challenges the Florida Supreme Court's denial of Bryan's contention that execution in Florida's electric chair would violate the Eight Amendment's prohibition against cruel and usual punishment. Oral arguments on the case are scheduled for February 2000. [*See* Section V - Other Comments - "California"].

d. Lethal Injection

The web-site for the Death Penalty Information Center (DPIC) contains a list labeled "Post-Furman Botched Executions". As of December 17, 1999, the list described 25 executions during which difficulties were encountered. Of the twenty-five executions listed, nine were conducted by way of electrocution, fifteen by way of lethal injection and one by way of the gas chamber.

The most common problem reported during an execution by way of lethal injection was difficulty finding a vein and inserting the intravenous tube. It is not unusual for inmates on death row to have used intravenous drugs and as a result have damaged veins. The second most commonly reported problem is a violent reaction to the lethal drugs on the part of the inmate. Additionally, during the execution of one inmate, the tightness of the leather strap restricted the flow of drugs into the inmate's veins and the inmate was not pronounced dead until 30 minutes after the drugs began to flow. Also, during another execution, one of the lethal drugs clogged the tube leading into the inmate's arm and stopped the flow of drugs.

The following are some legal challenges that have been made to lethal injection as a method of execution, none of which were successful:

Pain of procedure: In Ex parte Kenneth Granviel, 561 S.W.2d 503 (Tx. Crim. App. 1978), the defendant argued that execution by electrocution is "far more humane" than execution by injection of a lethal substance. In State v. Hinchey, 890 P.2d 602 (Az. 1995), the defendant argued that death by lethal injection violates the Eighth Amendment to the United States Constitution because "if carried out incorrectly, the procedure could be painful and if carried out correctly, 'he will be aware of the onset of loss of consciousness and will suffer shortness of breath and suffocation not unlike death by lethal gas.'" Id. at 610. *See also*, LaGrande v. Lewis, 883 F.Supp. 469 (Az. 1995)(rejecting defendant's argument that lethal

injection "poses too great a risk of extreme pain to the condemned, and must therefore be struck down."

Length of procedure: In Brown v. State, 933 P.2d 316 (Okla. Crim App. 1997), the defendant argued that his appellate counsel was ineffective for failing to raise the issue that lethal injection is cruel and unusual punishment because it "constitutes torture or lingering death".

Problems in finding a suitable vein: In Poland v. Stewart, 117 F.3d 1094 (9th Cir. 1997), the Arizona defendant challenged lethal injection as being cruel and usual punishment. The defendant submitted the affidavit of a sociologist who collected reports of "botched" executions involving either problems in finding a suitable vein or violent reactions to the drugs.

Vagueness of statute: In Ex parte Kenneth Granviel, 561 S.W.2d 503 (Tx. Crim. App. 1978), the defendant argued that the Texas statute was unconstitutionally vague for its failure to specify what lethal substance was to be used in the lethal injection. The defendant argued that because the lethal substance to be used was not specified in the statute, the prison officials could "choose a substance which would cause an agonizing death and result in the imposition of cruel and unusual punishment." Id. at 513. The defendant also argued that the failure to specify the lethal substance to be used constituted an improper delegation of legislative power to the Director of the Department of Corrections. In Delaware v. Deputy, 644 A.2d 411 (Del. Super. Ct 1994), the defendant argued that the lethal injection statute was unconstitutional because it failed to provide guidelines concerning the appropriate selection and training of the people administering the lethal injection.

2. 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.[2] 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.[3] 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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[2] This analysis will use the term "postconviction action" to describe collateral attacks, postconviction claims or motions.

[3] 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.[4]

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 issues that were or could have been resolved at trial or during the first appeal. In Florida,

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

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.[5]

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.[6]

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 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

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[5] 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.

[6] Id.

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.[7]

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 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

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[7] Id.

> 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 and DNA Testing

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. In Zeigler v. State, 654 So.2d 1162 (Fla. 1995), the Florida Supreme Court found that the time limit for filing a motion for postconviction relief based on newly discovered evidence began to run when the DNA testing method that the defendant was seeking to use became available. The court barred Zeigler's motion as untimely.

In Murray v. State, 692 So.2d 157 (Fla. 1997), the state admitted DNA evidence, using Polymerase Chain Reaction (PCR) testing, against the defendant at trial. It was argued on appeal that the PCR test did not pass the test for the admissibility of novel scientific evidence. The Florida Supreme Court found the evidence was improperly admitted due to inadequacies in the testimony of the state's expert witness. There have not been any Florida appellate cases that have specifically ruled on the admissibility of PCR testing.

In Henyard v. State, 689 So.2d 239 (Fla. 1996), the Florida Supreme Court found that the trial court had not abused its discretion in admitting DNA evidence analyzed pursuant to the Restriction Fragment Length Polymorphisms (RFLP) method of testing.

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. Methods of Execution

This bill creates s. 922.101, which changes the Florida's primary method of execution from electrocution to lethal injection for sentences carried out after January 10, 2000. For death sentences to be carried out after that date, persons sentenced to death may affirmatively select electrocution as a means of execution in lieu of lethal injection if they so desire. The election for electrocution will be waived unless the selection is made in writing and delivered to the warden of the correctional facility within 30 days after the Florida Supreme Court issues the mandate affirming the death sentence on direct appeal. If the person waives the election for electrocution, the sentence must be carried out by lethal injection.

The bill also provides that if the new provision for lethal injection is found unconstitutional, the sentence shall be carried out by electrocution pursuant to s. 922.10, or lethal injection pursuant to s. 922.105 ("if applicable"), or any other provision of law which may be applicable at the time of the execution. The bill also amends s. 922.105 to require that persons who are to be executed by electrocution shall be executed by lethal injection if electrocution is found unconstitutional. For example, if for some reason a constitutional problem arose with regard to giving death row inmates a choice as to their method of execution, it is possible that lethal injections could still be lawfully carried out as contemplated in s. 922.105, as a backup to electrocution if electrocution was found unconstitutional.

This bill also contains provisions allowing selections to be made for persons whose 30 day time period for making the selection has passed before the effective date of the act.

2. Postconviction Review of Death Penalty Cases

HB 1-A attempts to reduce delays in capital cases in Florida by imposing absolute time limitations at key points of the postconviction process. 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 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.

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." A "fully pled" postconviction action must 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.

In addition, postconviction actions must raise all meritorious 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 this act, the bill sets forth the following statute of limitations for the filing of postconviction actions:

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, a fully pled postconviction 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.

For cases where a death sentence was imposed before the bill's effective date, postconviction counsel is authorized to file a "fully pled" postconviction action by January 8, 2001. There is an exception to this provision for persons who have a postconviction action pending on the effective date of this act. The intended effect of this provision is to impose the bill's same statutory requirements with respect to fully pled postconviction actions in cases which do not currently have a postconviction action pending. The bill does not expand any existing right or time period to file postconviction actions where such motions are currently pending.

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 notify the Governor, Senate President and the Speaker of the House of actions filed in violation of the statutory time limitations. 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. This period may be extended for good cause.

HB 1-A essentially establishes two parallel appeal avenues 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 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.

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. The bill also prohibits persons receiving state compensation to represent or assist a person sentenced to death in a postconviction proceeding, from violating the statutory limits on postconviction actions. Any such person who violates the limitations will be considered in breech of their employment agreement. The Attorney General is required to notify the Senate President and the Speaker of the House of any state employee, or party contracting with the state, who violates the provisions of the act. The bill also authorizes the Attorney General to file a writ of prohibition in the Florida Supreme Court for violations of the time limitations or prohibition against successive postconviction actions.

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. The bill further amends this section to limit the filing of federal postconviction actions by state paid postconviction counsel to one in the federal district court, one in the appropriate federal court of appeals, and one in the United States Supreme Court.

Public Records in Capital Cases

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. [*See* "Section-by-Section"].

DNA Testing

HB 1-A allows a defendant to file a motion in the trial court to have DNA testing performed using the Polymerase Chain Reaction (PCR) method on evidence that was secured in relation to the trial that resulted in the defendant's conviction but which was not subject to PCR testing because PCR technology was not available at the time of trial. The bill requires the defendant to serve notice of the motion on the state and the victim or victim's family. The judge is not permitted to conduct a hearing unless the state and the victim or victim's representative is present.

The bill provides that in order for the trial court to grant the motion:

1. The defendant must present a prima facie case that identity was the issue at trial that resulted in the defendant's conviction as demonstrated by the trial transcript which the defendant must produce. The defendant also must show the "chain of custody" of the evidence in order to establish that the evidence has not been substituted or tampered with.

2. The defendant must agree to submit to DNA testing using the PCR method. The results of the testing may be used against the defendant at any further proceeding, including a retrial, resentencing or unrelated criminal proceeding.

3. Also, the defendant must demonstrate by clear and convincing evidence that the testing is highly likely to demonstrate that the results would have been admissible at trial and that, had the tests results been introduced at trial, no reasonable fact finder could have found the defendant guilty beyond a reasonable doubt.

The bill further provides that the trial court has the discretion to deny the motion if it finds that the requested testing would produce only cumulative or irrelevant information. The trial court must deny the motion "if the required testing would not conclusively demonstrate that the evidence would probably produce an acquittal at a new trial."

The bill provides that the defendant shall bear the costs for the production of any evidence, unless the court finds that the defendant has made the required showing and is indigent. If the court grants the defendant a new trial, the order is subject to appeal. A new trial granted under this provision will be expedited unless the state contends that it cannot relocate essential witnesses or does not agree to an expedited new trial. The case shall not be subject to discharge based on an alleged violation of the right to a speedy trial.

The bill does not provide an exception to the general time limit for filing a postconviction motion for a claim of newly discovered evidence. Instead, the bill will give persons sentenced to death until June 1, 2001 to file a motion to have DNA testing conducted. It appears as if the motion regarding DNA evidence could be raised in addition to the other postconviction actions authorized by the bill.

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. 922.10, making conforming changes with respect to executions by electrocution.
Section 3: Creating s.922.101, *See* “Effect of Proposed Changes.”
Section 4: Creating s. 922.103, codifying as the law of Florida, U.S. Supreme Court precedent that a retroactive change in the method of execution is not a violation of the Ex Post Facto Clause of the federal constitution. Providing that changing the method of execution does not violate the “savings clause” of the Florida Constitution. Preserving death sentences in the event that a method of execution is found unconstitutional.
Section 5: Creating s. 922.104, authorizing the prescribing, preparing, compounding, and dispensing of a lethal injection. Creating an exemption for persons assisting in any aspect of an execution if it is against their moral or ethical beliefs.
Section 6: Amending s. 922.105, *See* “Effect of Proposed Changes.”
Section 7: Amending s. 27.702, *See* “Effect of Proposed Changes.”
Section 8: 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 45 days of receipt of the notice. Requiring that within 45 days of the issuance of the mandate affirming a death sentence, 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 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 9: Amending s. 922.095: *See* "Effect of Proposed Changes."

Section 10: Amending s. 924.055: *See* "Effect of Proposed Changes."

Section 11: Creating s. 924.056, Providing that the defendant must cooperate with 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 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 court reporter to provide postconviction counsel with the trial transcripts within 30 days after the appointment of postconviction counsel. *See also* "Effect of Proposed Changes."

Section 12: Creating s. 924.057, *See* "Effect of Proposed Changes."

Section 13: Creating s. 924.058, *See* "Effect of Proposed Changes."

Section 14: 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 postconviciton 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 and the hearing held within 30 days. *See also* "Effect of Proposed Changes" for a detailed discussion concerning motions for DNA testing.

Section 15: 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 16: Amending s. 27.710, *See* "Effect of Proposed Changes."

Section 17: Amending s. 27.51, providing for reassignment of appellate public defender when the appellate public defender served as defendant's trial counsel.

Section 18: Amending s. 27.703, prohibiting the capital collateral regional counsel from accepting appointments which will create a conflict of interest. Providing that funds to pay private postconviction counsel will be appropriated to the Comptroller.

Section 19: 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 20: Amending s. 27.711, requires the registry of private postconviction attorneys to provide billing documentation to Comptroller prior to submission to the court.

Section 21: Creating s. 924.395, providing that the Legislature encourages the courts to impose sanctions on those who abuse the capital postconviction process.

Section 22: Creating s. 922.107, providing that the Department of Corrections' policies and procedures for executions are exempt from Administrative Procedure Act.

Section 23: Providing a severance clause.

Section 24: Providing as effective date, and providing that Section 15 requires a 2/3rds vote of the membership of each house in order to take effect.

III. 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		949,271	949,271
Department of Corrections	26,503	13,503	13,503
Total	3,904,695	8,999,362	10,538,729

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	319,500	4,372,500	4,612,500
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		949,271	949,271
Department of Corrections	26,503	13,503	13,503
Total	901,003	5,752,274	5,915,274

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. Twentyfive 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. With the exception of the Department of State, all other agencies report that they will be able to cover any additional costs in FY 1999-00 from existing resources.

IV. 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.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

1. Changing the Method of Execution

a. An Ex Post Facto Analysis

A change in the law which alters the method of execution for persons sentenced to death under previous law may give rise to legal challenges based on the state and federal prohibition against ex post facto laws (i.e., laws which criminalize, or punish more severely, conduct which occurred before the existence of the law). *See*, Article I, Section 9 of the Florida Constitution; and Article I, Section 10 of the United States Constitution. The Florida Supreme Court and the United States Supreme Court both use a two prong test to determine if there is an ex post facto violation:

> (1) whether the law is retrospective in its effect; and
> (2) whether the law alters the definition of criminal conduct or increases the penalty by which a crime is punishable.

See, Gwong v. Singletary, 683 So. 2d 112 (Fla. 1996); and California Dep't of Corrections v. Morales, 514 U.S. 499, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995).

The United States Supreme Court in Malloy v. South Carolina, 237 U.S. 180 (1915) has ruled that it is not an ex post facto violation to apply a change in the method of execution retroactively. Later in Weaver v. Graham, 450 U.S. 24, at 33 n.17(1981), the United States Supreme Court further explained Malloy:

> In Malloy v. South Carolina, we concluded that a change in the method of execution was not ex post facto because evidence showed the new method to be more humane, not because the change in the execution method was not retrospective. (Citation omitted.)

Other state courts,[8] including the Texas Court of Criminal Appeals have held that a retrospective change in the method of execution does not violate the ex post facto clause:

> We conclude in light of these holdings that execution by lethal injection may be imposed upon a defendant even though death by electrocution was the mode of execution authorized by law at the time of the commission of capital murder, at the time of his trial, and even if he had been previously sentenced to die by electrocution. The statute under consideration did not change the penalty of death for capital murder, but only the mode of imposing such penalty. The punishment was not increased, only some of the odious features incident to the former method of electrocution were abated. ...

Ex parte Kenneth Granviel, 561 S.W. 2d 503 (Tex. App. 1978), citing Malloy v. South Carolina, 237 U.S. 180 (1915) (footnoted omitted).

With respect to the Florida Supreme Court's analysis of this issue, Justice Harding with Lewis concurring, as wells as dissenting Justice Shaw with Anstead concurring, have gone on record in their respective Provenzano opinions stating that a retroactive change in the method of execution **does not** violate the ex post facto clause. Provenzano slip opinion at 14 and 63.

With respect to this issue Justice Harding stated:

> . . . it is important to note that several courts, including the United States Supreme Court, have held that it is not an ex post facto violation to apply a change in execution methods retroactively. (Citations omitted) Provenzano slip opinion at 12.
>
> My research has not revealed a single state that has found the retroactive application of a more humane method of execution to be unconstitutional. This is true even though the sentence imposed specifically called for the previous method of execution. (Emphasis added) Provenzano slip opinion at 14.

Justice Shaw commented on the ex post facto issue as follows:

> The question posed in the present case is whether retroactive application of these statutory changes violates ex post facto principles. I conclude that it does not, based on Malloy v. South Carolina, 237 U.S. 180 (1915). Provenzano slip opinion at 63
>
> I would apply Malloy to the present case and allow Provenzano's sentence to be carried out by lethal injection. Provenzano slip opinion at 63.

In her dissenting opinion in Provenzano, Justice Pariente stated:

> There is no indication that the legislative decision in 1999 to retain electrocution, contrary to the recommendations of the Florida Corrections Commission, was based on objective evidence that this method was more

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[8] In his concurring opinion in Provenzano, Justice Harding cites several cases of other states reaching the same result. Provenzano slip opinion at 13.

> humane than lethal injection or other alternative methods. Provenzano slip opinion at 78.

To support her criticism of the Legislature's "1999" decision, Justice Pariente included the following footnote:

> In fact, it appears the prime concern of the Legislature was that the death sentences not be invalidated as a result of a change in the method of execution. As Justice Harding's concurring opinion and Justice Shaw's dissent explain, the change to lethal injection would **not** result in **any** death sentence being vacated. (Emphasis added) Provenzano slip opinion at 78, n. 58

In addition to the U.S. Supreme Court's decision in Malloy and subsequent caselaw, s. 922.105(2) specifically codifies Malloy as the law of Florida. It provides:

> The provisions of the opinion and all points of law decided by the United States Supreme Court in Malloy v. South Carolina, 237 U.S. 180 (1915), finding that the Ex Post Facto Clause of the United States Constitution is not violated by a legislatively enacted change in the method of execution for a sentence of death validly imposed for previously committed capital murders, are adopted by the Legislature as the law of this state.

Also, Article 1, Section 17 of the Florida Constitution [9] now provides in part:

> . . . Methods of execution may be designated by the Legislature, and a change in any method of execution may be applied retroactively. . .

This provision specifically gives the Legislature state constitutional authority to retroactively change the method of execution, **notwithstanding** the state ex post facto constitutional provision.

b. A Savings Clause Analysis

A change in the method of execution also poses an issue with respect to Article X, Section 9 of the Florida Constitution which provides:

> Repeal of criminal statutes.-- Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.

The Florida "savings clause" (as it is commonly referred to) was originally passed in 1885 in response to criminals escaping prosecution or evading punishment because the underlying statute was repealed or amended. *See*, State v. Watts, 558 So.2d 994 (Fla. 1990). The purpose of this provision, is to save pending criminal prosecutions and the sentences imposed from the repeal of the underlying statute. Hayward v. State, 467 So.2d 462 (Fla. 2d DCA 1985). The Florida Supreme Court has held that "the effect of this constitutional provision is to give to all criminal legislation a prospective effectiveness." Washington v. Dowling, 109 So. 588 (Fla. 1926). The effect of giving criminal legislation prospective

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[9] This new provision of the state constitution has been challenged in the case of Armstrong v. Harris, No. 95,223. The challenge is based on a claim that the ballot summary of the proposed constitutional amendment was deficient. Oral arguments were held before the Florida Supreme Court on September 2, 1999, and a ruling has not yet been issued.

effectiveness is to leave undisturbed the prosecutions and punishments that had resulted from the law as it existed before being amended or repealed.

In 1923 the Florida legislature abolished death by hanging as the method of execution and enacted a statute that required the death penalty be carried out by electrocution. An inmate who was sentenced to death by hanging before the method of execution was changed argued that he could not be hung because the statute specifically stated that "hanging ...is hereby abolished." The courts had previously held that the inmate could not be electrocuted because the sentence pronounced by the trial court was death by hanging. The Florida Supreme Court in Washington v. Dowling, 109 So. 2d 588 (Fla. 1926), held that the savings clause prevented the retrospective change in the method of execution from hanging to electrocution.

Under the Washington rationale, inmates had to be hung if they were sentenced to death for crimes committed before the effective date of the statute calling for death by electrocution. In Ex parte Browne, 111 So. 518 (Fla. 1927), the Florida Supreme Court again held that the statute requiring execution by electrocution could not be applied to crimes committed before the effective date of the statute because the savings clause prohibited retroactive changes in punishment. In Browne, the case was remanded to the trial court to have the sentencing order changed to identify hanging as the method of execution rather than electrocution.

The present day concern surrounding a Legislative change in Florida law with respect to the method of execution has been framed in terms of risking the loss of death sentences by having them commuted to life due to operation of the savings clause if the method of execution where changed. The argument for this feared result could be expressed as follows:

> That because of the decision of the Court in Washington, Florida can not lawfully change the method of execution because the law in effect at the time a convicted person's death sentence was imposed only provided for executions to be carried out by electrocution. [s. 922.20]. If electrocution were found to be unconstitutional and therefore not available as a method of execution, the decision of the Court in Washington would prevent those inmates from being executed by any other means. Due to the fact that the method of execution (ie. Electrocution) would, at that point be unconstitutional, the only available recourse would be to commute those sentences to life.

Looking at it another way, if the method of execution were held unconstitutional, a literal application of Washington would require precisely the result that the Court in Washington sought to avoid, to wit: death sentenced inmates having their sentence commuted to life. The end result of this logic is that the provision of the constitution that has as its purpose to prevent inmates from evading their sentence would be grossly misinterpreted and painfully distorted to require death sentenced inmates to have their sentences commuted to life.

This concern, however, arises from looking only at the end result of Washington without considering the rationale the Court utilized in reaching its result, and perhaps more importantly, the outcome the Court was **not** willing to direct (ie. commuting death sentences to life). It is important to note, that the Court in Washington was interpreting the savings clause with the express purpose of allowing it to accomplish its intended purpose as the except below illustrates:

> To hold that the subsequent amendment of [92 Fla. 613] the statute providing how punishment of death shall be inflicted operates to stay or prevent the execution of a sentence, legal and final at the time it was imposed, would obviously prevent the

> execution of the sentence pronounced, and thereby prevent the punishment imposed by the law and the sentence of the court. The constitutional provision that the repeal or amendment of any criminal statute shall not affect the punishment of any crime committed before such repeal or amendment would thereby be ignored and rendered nugatory. **Such a conclusion is not only inconsistent with the plain meaning of the Constitution, but is clearly opposed thereto.** (Emphasis added).

Washington supra at 592.

In addition, the Court in Washington and Ex parte Brown, was dealing with an change in law in 1923 which made **no provision** to address those persons who had been sentenced to death by hanging before the execution method was changed. The present situation is very different than the one confronting the Court in Washington and Ex parte Brown. First, the Legislature **has made provisions**, both in the state constitution and in statute, to address those persons sentenced to death under the previous law.

Subsections 922.105(3)&(6) provide:

> (3) A change in the method of execution does not increase the punishment or modify the penalty of death for capital murder. Any legislative change to the method of execution for the crime of capital murder **does not** violate s. 10, Art. I or s. 9, Art. X of the State Constitution.
>
> (6) Notwithstanding s. 775.082(2), s. 775.15(1)(a), or s. 790.161(4), or any other provision to the contrary, no sentence of death shall be reduced as a result of a determination that a method of execution is declared unconstitutional under the State Constitution or the Constitution of the United States. In any case in which an execution method is declared unconstitutional, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method of execution.

Further, Article 1, Section 17, of the Florida Constitution (discussed above in "An Ex Post Facto Analysis") which authorizes the Legislature to retroactively change the method of execution, is also applicable to this issue. The state constitution is no longer silent on legislative changes to the method of execution. The directive is clear, notwithstanding the Washington case, that such changes may be applied retroactively.

Commuting death sentences to life due to a change in the method of execution would be directly contrary to the provisions shown above. It would also be contrary to the **purpose** of the savings clause as acknowledged by the Court in Washington. In addition, it would be directly contrary to the express language of the savings clause.[10] Further, trying to justify such a result on the basis of the savings clause, would pit one provision of the constitution squarely at odds with another when it is absolutely unnecessary since the Legislature has acted, and the people of the state have voted, directly on this issue subsequent to the Washington case.

c. Waiving an Eighth Amendment Claim

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[10] Justice Shaw in his dissenting opinion in Provenzano indicated he would recede from Washington v. Dowling, 109 So. 588 (Fla. 1926), to the extent that it would preclude executions from being carried out by another method. Provenzano slip opinion at 63, n. 53.

In Stewart v. LaGrand, --- U.S. ---, 119 S.Ct 1513 (1999), the United States Supreme Court ruled that an inmate sentenced to death waived his Eighth Amendment claim against lethal gas by selecting it as a method of execution over lethal injection. At the time LaGrand was sentenced to death for first degree murder in Arizona, lethal gas was the state's only method of execution. Later, Arizona amended their statute to provide persons sentenced to death before November 23, 1992 with an option to select lethal injection or lethal gas as the method of execution. Persons who fail to make a selection, are executed by lethal injection. *See*, Ariz.Rev.Stat. Sec. 13-704(B). After this statutory change, LaGrand still chose to be executed by lethal gas. In March of 1999, LaGrand was given an opportunity to rescind his choice of lethal gas and select lethal injection. LaGrand, however, insisted on staying with lethal gas as his method of execution. He then attempted to challenge lethal gas as cruel and unusual punishment. The Court stated: "By declaring his method of execution, picking lethal gas over the state's default form of execution -- lethal injection-- Walter LaGrand waived any objection he might have to it."

The fact that LaGrand selected the optional method, as opposed to the state's default method, is significant when viewed in the context of developing caselaw. Both the California Supreme Court and the United States Ninth Circuit Court of Appeals have held that only the primary method of execution may be challenged as being cruel and unusual. An affirmative choice of an alternate method waives any challenge that the alternate method is cruel and unusual. *See*, People v. Bradford, 929 P.2d 544 (Ca. 1997); and Poland v. Stewart, 92 F.3d 881 (9th Cir. 1996). The court in Poland further held that "the mere existence of the option is not a violation of Poland's constitutional rights." The California experience indicates that even if the Court finds a method of execution unconstitutional, the penalty would still be death. People v. Holt, 937 P.2d 213 (Cal. 1997)(invalidation of the means by which a sentence is carried out does not affect the validity of the sentence).

With respect to the effect, under the bill, of requiring persons sentenced to death to affirmatively choose electrocution over the default method of lethal injection, under LaGrand, persons choosing electrocution would waive any Eighth Amendment challenges to it as a method of execution.

2. 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 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. California

California has recently litigated issues relating to their methods of execution in both state and federal courts. A review of this litigation could give Florida guidance on constitutional limits to legislation regulating methods of execution.

In 1996, the United States Court of Appeals for the Ninth Circuit in the case of Fierro v. Gomez, 77 F.3d 301 (9th Cir. 1996), held that the gas chamber used by California violated the Cruel and Unusual clause of the United States Constitution. At the time of the sentencing of David Fierro the sole method for execution was lethal gas. However, before the Fierro case was decided, California amended state law to allow all inmates sentenced prior to or after the effective date of the law to choose between lethal injection and lethal gas. Lethal gas was the default method if a person did not make a choice within ten days of being served with an execution warrant. The option method that California passed also provided that if either manner of execution was held invalid, the punishment would be imposed by the alternative means remaining. The Ninth Circuit acknowledged that regardless of their holding (that lethal gas is unconstitutional) the inmate's sentence of death remained unaffected.

During the same year that the Ninth Circuit held lethal gas to be cruel and unusual punishment, California passed a third change to their law which made lethal injection the default method of execution. The United States Supreme Court vacated the Ninth Circuit's decision in Fierro "in light of" the new change to the California law without further explanation. In his concurring opinion in Jones v. State, *supra*, Justice Harding wrote that "the United States Supreme Court [in Fierro] impliedly approved the course of action taken by the California Legislature" and urged the Florida Legislature to adopt the California approach.

b. 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.

c. 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 . . .

d. DNA Evidence

With respect to the bill's provisions concerning motions for DNA testing, the bill provides that the trial court is not permitted to conduct a hearing on whether to allow DNA testing unless the state and the victim or the victim's representative are present. However, there may be cases in which the victim does not have any family or when the family does not wish to be present at such a hearing and the bill does not contain exceptions which would cover these circumstances.

The motion which the bill initially contemplates is for the defendant to have DNA testing performed. However, the bill provides for procedures "in the event the trial court grants the motion and makes a finding that the defendant is entitled to a new trial." In short, what begins as a motion for DNA testing grants relief in the form of a new trial, and it does so **before** any DNA testing has been done.

In addition, the bill sets two distinct standards before the court may grant a motion for DNA testing. The lesser of these standards requires the court to deny the motion if the "testing would not conclusively demonstrate that the evidence would probably produce an acquittal at trial." This "conclusive" "probability" standard is unnecessary given the higher standard which prohibits the court from granting the motion unless it is demonstrated by "clear and convincing evidence that . . . no reasonable jury or court could have found the defendant guilty. . ."

e. 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.[11] 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

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

> 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.

(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.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON CRIME AND PUNISHMENT:

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