

# 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.)

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Prepared By: Judiciary Committee

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BILL: CS/CS/SB 1802

SPONSOR: Judiciary Committee, Criminal Justice Committee and Senator Campbell

SUBJECT: Capital Collateral Representation

DATE: April 27, 2005

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cellon</u>	<u>Cannon</u>	<u>CJ</u>	<u>Fav/CS</u>
2.	<u>Brown</u>	<u>Maclure</u>	<u>JU</u>	<u>Fav/CS</u>
3.	_____	_____	<u>JA</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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## I. Summary:

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, or postconviction, proceedings. Currently, a registry attorney is authorized to represent only five capital collateral defendants at one time. This committee substitute authorizes registry attorneys who are representing more than five inmates as of July 1, 2005, to continue to represent them until the completion of their cases.

The committee substitute provides that if a registry attorney fails to execute a required contract with the Chief Financial Officer within a specified time period or fails to file a quarterly report with the commission, the trial court must remove the attorney from the case and the executive director of the commission must remove the attorney from the registry.

Currently, a registry attorney is entitled to payment at each stage of the postconviction process according to a statutory schedule. The committee substitute 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 motion. The committee substitute also authorizes payment of up to \$10,000, in addition to fees already authorized, if the current fees do not provide adequate compensation.

The committee substitute authorizes the Commission on Capital Cases to sponsor continuing legal education training devoted to capital cases.

This committee substitute substantially amends the following sections of the Florida Statutes: 27.709, 27.710, and 27.711.

## **II. Present Situation:**

### **Overview of Postconviction Proceedings in Capital Cases**

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) or registry counsel usually represent defendants in postconviction proceedings.

State postconviction proceedings are controlled by Rules 3.850, 3.851, and 3.852, 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 that 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 requires new fact-finding, Rule 3.850 and 3.851 motions are filed in the trial court that sentenced the defendant to death. Appeals from Rule 3.850 and 3.851 motions are to the Florida Supreme Court. (At this point, the CCRC or registry attorney, 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 are 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.

### **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.

### **Capital Collateral Regional Counsel**

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

Since 2003, postconviction representation of capital defendants in the Northern Region has been provided by registry attorneys, in a pilot project undertaken to determine whether capital collateral representation of indigent inmates could be provided in a more efficient manner. s. 27.701, F.S.

The CCRC represents defendants sentenced within the CCRC's 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 that 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 commission customarily receives and discusses these reports at its quarterly meetings.

### **Attorney Registry for Postconviction Representation**

The 1998 Legislature created a statewide registry of private attorneys to supplement the CCRC system and serve as a backup by alleviating 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 represents death-sentenced defendants in capital collateral proceedings. That is, the attorney must have at least three 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.

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 permitted by the trial court to withdraw. s. 27.710(3), F.S.

### ***Attorney Limitations***

Certain limitations are placed on attorneys who are appointed pursuant to the registry statute, to provide that an attorney may not:

- Represent more than five capital defendants at any one time (ss. 27.710(3) and 27.711(9), F.S.);
- File repetitive or frivolous pleadings that are not supported by law or facts (s. 27.711(10), F.S.);
- Represent the death-sentenced defendant during a retrial, a resentencing proceeding, or a proceeding commenced under ch. 940, F.S. (executive clemency) (s. 27.711(11), F.S.);
- 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 (s. 27.711(11), F.S.); or
- Represent the death-sentenced defendant in any civil litigation other than habeas corpus proceedings (s. 27.711(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. 27.711(2), F.S. The attorney must specify that he will represent the defendant throughout all postconviction capital collateral proceedings, including federal habeas corpus proceedings, or until released by order of the trial court. *Id.* Additionally, the attorney must enter into a contract with the Chief Financial Officer. s. 27.710(4), F.S. The Chief Financial Officer 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 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, after filing a petition for writ of certiorari in the U.S. Supreme Court; and
- \$5,000, if, at any time, a death warrant is signed.

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.

### **Litigation on Attorney's Fees**

It should be noted that a statutory fee cap as applied in the extraordinary circumstances of postconviction litigation has been found to be unconstitutional based on the holding and reasoning in *Makemson v. Martin County*, 491 So.2d 1109 (Fla. 1986).

The Court's holding in *Makemson* looked 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 clarified its position in 2002, in *Olive v. Maas*, 811 So.2d 644, 653 (Fla. 2002), 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, 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 or she may be entitled.

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.

### **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 a 12-hour minimum, within the previous two years, continuing legal education on capital case defense for attorneys appointed to represent clients in capital cases at the trial and direct appeal stage. *Fla.R.Cr.P. 3.112*.

The Court has considered and opted not to set minimum requirements for counsel in capital postconviction cases that might vary from those enacted by the Legislature in this area. The Court, however, has shared concerns with the commission about deficiencies the Court has observed among registry counsel, and has endorsed the need for increased standards for registry counsel. (Remarks by Justice Cantero at the Commission's February Meeting, Tallahassee, Florida; Letter to Executive Director of the Commission, February 8, 2005, Chief Justice Pariente.)

### **III. Effect of Proposed Changes:**

The committee substitute 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 committee substitute also amends s. 27.710, F.S., to modify the continuing legal education requirements for registry attorneys. Currently, the registry attorneys must attend 10 hours of training annually. The committee substitute requires registry attorneys who are handling a capital case to attend at least 12 hours of continuing legal education every two 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. The committee substitute requires that satisfaction of the minimum requirements be proven by written notification to the commission. This requirement is satisfied by submitting the application by electronic mail without a signature.

The committee substitute raises the minimum requirements for court appointed counsel in capital postconviction litigation, but provides that the trial court may appoint counsel that does not meet

the requirements under exceptional circumstances. The court must enter an order specifying the exceptional circumstances and the court's determination of counsel's competence.

The minimum requirements for appointment are almost identical to those specified in Rule 3.112, Rules of Criminal Procedure, for the appointment of attorneys in death penalty cases at the trial and appellate level. The committee substitute requires that a lawyer:

- Be familiar with the production of evidence and use of expert witnesses, including psychiatric and forensic evidence;
- Has demonstrated proficiency necessary for representation in capital cases, including the investigation and presentation of mitigation evidence; and
- Has five years' felony criminal law practice, and served as lead or co-counsel in either:
  - Nine criminal jury trials consisting of at least two capital cases; and either three of the nine trials were murder trials, or one of the nine was a murder trial coupled with five additional felony trials, or one postconviction evidentiary hearing plus five felony trials; or
  - One capital appeal and no fewer than three felony appeals, one of which was murder; or six felony appeals of which two were murder; or one capital postconviction evidentiary hearing and three felony appeals.

The committee substitute 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.

The committee substitute 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 committee substitute also amends s. 27.711, F.S., to modify the payment schedule for registry attorneys. The committee substitute 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 committee substitute 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 committee substitute provides that a registry attorney is entitled to \$100 per hour, up to a maximum of \$10,000, as a supplement to attorney's fees otherwise provided for if those fees do not adequately compensate the attorney, for good cause, in exceptional 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 committee substitute clarifies that a registry attorney is

entitled to \$1,000 within two fiscal years, regardless of how many capital defendants the attorney represents, for continuing legal education pertinent to that work in this state.

The committee substitute authorizes registry attorneys who are representing more than five capital postconviction clients as of July 1, 2005, to continue to represent them until the completion of their cases.

#### **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:

See the discussion on **Litigation on Attorney's Fees**, in the Present Situation portion of the analysis.

#### **V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Capital collateral counsel is entitled to faster payment and additional fees in certain circumstances, under the provisions of this committee substitute. Payment is provided for attorney services after the final hearing on a defendant's motion for postconviction relief, rather than current practice, which requires attorneys to wait until after the final order is issued in the hearing. Upon a showing of extraordinary circumstances, the attorney is also authorized to payment of \$100 an hour, up to a maximum of \$10,000, as a supplement to other fees.

C. Government Sector Impact:

It should be noted that the entire question of the cost-effectiveness of registry attorneys versus the Capital Collateral Regional Counsel attorneys is the subject of a performance review currently being undertaken by the Auditor General. The review will be submitted to the presiding officers of both legislative chambers by January 30, 2007.



**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

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

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## **VIII. Summary of Amendments:**

None.

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