

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: SB 1568

SPONSOR: Senator Burt

SUBJECT: Capital Collateral Proceedings

DATE: February 14, 2002 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cellon</u>	<u>Cannon</u>	<u>CJ</u>	<u>Favorable</u>
2.	<u>Matthews</u>	<u>Johnson</u>	<u>JU</u>	<u>Favorable</u>
3.	_____	_____	<u>FT</u>	_____
4.	_____	_____	<u>APJ</u>	_____
5.	_____	_____	<u>AP</u>	_____
6.	_____	_____	_____	_____

I. Summary:

Senate Bill 1568 requires attorneys in private practice who want to represent capital defendants in postconviction collateral proceedings as a member of the statewide registry to attend a continuing legal education course of at least ten hours' duration that is specifically devoted to the defense of capital cases.

The bill provides for payment of Registry counsel in the active death warrant stage of a case. It deletes the statutory provision for payment of Registry counsel to represent a capital defendant before the United States Supreme Court.

This bill substantially amends or repeals the following sections of the Florida Statutes: 27.710 and 27.711.

II. Present Situation:

A. Overview of death penalty proceedings

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

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

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

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

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

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

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

B. Capital Collateral Regional Counsel

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

The CCRC represents defendants sentenced within his or her region. In the event that a CCRC has a conflict of interest with a client, the sentencing court may designate another CCRC or private counsel to represent the defendant. s. 27.703, F.S.

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

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

C. Attorney registry for postconviction representation

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

Attorney appointment. The executive director of the Commission on Capital Cases compiles and maintains the statewide attorney registry. Under s. 27.710(5), F.S., an attorney from the statewide registry is appointed by the trial court that sentenced the defendant when it is notified by the executive director of the need for counsel to be appointed.

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

The attorney must certify that, if appointed, he or she will continue such representation under the terms and conditions set forth in s. 27.711, F.S., until the sentence is reversed, reduced, or carried out, unless he or she is permitted by the trial court to withdraw.

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

- An attorney may not represent more than 5 capital defendants at any one time,
- an attorney may not file repetitive or frivolous pleadings that are not supported by law or facts,
- an attorney may not represent the death-sentenced defendant during a retrial, a resentencing proceeding, or a proceeding commenced under ch. 940 (executive clemency), an attorney may not represent the death-sentenced defendant in a proceeding challenging a conviction or sentence other than the conviction and sentence of death for which the appointment was made, or
- an attorney may not represent the death-sentenced defendant in any civil litigation other than habeas corpus proceedings. s. 27.711 (9) – (11), F.S.

Attorney contract. Immediately after appointment by the trial court that sentenced the defendant to death, the attorney must file a notice of appearance with the trial court indicating acceptance of the appointment. s. 27.11(2), F.S. The attorney must specify that he will represent the defendant throughout all postconviction capital collateral proceedings or until released by order of the trial court. *Id.* Additionally, the attorney must enter into a contract with the Comptroller. s. 27.710(4), F.S. The Comptroller develops the form of the contract and functions as contract manager as well as enforces performance of the terms and conditions of the contract. *Id.*

Fee and payment schedule. Section 27.711(4), F.S., provides a fee and payment schedule. Upon approval by the trial court, and after certain stages in litigation are complete, a registry attorney is entitled to payment of \$100 per hour by the Comptroller, up to a maximum of:

\$2,500 upon accepting the appointment and filing the notice of appearance,

\$20,000 after timely filing in the trial court the capital defendant's complete original motion for postconviction relief, or if the trial court schedules a hearing on the matter that makes the filing of the motion unnecessary or otherwise disposes of the case,

\$20,000 after the trial court issues a final order granting or denying the defendant's motion for postconviction relief,

\$20,000 after timely filing in the Supreme Court the defendant's briefs that address the trial court's final order granting or denying the defendant's motion for postconviction relief and the state petition for writ of habeas corpus,

\$10,000 after the trial court issues an order, pursuant to a remand from the Supreme Court, which directs the trial court to hold further proceedings on the motion for postconviction relief,

\$4,000 after the appeal of the trial court's denial of the motion for postconviction relief and the state petition for writ of habeas corpus become final in the Supreme Court,

\$2,500 at the conclusion of the defendant's postconviction capital collateral proceeding in state court and after filing a petition for writ of certiorari in the U.S. Supreme Court, and

\$5,000 if the U.S. Supreme Court accepts for review the defendant's collateral challenge of the conviction and sentence of death. This payment shall be full compensation for representing the defendant throughout the certiorari proceedings before the U.S. Supreme Court.

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

Finally, the attorney is entitled to a maximum of \$15,000 for miscellaneous expenses, such as transcript preparation, expert witnesses, and copying, unless the trial court finds that extraordinary circumstances exist in which case the attorney is entitled to payment in excess of \$15,000. s. 27.711(6), F.S.

Section 27.711(7), F.S., provides for a payment of up to \$500 per fiscal year to an attorney who is actively representing a capital defendant for tuition and expenses for continuing legal education. The curriculum is not specified by the statute.

There is no current provision for payment of an attorney for work done on behalf of his or her client in the active death warrant stages of the case.

Current caseloads. In November 2001, the Office of Program Policy Analysis and Government Accountability (OPPAGA) published a report on the CCRC's and Registry attorneys. OPPAGA reports that the Registry contains 122 lawyers and of these, 38 lawyers are representing 56 capital defendants. (*Performance of Collateral Counsels Improved; Registry Accountability Needs to be Revisited*, OPPAGA Justification Review, November 2001, Report No. 01-52.)

D. Pending Litigation On Attorney's fees

In May, 2000, an attorney was appointed in the Eighth Circuit to represent Bennie Demps, a capital defendant with an active death warrant. The attorney was appointed outside the normal appointment process for a Registry attorney and the attorney did not enter into a contractual arrangement with the Comptroller's Office. Demps was executed on June 7, 2000.

The attorney requested payment of attorney's fees in the amount of \$26,180.00 (130.9 hours x \$200 per hour) and reimbursement of costs in the amount of \$1,130.59. The Comptroller objected to the hourly rate because ss. 27.703 and 27.711, F.S., limit attorney's fees for Registry counsel to \$100 per hour.

The Circuit Court ruled that the \$100 statutory cap as applied in the "extraordinary circumstances" of the case is unconstitutional based on the holding and reasoning in *Makemson v. Martin County*, 491 So.2d 1109 (Fla. 1986). The Comptroller was ordered to pay the attorney at the requested rate. *State v. Demps, Final Order on Attorney George F. Schaefer's Reapplication for Award of Attorney's Fees*, Fla. 8th Circuit, Case No. 77-0116 CFA. The court's ruling is currently on appeal.

E. Consideration of Minimum Continuing Legal Education Standards

The Florida Bar requires attorneys who are licensed to practice law in Florida to complete a minimum of 30 hours continuing education course work over a three-year period.

The Florida Supreme Court has set forth the following minimum continuing legal education standards for attorneys representing clients in capital cases at the *trial and direct appeal* stage:

"No attorney may be qualified on any of the capital lists unless he or she has attended within the last year a continuing legal education program of at least ten

hours' duration devoted specifically to the defense of capital cases. Continuing legal education programs meeting the requirements of this rule shall be offered by the Florida Bar or another recognized provider and should be approved for continuing legal education credit by the Florida Bar. The failure to comply with this requirement shall be cause for removal from the list until the requirement is fulfilled." *Fla.R.Cr.P. 3.112(c)(3)*.

The Court is currently considering setting minimum requirements for counsel in capital postconviction cases.

III. Effect of Proposed Changes:

Senate Bill 1568 would require attorneys who are included on the statewide registry of lawyers in private practice seeking appointment to represent capital defendants in postconviction matters to attend, within the last year, a continuing legal education program of at least ten hours' duration devoted specifically to the defense of capital cases. This provision essentially codifies the Court Rule (Florida Rule of Criminal Procedure 3.112(c)(3)) regarding trial and direct appeal counsel in capital cases.

The bill would also provide for payment of Registry attorneys for their work at the active death warrant stage of a case, of up to \$5,000 at the rate of \$100 per hour. This section of the bill also deletes the provision for payment for representation of a capital defendant before the United States Supreme Court.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The Court's holding and reasoning in the *Makemson v. Martin County* case seemed to look to the statutes which set fee caps as a "legislative guide," but stated that "it is within the inherent power of Florida's trial courts to allow, in extraordinary and unusual cases, departure from the statute's fee guidelines when necessary in order to ensure that an attorney who has served the public by defending the accused is not compensated in an amount which is confiscatory of his or her time, energy and talents. More precise delineation, we believe, is not necessary. Trial and appellate judges, well aware of the

complexity of a given case and the attorney's effectiveness therein, know best those instances in which justice requires departure from statutory guidelines." *Id.*, at 1115.

The Court ruled on February 14, 2002, in the case of *Olive v. Maas*, (No. SC00-317, Florida Supreme Court, nonfinal opinion) that trial courts are authorized to grant fees in excess of the fee caps set forth in s. 27.711, F.S., where extraordinary or unusual circumstances exist in a capital collateral case. The Court applied the reasoning of the *Makemson* case discussed above, as well as *Makemson's* progeny. The pertinent issue in *Olive* was that the Registry attorney did not sign the contract for services, contending that by agreeing to the costs and fees set forth in s. 27.711, F.S., the attorney would be waiving any other compensation to which he may be entitled.

Based on the ruling in the *Olive* case, it is probable that the Court will rule similarly in the *Demps* case (discussed in the Present Situation – Pending Litigation section of the Staff Analysis). Therefore, it should be noted that the message from the Court seems to be clear that while the statute may be a guidepost for setting fees, the courts are free to exceed the statutory fee caps in extraordinary situations in order to ensure adequate representation.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

It is unknown what, if any, fiscal impact this bill would have. There have been no Registry cases that have advanced to the active death warrant stage to date. It is speculation, but it seems that the closing of the loophole which left open the issue of compensation for Registry lawyers at that stage will serve to make the process run more smoothly and eliminate the need for counsel who is unfamiliar with the case to take it over at that critical stage.

VI. Technical Deficiencies:

None.

VII. Related Issues:

It should be noted that the amendment to s. 27.711(4)(h), F.S., in Section 2 of the bill will eliminate the provision for payment of attorneys for representation of their client before the United States Supreme Court should the court accept for review the capital defendant's collateral challenge of the conviction and sentence of death. Section 27.711(4)(g), F.S., provides for

payment of up to \$2,500 for the *filing of the petition* for writ of certiorari in the U.S. Supreme Court. The Executive Director of the Commission on Capital Cases relates that there are monies available for compensation at the federal level should the case be accepted for review.

VIII. Amendments:

None.

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