HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HJR 1741 Rules of Practice and Procedure
SPONSOR(S): Public Safety & Crime Prevention
TIED BILLS: None **IDEN./SIM. BILLS:** SJR 2378

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Public Safety & Crime Prevention	13 Y, 6 N	De La Paz	De La Paz
2) Judiciary		Jaroslav	Havlicak
3)			
4)			
5)			

SUMMARY ANALYSIS

Under Article V, Section 2 of the Florida Constitution, the Supreme Court "shall adopt rules for the practice and procedure in all courts . . ." The same section also authorizes the Legislature to repeal court rules of procedure with a 2/3 vote of the membership of both houses.

Unlike the federal constitution, the Florida Constitution includes a specific provision pertaining to the separation of powers among the three braches of government. Article II, Section 3 of the Florida Constitution provides: "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."

Changes to substantive law by court rules of procedure violate the separation of powers provision of the Florida Constitution. An example of the creation of a new substantive right through court rule of procedure can be found with the passage of Florida Rule of Juvenile Procedure 8.350 last year which created a new right to counsel that was not constitutionally required, not statutorily authorized and not funded by the Legislature. (See Effects of Proposed Changes for details on this and other examples.)

This joint resolution proposes to amend Article V, Section 2 of the Florida Constitution relating to the Supreme Court's rulemaking authority. The amendment removes the current authority of the Supreme Court to adopt rules of practice and procedure. In lieu of the current provision, the amendment creates a Judicial Conference to propose rules of procedure to the Legislature. The membership of the Judicial Conference is to be provided by general law. This joint resolution provides that the Legislature may amend, adopt, reject or repeal rules by general law. Under this joint resolution, inaction by the Legislature shall be deemed rejection of a rule proposed by the judicial conference. It also provides that rules proposed by the Judicial Conference shall not be inconsistent with general law, and not abridge, enlarge, or modify any substantive right.

The joint resolution also addresses how the judicial conference will determine its chairman, and provides that the clerk of the Supreme Court shall also serve as the clerk for the judicial conference.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

1. Reduce government?	Yes[]	No[x]	N/A[]
2. Lower taxes?	Yes[]	No[]	N/A[x]
3. Expand individual freedom?	Yes[]	No[]	N/A[x]
4. Increase personal responsibility?	Yes[x]	No[]	N/A[]
5. Empower families?	Yes[]	No[]	N/A[x]

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

Because this joint resolution creates a new public entity, the Judicial Conference, it could arguably be described as expanding government.

B. EFFECT OF PROPOSED CHANGES:

Constitutional Authority

Under Article V, Section 2 of the Florida Constitution, the Supreme Court "shall adopt rules of practice and procedure in all courts . . ." The same section also authorizes the Legislature to repeal court rules of procedure with a 2/3 vote of the membership of both houses.

Separation of Powers

Unlike the federal constitution, the Florida constitution includes a specific provision pertaining to the separation of powers among the three braches of government. Article II, Section 3 of the Florida provides: "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."

While the Supreme Court has held that it has exclusive authority to enact rules of practice and procedure in all courts, the Legislature's authority to enact substantive law is also exclusive.[1]

Changes to substantive law by court rules of procedure violate the separation of powers provision of the Florida Constitution. Unlike the Florida Supreme Court, which can protect itself against legislative encroachments on its authority by declaring such enactments an unconstitutional violation of the separation of powers provision, the Legislature's only means to shield the substantive law it passes from "amendment" or alteration by court rule of procedure is by repealing the rule of procedure.[2] In such instances, the Florida Supreme Court has the capability of readopting the very same rule of procedure repealed by the Legislature almost immediately.[3]

Distinguishing Substance from Procedure

Generally speaking, "substantive law" involves matters of public policy affecting the authority of government and rights of citizens relating to life, liberty and property. Court "rules of practice and procedure" govern the administration of courts, and the behavior of litigants within a court proceeding.[4]

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[1] *See* Art. III, s. 1, Fla. Const.; *Allen v. Butterworth*, 756 So.2d 52 (Fla. 2000); *Johnson v. State*, 336 So.2d 93 (Fla. 1976).
[2] *See Allen*, *supra* at n. 2.
[3] *See id.*
[4] In *Allen v. Butterworth*, the Florida Supreme Court referred to a discussion explaining the distinction between substance and procedure from Justice Adkins' concurring opinion in *In Re Rules of Criminal Procedure,* 272 So.2d 65,66 (Fla. 1972):

Comparison with the Federal System

Federal courts have acknowledged for some time that Congress has the authority to regulate matters of practice and procedure in the federal courts.[5] Congress delegated some of its rulemaking power to the Supreme Court of the United States in 1934 by passing the Rules Enabling Act,[6] which gave the Supreme Court the authority to promulgate rules of practice and procedure for federal courts. Notwithstanding this delegation of authority, however, Congress plays a critical role in implementing any rule proposals offered by the Court. All rule proposals are subject to review by Congress and take effect only after the Supreme Court has presented them to Congress, and after Congress has had seven months to review proposed rules or changes.[7] Congress uses the review period to "make sure that the action under the delegation squares with the Congressional purpose."[8] In fact, the federal statute currently provides that "[s]uch rules shall not abridge, enlarge or modify any substantive right."[9]

Although Congress has authorized the Court to exercise some of legislative authority to regulate the courts, Congress may at any time amend or abridge by statute the Federal Rules of Civil Procedure, Rules of Appellate Procedure, Rules of Evidence, or other federal procedural rules promulgated under the Rules Enabling Act.[10]

Rules are proposed by the Judicial Conference of the United States and reviewed by the Supreme Court who, if they approve, forward them to Congress by May 1st.[11] If Congress does not reject, modify, or defer the rules, they take effect as a matter of law on December 1st of the year proposed.[12]

In construing the similar language of the provision of an earlier state constitution relating to rules of practice and procedure,[13] the Florida Supreme Court noted:

> Unlike the Act of Congress in providing that the Supreme Court of the United States may promulgate rules for the district courts, Section 3 of Article V, *supra*, failed to specify that such rules as might be promulgated by this court "shall neither abridge, enlarge, nor modify the substantive rights of any litigant"; however, such limitation is implicit by reason of Article II of our Constitution providing for a separation of the powers of government of this state."[14]

> Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof. Examination of many authorities leads me to conclude that substantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property. As to the term "procedure," I conceive it to include the administration of the remedies available in cases of invasion of primary rights of individuals. The term "rules of practice and procedure" includes all rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution.

[5] *See, e.g.*, *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825).
[6] Pub. L. No. 73-415, 48 Stat. 1064 (June 19, 1934). The current version of the Rules Enabling Act, as subsequently amended, is codified as 28 U.S.C. §§ 2071-2077.
[7] *See* 28 U.S.C. § 2074.
[8] *Sibbach*, 312 U.S. at 15.
[9] Title 28 U.S.C. § 2072(b).
[10] *See* 28 U.S.C. § 2071.
[11] *See* 28 U.S.C. §§ 2074 and 2075. The Judicial Conference is chaired by the Chief Justice of the United States Supreme Court and consists of the chief judges of the 13 appellate circuits, the chief judge of the Court of International Trade, and other selected federal judges.
[12] *See id.*
[13] Article V, s. 3, Fla. Const. (1885), as amended by HJR 810 (1955), adopted 1956, provided: "The practice and procedure in all courts shall be governed by rules adopted by the supreme court."
[14] *State v. Furen*, 118 So.2d 6, 12 (Fla. 1960).

Comparison to Larger States

The rulemaking provisions of the three states with populations larger than Florida—California, New York and Texas—were examined to compare Florida's system with theirs. In all three states, their legislatures play an active role in, and have the final word on, the shape of court rules.

In California, the state constitution specifically requires that "[t]he rules adopted shall not be inconsistent with statute."[15] As a result, rules of procedure that are inconsistent with statute are null and void.[16] They also have a committee responsible for promulgating rules called the "Judicial Council." However, the Judicial Council itself promulgates rules, and the state supreme court does not approve such rules.

In New York, rules of practice and procedure that have statewide application are passed by the Legislature like statutes.[17] The state Judicial Conference serves only in an advisory role.[18]

In Texas, the state Supreme Court is responsible under the constitution to promulgate rules of civil procedure and rules for judicial administration that are not inconsistent with state law.[19] Although the Supreme Court has authority to promulgate such rules, they are subject to legislative control if the legislature chooses to exercise it.[20] Criminal rules of procedure are provided by statute.[21]

The Power of Rulemaking Authority to Affect Substantive Law

The following are examples of substantive rights being created or extended by rule of procedure.

Attorneys for Dependant Children

In 2003, the Florida Supreme Court created Florida Rule of Juvenile Procedure 8.350 and made it "effective immediately."[22] The rule created a new substantive right to counsel that was not constitutionally required, not statutorily authorized, and not funded by the Legislature.

The rule provides that if a dependent child disagrees with the Department of Children and Families' motion to place the child into a residential treatment program, the court must appoint a lawyer to represent the child. This rule would apply exclusively to situations where the child was seriously emotionally disturbed.[23] As a result of the court rule, the guardian ad litem ("GAL") of such a child is

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[15] Article VI, § 6(d), Cal. Const.

[16] California courts have stated that rules of procedure promulgated by their state Judicial Council are subordinate to statutes enacted by the Legislature; if the two conflict, either in letter or merely intent, the court rule is invalid. *See Cooper v. Westbrook Torrey Hills, LP*, 97 Cal.Rptr.2d 742 (Cal. App. 4 Dist. 2000); *In re Jermaine B.*, 26 Cal.Rptr.2d 612 (Cal. App. 3 Dist. 1994). This applies not only to statutes in effect when a rule was adopted, but also to statutes enacted subsequently. *See Trans-Action Commercial Investors, Ltd. v. Jelinek*, 70 Cal.Rptr.2d 449 (Cal. App. 1 Dist. 1997). Therefore, corrective legislation would effectively repeal an inconsistent court rule, and require the promulgation of a new rule of procedure consistent with the new statute.

[17] *See generally* N.Y. CIVIL PRACTICE LAW; N.Y. CRIMINAL PROCEDURE LAW.

[18] *See* N.Y.L. 1978, ch. 156, § 6; N.Y. JUDICIARY LAW § 214-a.

[19] *See* Art. V, § 31, Tex. Const.

[20] *See Armadillo Bail Bonds v. State*, 802 S.W.2d 237 (Tex. Cr. App. 1990).

[21] *See* Art. V, § 31, Tex. Const.

[22] *Amendments to the Rules of Juvenile Procedure*, 842 So.2d 763, 768 (Fla. 2003).

[23] Currently, a dependent child may be placed by the Department of Children and Families into a residential treatment center only after verification by a qualified evaluator (psychologist or psychiatrist) that residential mental health treatment is clinically appropriate, and that available less restrictive treatment modalities have been considered. As part of the assessment for the suitability of the child for residential placement, the evaluator must make written findings of fact which include that the child appears to have an emotional disturbance serious enough to require residential treatment, and is

placed in an adversarial position with a court appointed attorney. Unlike the GAL (who must act in the best interest of the child) the court-appointed lawyer is to represent the "stated position" of the emotionally disturbed child.

In deciding to create this new substantive right, the Supreme Court stated:

> [W]e recognize the **strong policy reasons** raised by the comments in favor of appointment of an attorney for a dependent child in order to ensure that the child has a meaningful opportunity to be heard (e.g., the importance of an attorney-client privileged relationship between the child and counsel, and the **therapeutic benefits that representation** would provide to the child).[24] (emphasis added)

In preparation for approving the rule, the court asked the Department of Children and Family Services ("DCF") to comment on sources of funding for lawyers appointed by the court to provide the representation mandated by the court rule.[25] DCF pointed out that there was no provision in the state budget, county budgets, or budget for the Florida courts, for the payment of attorney's fees required under the rule.[26] The court nevertheless identified as a possible funding source funds already appropriated for legal representation in Chapter 39 proceedings.[27] DCF estimated that the cost to implement the proposed rule would be over $1,000,000 annually.[28]

Regardless of one's perspective as to the merits of such a policy, five justices of the Florida Supreme Court established this policy as the law of Florida entirely by rule of procedure "effective immediately."[29]

DNA Testing

In 2001, the Florida Legislature, in s. 925.11 F.S., created a limited statutory right to give defendants in closed criminal cases an additional opportunity to prove their actual innocence using DNA (deoxyribonucleic acid) evidence.[30] The statute also set a two-year time limit for pending and future

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reasonably likely to benefit from such treatment. Section 39.407(5), F.S. There were 518 of such placements from 2000 to 2001.

[24] *Amendments to the Rules of Juvenile Procedure*, 842 So.2d at 765.

[25] Comments filed by DCF, February 15, 2002, at 1 and 2.

[26] *See id.* at 24.

[27] Justice Pariente, writing for the majority, said:

> Finally, regarding potential sources of funding, several commentators pointed out that during the 2002 legislative session the Florida Legislature appropriated, and Governor Bush approved, $7.5 million to Guardian Ad Litem programs for representation of children **in chapter 39 proceedings**. See Ch. 2002-394, § 7, at 4613-15, Laws of Fla. Chapter 39 governs proceedings related to children and section 39.407(5) specifically governs proceedings related to the placement of dependent children into residential treatment facilities. Thus, it is possible that a portion of the funding appropriated by the Legislature and approved by Governor Bush could be used as a source to pay those attorneys who are appointed to represent dependent children **in rule 8.350 proceedings** as mandated by this rule.

Amendments to the Rules of Juvenile Procedure, 842 So.2d at 765 (emphasis added).

[28] DCF comments at 8.

[29] Justices Wells and Harding dissented from the view that the Supreme Court has the authority to establish such a policy by rule of procedure. Justice Wells commented: "The majority has now adopted a rule, which in material part was rejected by a vote of eighteen to seven by the committee which had the responsibility to first review this rule. . . . I know of no authority for this Court to mandate the appointment of counsel by rule when there is no constitutional or statutory requirement for counsel." *Amendments to the Rules of Juvenile Procedure*, 842 So.2d at 769 (Wells, J., dissenting). Justice Harding stated: ". . . the majority sets forth no constitutional or statutory basis for requiring that counsel be appointed. . . . I do not think this Court has the authority, by rule, to require trial judges to appoint counsel for dependent children facing commitment to treatment facilities." *Id.* (Harding, J., concurring in part and dissenting in part).

[30] *See* ch. 2001-97, L.O.F.

cases. The law was passed, approved by the Governor on May 31, 2001, and became effective on October 1, 2001. For cases that were closed when the law was passed, anyone seeking DNA testing could file a petition with the court by October 1, 2003.[31] This deadline only applied to individuals whom could have filed their petitions within the statutory time period because the facts supporting the petition could have been ascertained by due diligence. It is important to note that for those subject to the October 1, 2003 deadline, section 925.11, F.S., revived remedies, for an *additional* two years, which were otherwise extinguished under the existing law.[32] In other words, but for the creation of section 925.11, F.S., these individuals could not have pursued DNA testing at all because their claims would have been deemed procedurally barred.[33]

After the time limit expired, agencies were allowed, but not required, to destroy the evidence. The Court passed a rule to implement the statute that reflected statutory deadlines shortly after enactment.[34]

Approximately a month before the October 1st deadline expired, the Florida Supreme Court struck the statutory deadline and is now considering a revised rule proposal that would extend the October 1, 2003 deadline another year or more.[35] At the same time, the Court ordered government entities to store evidence in all closed criminal cases indefinitely.[36]

The effect of this ruling essentially extends the limited statutory right created by the Legislature beyond the limits it established, purely based on the procedural authority of the Florida Supreme Court over rules of practice and procedure, for a period of time to be determined by the Court.

In subsequent comments submitted by the Criminal Court Steering Committee which are now under consideration by the Florida Supreme Court, the committee asserts with respect to the October 1, 2003 deadline: "[t]here is no question that this Court, and not the [L]egislature, has the authority to set deadlines for filing these claims."[37] Notwithstanding this assertion, the opinion of Florida Supreme Court "suspending" the statutory deadline was a 4 to 3 decision. Justice Wells, (joined by Justices Cantero and Bell) said in dissent:". . . this Court does not have jurisdiction to "suspend" a provision of a lawfully enacted statute or to mandate that evidence . . . be maintained beyond the period the statute specifically states that the evidence is to be maintained."[38]

Florida Standard Jury Instructions

The Florida Standard Jury Instructions in Criminal Cases ('standard instructions") are the product of the operation of Rule 3.985. Courts have no constitutional authority to add substantive elements to crimes either in case law or by incorporating them into jury instructions. The Legislature has the sole authority to determine what acts are criminal acts and what the penalties for crimes are to be.[39] Moreover, any

[31] Regardless of the expiration of this deadline, however, a defendant could still petition for DNA evidence if the facts on which the petition was based was not known to the defendant and could not have been discovered with due diligence.
[32] The means of convicted criminal defendants to seek to prove innocence by any form of newly discovered evidence is pursuant to FLA. R. CRIM. P. 3.850. This rule only authorizes such claims to be brought for two years in noncapital cases unless the facts could not have been discovered with due diligence.
[33] *See* FLA. R. CRIM. P. 3.850(b); *Serici v. State*, 773 So.2d 34 (Fla. 2000); *Zeigler v. State*, 64 So.2d 1162 (Fla. 1995).
[34] *See Amendment to Florida Rules of Criminal Procedure Creating Rule 3.853*, 807 So.2d 633 (Fla. 2001).
[35] *See Amendments to Florida Rule of Criminal Procedure 3.853(d)(1)(A)*, 857 So.2d 190 (Fla. 2003).
[36] *See id.*
[37] Comments of the Criminal Court Steering Committee, October 13, 2003, at 3 (citing Lewis, J., concurring in *Amendments to Florida Rule of Criminal Procedure 3.853(d)(1)(A)*).
[38] See id. at 8 and 9 n.33, (citing Wells, J., dissenting in *Amendments to Florida Rule of Criminal Procedure 3.853(d)(1)(A)*).
[39] S*ee* Art. III, s. 1, Fla. Const. *See also B.H. v. State*, 645 So.2d 987 (Fla.1994) (holding that because Florida does not recognize common-law felonies, no felony can exist under Florida law unless it is created by a valid statute properly approved by the Legislature); *Perkins v. State*, 576 So.2d 1310, 1312 (Fla. 1991) ("[T]he power to create crimes and punishments in derogation of the common law inheres solely in the democratic processes of the legislative branch").

attempt to delegate the authority to define a crime is unconstitutional as a violation of the separation of powers doctrine as is any attempt by another branch to usurp the Legislature's authority to define a crime.[40] The same is true of affirmative defenses and setting the elements required to establish such defenses.

In criminal prosecutions, the accuracy of the jury instructions are especially crucial. Unlike convicted defendants who may appeal an erroneous jury instruction and seek a new trial, if a criminal defendant is acquitted of his or her charge as a result of an inaccurate jury instruction, the state cannot appeal that matter to appellate court, and may not retry the defendant.

In that vein, the standard instructions of voluntary intoxication, insanity, manslaughter, and second degree murder are discussed.

Voluntary Intoxication

Voluntary Intoxication was eliminated as a defense for all offenses and for all purposes by the Legislature in 1999 except when it was a result of a lawfully prescribed prescription.[41] The most recent edition of the standard jury instructions, still lists this instruction as if it is available as a defense. The standard instructions provide no comment or footnote indicating that the defense is no longer available for crimes committed after the effective date of the act.

Insanity

In 2000, the Legislature passed Chapter 2000-315, Laws of Florida which created s. 775.027, F.S. In that section, the Legislature codified the elements necessary for a defendant in a criminal case to establish an "insanity" defense. The elements in s. 775.027, F.S., were identical to those the used in the standard instructions.[42] However, s. 775.027, F.S., was markedly different from the standard instruction in two significant ways. First, it required the *defendant to prove* that he/she was insane by "clear and convincing evidence." Second, it expressly prohibited other types of "insanity" defenses.[43]

The current standard instruction on insanity still reflects the approach the Legislature rejected in 2000 and requires the *state to prove* the defendant was sane beyond a reasonable doubt. In addition, notwithstanding the prohibition in s. 775.027, F.S., the standard instructions include a different type of insanity defense entitled "Insanity – Hallucinations."[44]

Recently in December of 2003, the Supreme Court Committee on Standard Jury Instructions in Criminal Cases proposed changes to the standard instruction on insanity.[45] These proposed changes include language amending the instruction to conform to the requirement of s. 775.027, F.S., for the defendant to prove he was insane. However, along with the inclusion of that language, the proposed

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[40] *See State v. Watso*, 788 So.2d 1026, 1029 (Fla. 2d DCA 2001).
[41] *See* s. 775.051, F.S.
[42] The elements to establish the insanity defense are:
(a) The defendant had a mental infirmity, disease, or defect; and
(b) Because of this condition, the defendant:
1. Did not know what he or she was doing or its consequences; or
2. Although the defendant knew what he or she was doing and its consequences, the defendant did not know that what he or she was doing was wrong.
[43] Section 775.027, F.S., provides: "Mental infirmity, disease, or defect does not constitute a defense of insanity except as provided in this section."
[44] Under this statutorily prohibited insanity defense, a defendant may be found not guilty by reason of insanity if:
(a) The defendant had a mental infirmity, disease, or defect; and
(b) Because of this condition, the defendant had hallucinations or delusions which caused the person to honestly believe to be facts things that are not true or real.
[45] *See* FLA. BAR NEWS, December 1, 2003.

new instruction adds language that could be construed to create another statutorily prohibited insanity defense. The additional language states:

> A defendant who believed that what [he] [she] was doing was morally right is not insane if the defendant knew that what [he] [she] was doing violated societal standards or was against the law.

In other words if the defendant believes he or she was morally justified, and he or she *did not* know it was against the law, or against "societal standards," the argument could be made that the defendant *was* insane.[46]

Premeditated Murder and Manslaughter

The Florida homicide statutes treat a defendant's intentional killing of a certain individual as first-degree premeditated murder under s. 782.04, F.S. That section defines this crime as follows: "[t]he unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed or any human being."[47] A premeditated murder is a killing done after consciously deciding to do so.[48] There is no fixed period of time that must pass between the formation of the intent and the killing; but it must be sufficient to allow for reflection by the defendant.[49] First-degree premeditated murder is a capital offense punishable by death or life imprisonment.[50]

By statute, manslaughter is a substantially different homicide with a substantially lower maximum penalty of 15 years imprisonment.[51] Section 782.07, F.S., defines this crime as follows:"[t]he killing of a human being by act or procurement, or culpable negligence of another, without lawful justification according to the provisions of Chapter 776, *and in cases in which such killing shall not be* excusable homicide or *murder, according to the provisions of this chapter* is manslaughter." (emphasis added).

The standard jury instruction for manslaughter provides in part that:

> 1. [the] victim is dead
> 2. [the] Defendant
> (a) *intentionally* caused the death of victim
> (b) *intentionally* procured the death of victim or
> (c) the death of victim was caused by culpable negligence of the defendant.
>
> (emphasis added)

The instruction also includes a statement that reads:" In order to convict of manslaughter by *intentional act*, it is not necessary for the State to prove that the defendant had the *premeditated intent to cause death.*" While this sentence is placed in the instruction to distinguish the intent element injected into manslaughter by the standard jury instruction from the premeditated intent required by statute in first-degree murder, it is impossible to determine how effective that language has been in explaining that "fine line" distinction to jurors. In fact the later statement directly contradicts the express wording of 2 (a) of the standard instruction that the defendant "intentionally cause the death of the victim." A fair question for any juror hearing these instructions to ask is "what is the difference between a defendant

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[46] For other examples involving jury instructions, see "Interim Project on Standard Jury Instructions in Criminal Cases – Committee on Public Safety and Crime Prevention."

[47] In instances where the person killed is not the intended victim, the defendant is still responsible for the same crime through the doctrine of "transferred Intent," which transfers the defendant's intent to kill his intended victim to the murdered victim. *See Provenzano v. State*, 497 So.2d 1177 (Fla. 1986); *Coston v. State*, 190 So. 520 (Fla. 1939). *See generally* 15B FLA. JUR. 2D CRIMINAL LAW § 3375.

[48] *See* Florida Standard Jury Instructions in Criminal Cases – Murder First Degree (2003).

[49] *See id.*

[50] *See* ss. 782.04(1)(a) and 775.082, F.S.

[51] Under s. 782.07(1), F.S., manslaughter is a second-degree felony. By comparison, "dealing in stolen property" is an example of another crime that is a second-degree felony. *See* s. 812.019, F.S.

intentionally doing an act which he or she intends will cause the death of the victim, and a premeditated killing?" It is also impossible to ascertain to what extent, if any, the manslaughter standard jury instruction has resulted in juries returning verdicts of manslaughter for conduct that the Legislature has defined as premeditated murder.

Second-Degree Murder

With respect to second-degree murder, s. 782.04(2), F.S., defines this offense as "[t]he unlawful killing of a human being, when perpetrated by any *act imminently dangerous* to another and evincing a depraved mind regardless of human life, although without premeditated design to effect the death of any particular individual . . .." (emphasis added). However, to this statutory definition, the standard jury instruction adds substantive elements to the offense by instructing that an "act imminently dangerous" must be one that:

> a) person of ordinary judgment would know is reasonably certain to kill or do serious bodily injury, AND
> b) [is] done from ill will, hatred, spite or evil intent, AND
> c) the act itself indicates an indifference to human life.

It is important to emphasize here that (a), (b) and (c) above are not to explain or clarify the statutorily defined elements of the crime, but are *in addition* to them. This is especially significant for elements in (b) and (c). The (b) elements require proof of a specific motive beyond indifference to human life. While (c) may seem redundant of the statutory language, it could cause jurors to speculate on what it is that (c) adds to the "act imminently dangerous" that the statutory language alone does not.

The Trooper Robert Smith Act

Chapter 2000-229, Laws of Florida, was entitled the Trooper Robert Smith Act. It substantially amended the criteria for holding persons arrested for dangerous crimes without bond.[52] Aside from revising the criteria, a key component of the act was to remove a requirement that all persons held without bail for a dangerous crime must be tried within 90 days or be released from custody. The bill also repealed the applicable rules of criminal procedure "to the extent they were inconsistent with the act.[53] As of this date, the applicable rules of procedure have not been amended to reflect the changes made to the pretrial detention statute, and still contain the provision requiring the release of persons arrested for dangerous crimes if not tried within 90 days.[54]

A challenge to this act is currently pending before the Florida Supreme Court on the question of whether section 907.041(4)(b), F.S., (the section amended by the act) is purely procedural and therefore whether the act amending this section violates the separation of powers clause of the Florida Constitution.[55]

Proposed Changes

This joint resolution proposes amending Article V, section 2 of the Florida Constitution relating to the Supreme Court's rulemaking authority. The amendment removes the current authority of the Supreme Court to adopt rules of practice and procedure.

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[52] Among the crimes listed are homicide, manslaughter, illegal use of explosives, sexual battery, and kidnapping. *See* s. 907.041(4)(a), F.S., for the complete list of "dangerous crimes."
[53] The act specifically repealed FLA. R. CRIM. P. 3.131 and 3.132 to the extent inconsistent with its provisions.
[54] FLA. R. CRIM. P. 3.132 was last amended in 1992. *See In re Amendments to the Florida Rules of Criminal Procedure*, 606 So.2d 227 (Fla. 1992).
[55] *See State v. Raymond*, No. SC03-1263.

In place of the stricken language, this joint resolution proposes to amend the state constitution to:

- provide for the creation of a judicial conference with membership to be composed according to general law;
- provide that the chair of the judicial conference shall be determined by majority vote of its members;
- provide that the clerk of the Supreme Court shall serve as clerk for the judicial conference;
- require rules of practice and procedure proposed by the judicial conference to be forwarded to the Legislature for consideration;
- provide that the Legislature may amend, adopt, reject or repeal rules by general law;
- provide that rules proposed by the judicial conference have no force unless adopted by general law;
- provide that inaction by the Legislature shall be deemed rejection of the rule proposal; and
- require that rules proposed by the judicial conference shall not be inconsistent with general law, and not abridge, enlarge, or modify any substantive right.

If passed by the Legislature, the joint resolution would be placed before the voters for approval or rejection in the November 2004 general election.

C. SECTION DIRECTORY:

This joint resolution, proposing an amendment to Article V, section 2 of the Florida Constitution, and containing ballot summary language describing the proposed amendment, is not divided into sections.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   The Department of State's Division of Elections estimates that the average cost to advertise a proposed constitutional amendment twice in a newspaper of general circulation in each county prior to the 2004 general election will be $35,000.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

By its own terms, Article VII, s. 18, Fla. Const., the local mandates provision of the state constitution, applies only to general laws, not to other constitutional provisions.

2. Other:

Constitutional Amendment Process

This is a legislative joint resolution, which is one of the methods for proposing, approving or rejecting amendments to the Florida Constitution.[56] The joint resolution requires passage by a three-fifths vote of the membership of each house of the Legislature. The proposed constitutional amendment must be submitted to the electors at the next general election held more than 90 days after the joint resolution is filed with the custodian of state records. If approved by a majority of the electors voting on the question, the proposed amendment becomes effective on the Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment.

B. RULE-MAKING AUTHORITY:

This section of the analysis is for rulemaking authority issues relating to executive agencies. See Effects of Proposed Changes for discussion of court rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Differences Between Proposed Changes and the Federal System

In comparison to the federal approach, the rulemaking process provided in this joint resolution differs primarily in two respects. First, under the process provided in the bill, the Legislature must affirmatively act to approve a rule of procedure, and inaction by the Legislature constitutes rejection of the rule. In the federal system, inaction by Congress is deemed acceptance of the rule. Second, under this joint resolution, the judicial conference submits proposed rules directly to the Legislature. The Supreme Court does not review or approve such rules prior to submission to the Legislature for consideration.

Impact to the Legislature On Limiting Death Penalty Postconviction Appeals

The exclusive authority of the Florida Supreme Court over court practice and procedure has directly impacted the ability of the Legislature to address the most problematic and time consuming aspect of the administration of the death penalty, i.e., the establishment of time limits (statutes of limitations) for capital felons sentenced to death to file "postconviction" motions.[57]

With respect to statutes of limitations on postconviction motions in death penalty cases, the Legislature has no current authority to attempt to effectuate any limitation on death penalty postconviction motions through general law, regardless of how repetitious, factually baseless, frivolous, or untimely the motions are.[58]

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[56] *See* Art. XI, Fla. Const. (providing for amendment by legislative joint resolution, constitution revision commission proposal, citizen initiative, and constitutional budget or tax commission proposal).

[57] "Postconviction" motions are brought after the conviction and sentence have been affirmed on appeal or the time for filing an appeal has expired. The most frequent issue alleged in such motions are claims of ineffective assistance of counsel.

[58] *See Allen v. Butterworth*, 756 So.2d 52 (Fla. 2000). The case of convicted double murderer Cary Michael Lambrix provides examples of successive and frivolous litigation filed by one inmate currently under two death sentences.

In a special session held in 2000, the Legislature addressed a concern expressed by the Governor over the increasing delay in carrying out death sentences. The average delay was approximately 14 years for executions carried out between 1994 and 1999. To solve the problem the Legislature decided to impose a statute of limitations on post-conviction death penalty appeals in the same manner as they impose statute of limitations in other contexts. The name of that legislation was the Death Penalty Reform Act of 2000 ("DPRA").[59] The statute of limitations in the DPRA provided that appeals filed after the deadline would be time-barred.[60]

Three months after the bill was signed into law by the Governor, the Florida Supreme Court found it unconstitutional.[61] The court held: ". . . we find that the DPRA is an unconstitutional encroachment on this Court's exclusive power to "adopt rules for the practice and procedure in all courts."[62]

The Supreme Court rejected the state's argument that if Congress has the authority to set a statute of limitations in death penalty postconviction motions, that the Florida Legislature should also have the same authority.[63] The court noted that:

> In Florida, article V, section 2(a) of the Florida Constitution grants this Court the exclusive authority to adopt rules of procedure. Consequently, the separation of powers argument raised in the present case would never be an issue in the federal system. Unlike the Florida Constitution, the federal constitution does not expressly grant the United States Supreme Court the power to adopt rules of procedure.[64]

If the amendment proposed in this joint resolution were to be approved by the voters, it would remove the basis the Florida Supreme Court said was dispositive in invalidating the DPRA.[65] The Legislature would then have the authority to reestablish time limitations with respect to death penalty postconviction motions provided they are not invalidated on other constitutional grounds.

Lambrix was convicted for the brutal murders of two women in 1983. His convictions and two death sentences were affirmed in 1986. *See Lambrix v. State*, 494 So.2d 1143 (Fla. 1986). In 1988, the "best" issue Lambrix had to raise in his postconviction motion was that his appellate lawyer was ineffective for failing to argue that it was error for the judge to excuse a prospective juror and his wife from the jury selection panel while Lambrix was not present. The man excused informed the state, defense and the judge that he was Lambrix's cellmate in county jail for 2 -3 weeks and that he had discussed the case with Lambrix, and that he had discussed the case with his wife and told her his opinion –denied - 529 So.2d 1110 (Fla. 1988). Since that case, Lambrix has also filed the following claims alleging ineffective assistance of counsel. Ineffective assistance of trial counsel – denied – 534 So.2d 1151 (1988); ineffective assistance of postconviction counsel – denied – 559 So.2d 1137 (Fla. 1990); ineffective assistance of appellate counsel – denied – 641 So.2d 847 (Fla. 1994). He also filed a habeas corpus petition in federal court alleging several of the same issues raised in yet another state postconviction motion filed in 1997 in which the only noteworthy issue was a claim that he should have been able to represent himself back in his original postconviction motion – denied. 698 So.2d 247 (Fla. 1997). He even filed a law suit claiming that prison officials violated his civil rights by intercepting sexually explicit material he ordered through the mail. *See Lambrix v. Dugger*, 610 So.2d 1366 (Fla. 1st DCA. 1992) - denied.

[59] Chapter 2000-3, L.O.F. One of the clauses in the bill's preamble read: "WHEREAS, in order for capital punishment to be fair, just, and humane for both the family of victims and for offenders, there must be a prompt and efficient administration of justice following any sentence of death ordered by the courts of this state, . . ."

[60] *See id.*

[61] *See Allen v. Butterworth*, 756 So.2d 52 (Fla. 2000).

[62] *Id.* at 53. The court also found a section of bill setting a standard for filing a successive motion violated due process and equal protection requirements.

[63] *See Id.* at 63. The federal statute discussed was the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214, codified at 28 U.S.C. §§ 2244 and 2255.

[64] *Id.* at 63.

[65] *See id.* at 59. The word "dispositive" was used in the context of describing the issue the Court resolved the case on, without having to reach other issues raised by the defendant.

In the DPRA, the Legislature also repealed the Rules of Criminal Procedure that were in conflict with its provisions.[66] After the court struck down the DPRA, they put the repealed rule back in place while they considering a new rule proposal that was later abandoned.[67] The average delay for executions carried out between 2000 and 2004 has increased to approximately 15.5 years.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

None.

[66] *See id.*

[67] *See id.* at 65. The initial rule proposal was substantially modified and the rule was later amended in 802 So.2d 298 (Fla. 2001) and 828 So.2d 999 (Fla. 2002).