

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1637 CS Capital Collateral Representation  
**SPONSOR(S):** Vana and others  
**TIED BILLS:** **IDEN./SIM. BILLS:** SB 1802

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Criminal Justice Committee	6 Y, 0 N, w/CS	Kramer	Kramer
2) Justice Appropriations Committee		Burns	DeBeaugrine
3) Justice Council			
4)			
5)			

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### SUMMARY ANALYSIS

The Commission on Capital Cases, a legislative commission within the Office of Legislative Services, maintains a registry of attorneys qualified to represent defendants in capital collateral (postconviction) proceedings. Currently, a registry attorney is authorized to represent only 5 capital collateral defendants at one time. This bill authorizes a registry attorney to represent up to 10 capital collateral defendants at one time.

The bill significantly increases the minimum qualifications for registry attorneys.

Currently, a registry attorney is entitled to payment at each stage of the postconviction process according to a statutory schedule. The bill modifies the payment schedule by authorizing payment of an attorney after the final evidentiary hearing has been held on the defendant's postconviction motion rather than requiring the attorney to wait until the judge has ruled on the postconviction motion. The bill also authorizes payment of up to \$10,000, in addition to fees already authorized, for good cause shown and if approved by the court if the current fees do not provide adequate compensation due to extraordinary circumstances.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government: The bill increases the minimum experience required for a private attorneys to qualify to be provide capital collateral representation.

#### B. EFFECT OF PROPOSED CHANGES:

**Overview of Postconviction Proceedings in Capital Cases:** A defendant who is convicted of a crime in which the death penalty is imposed receives a direct appeal of his or her sentence and conviction to the Florida Supreme Court. At this stage, a capital defendant is represented by the public defender's office, if the defendant is indigent, or by a private attorney. Matters which are raised on direct appeal include evidentiary rulings made by the trial court during the course of the defendant's trial, and other matters objected to during the course of the trial such as the jury instructions, prosecutorial misconduct, and procedural rulings made by the trial court. If the Florida Supreme Court affirms the capital defendant's conviction and sentence, a defendant can appeal that decision to the United States Supreme Court by filing a petition for writ of certiorari. If the Supreme Court refuses to hear the defendant's appeal, a defendant is entitled to begin state postconviction proceedings.

State postconviction proceedings are controlled by Florida Rules of Criminal Procedure 3.850, 3.851 and 3.852. Unlike a direct appeal, which challenges the legal errors apparent from the trial transcripts or record on appeal, a collateral postconviction proceeding is designed to raise claims which are "collateral" to what transpired in the trial court. Postconviction proceedings usually involve claims that the defendant's trial counsel was ineffective, claims of newly discovered evidence or claims that the prosecution failed to disclose exculpatory evidence. Since the consideration of these claims often require new fact finding, collateral postconviction motions are filed in the trial court which sentenced the defendant to death. Appeals from the grant or denial of postconviction relief are to the Florida Supreme Court.

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

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.

In the middle and southern regions of Florida, the Capital Collateral Regional Counsel provide postconviction representation to indigent capital defendants.<sup>1</sup> In the northern region of the state, representation is provided by private attorneys appointed by the court as explained in more detail below.

#### **Commission on Capital Cases**

Section 27.709, F.S. creates the Commission on Capital Cases, a legislative commission within the Office of Legislative Services which is tasked with reviewing the "administration of justice in capital collateral cases". The commission is comprised of two members appointed by the Governor, two Senators appointed by the President of the Senate and two members of the House of Representatives appointed by the Speaker of the House of Representatives.

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<sup>1</sup> s. 27.701, F.S.

## **Registry Attorneys**

In 1998, the legislature created a registry of private attorneys to represent a death row inmate when a Capital Collateral Regional Counsel has an excessive caseload or has a conflict of interest. Since 2003 postconviction representation of all indigent capital defendants in the northern region of Florida has been provided by registry attorneys. The registry of attorneys is comprised of lawyers who have met certain statutory criteria and is maintained by the Commission on Capital Cases.<sup>2</sup> A member of the registry must be a member in good standing in the Florida Bar, with not less than 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 of these proceedings.<sup>3</sup>

A registry attorney is required to attend at least 10 hours of continuing legal education specifically devoted to the defense of capital cases annually. A registry attorney is not permitted to represent more than 5 defendants in capital postconviction litigation at any one time.

A registry attorney who is appointed by the court to represent a capital defendant is required to enter into a contract with the Chief Financial Officer. 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 Chief Financial Officer, 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,
- \$5,000 if at any time a death warrant is issued to compensate for attorneys fees and costs for representing the defendant throughout the proceedings before the state courts

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. The attorney is also entitled to a maximum of \$15,000 for miscellaneous expenses such as the cost of preparing transcripts, compensating expert witnesses and copying documents.

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<sup>2</sup> s. 27.710(2), F.S

<sup>3</sup> s. 27.704(2), F.S

The court is required to monitor the performance of assigned counsel to ensure that the capital defendant is receiving quality representation and must receive and evaluate allegations that are made regarding the performance of assigned counsel.<sup>4</sup>

### **Effect of HB 1637**

HB 1637 amends s. 27.709, F.S. to authorize the Commission on Capital Cases to sponsor continuing legal education training devoted specifically to capital cases.

The bill also amends s. 27.710, F.S. to modify the continuing legal education (CLE) requirements for registry attorneys. Currently, the registry attorneys must attend 10 hours of CLE annually. The bill requires registry attorneys who are handling a capital case to attend at least 12 hours of CLE every 2 years.

Currently, to be eligible for court appointment as counsel in postconviction proceedings, an attorney must certify that he or she satisfies the minimum experience and training requirements. As explained above, a registry attorney must have not less than 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 of these proceedings. These requirements are the same as those for the Capital Collateral Regional Counsel. The bill substantially modifies the minimum requirements for registry counsel by providing that a registry attorney must certify that he or she:

1. Is familiar with the production of evidence and use of expert witnesses, including psychiatric and forensic evidence;
2. Has demonstrated proficiency necessary for representation in capital cases including the investigation and presentation of mitigation evidence; and
3. Satisfies the CLE requirements and has 5 years experience in felony criminal law practice which must have included serving as lead or co-counsel in either:
  - a. 9 state or federal criminal jury trials tried to completion, of which 2 were capital and 3 must have been murder trials or 1 murder trial and 5 felony trials or 1 postconviction evidentiary hearing and 5 felony trials; or
  - b. 1 capital appeal and no fewer than 3 felony appeals, of which one was murder; or 6 felony appeals, of which 2 were murder; or one capital postconviction evidentiary hearing and 3 felony appeals.

The bill provides that satisfaction of the minimum requirements must be proven by written notification to the commission. The certification requirement can be satisfied by submission of the application by electronic mail without a signature.

The bill further provides that in the event the trial court determines that exceptional circumstances require appointment of counsel not meeting the minimum requirements, the trial court may appoint that person and shall enter an order specifying, in writing, the exceptional circumstances requiring deviation and the court's explicit determination that counsel chosen will provide competent representation in accord with the policy concerns of this section.

The bill also requires a registry attorney to agree to submit quarterly reports to the commission and provides that if an attorney fails to submit a quarterly report within 30 days following the end of the quarter, the executive director must notify the trial court and the attorney.

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<sup>4</sup> s. 27.711(12), F.S.

The bill provides that if a registry attorney does not wish to continue representation in the federal courts, the attorney must make reasonable efforts to assist the defendant in finding replacement counsel who meets the federal requirements to represent a capital defendant in federal proceedings.

The bill also amends s. 27.711, F.S., to modify the payment schedule for registry attorneys. The bill authorizes payment of \$100 per hour, up to a maximum of \$20,000 after the final hearing on the capital defendant's motion for postconviction relief rather than when the trial court issues a final order granting or denying the defendant's motion. In some cases, judges take an extended amount of time in ruling on a postconviction motion after the evidentiary hearing is held – this provision will authorize payment of the attorney sooner. The bill authorizes payment of \$100 per hour, up to a maximum of \$2,500 after filing a petition for writ of habeas corpus pursuant to 28 U.S.C. s.2254 rather than after filing a petition for writ of certiorari in the United States Supreme Court. The bill provides that a registry attorney is entitled to \$100 per hour, up to a maximum of \$10,000 as a supplement to attorneys fees for good cause show and if approved by the court, if payment otherwise provided does not provide adequate compensation due to extraordinary circumstances.

Currently, an attorney who is actively representing a capital defendant is entitled to a maximum of \$500 per fiscal year for tuition and expenses for continuing legal education that pertains to the representation of capital defendants. The bill clarifies that a registry attorney is entitled to \$1000 within 2 years for CLE expenses, regardless of how many capital defendants the attorney represents.

The bill will authorize a registry attorney to represent up to 10 inmates in capital postconviction litigation at any one time rather than only 5 inmates.

#### C. SECTION DIRECTORY:

Section 1. Amends s. 27.709, F.S. relating to Commission on Capital Cases; authorizes the commission to sponsor courses.

Section 2. Amends s. 27.710, F.S. relating to registry attorneys; revises requirements relating to continuing legal education; modifies minimum requirements.

Section 3. Amends s. 27.711, F.S. relating to terms and conditions of appointment of registry attorneys; revises payment schedule.

Section 4. Provides effective date of July 1, 2005.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

Indeterminate. While authorizing additional cases per attorney, large changes to the number of death sentence cases is not expected.

Also, provisions allowing for a \$10,000 increase in attorney fees is subject to court approval in extraordinary circumstances. Courts are already allowing for fees in excess of statutory caps for extraordinary circumstances. This bill provides for a limit.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill provides that a registry attorney is entitled to additional payment of \$100 per hour, up to a maximum of \$10,000 as a supplement to attorneys fees otherwise provided for good cause shown and if provided for by the court if current fees do not adequately compensate the attorney due to extraordinary circumstances.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

The Criminal Justice Committee adopted a strike-all amendment that made the following changes:

- Removed language from the bill which required that if a registry attorney fails to execute the contract with the Chief Financial Officer or file quarterly reports, the trial court must remove the attorney from the case and the executive director of the Commission on Capital Cases must remove the attorney from the registry without awarding any attorney's fees.
- Clarified that a registry attorney is entitled to only \$1000 for CLE within 2 fiscal years regardless of how many capital defendants the attorney represents.
- Removed language authorizing the Commission on Capital Cases to undertake any project recommended or approved by the appointed commission members
- Increased the minimum requirements for registry counsel to those indicated in the analysis above.

- Provided that registry attorney is entitled to maximum of \$10,000 as a supplement to attorneys fees in extraordinary circumstances rather than \$16,000.