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.)

Prepared By: Criminal Justice Committee

BILL:	SB 1972
SPONSOR:	Senator Crist
SUBJECT:	Death Penalty Appeals/Court Rules
DATE:	April 18, 2005 REVISED: 04/20/05

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	**Fav/1 amendment**
2.			JU	
3.			JA	
4.				
5.				
6.				

Please see last section for Summary of Amendments

- [ ] Technical amendments were recommended
- [X] Amendments were recommended
- [ ] Significant amendments were recommended

I. Summary:

During a special session in January of 2000, the Legislature passed the Death Penalty Reform Act (DPRA) which advanced the start of the state postconviction process in capital cases by requiring the appointment of counsel while the case is on direct appeal. This is known as a "dual track" or "parallel track" process. The bill created statutory time limitations on the filing of postconviction actions and limited the filing of successive postconviction claims.

In April of 2000, the Florida Supreme Court struck down the DPRA and held that it was an "unconstitutional encroachment on the Court's exclusive power to 'adopt rules for the practice and procedure in all courts.'" The Court also found that the DPRA violated due process and equal protection. *Allen v. Butterworth,* 756 So.2d 52 (Fla. 2000).

SJR 1942, which is tied to this bill, would amend the Florida constitution to create a judicial conference to propose rules of practice and procedure governing violations of criminal law and postconviction proceedings. The conference will make recommendations to the Florida Supreme Court who will then submit proposed rules to the Legislature. The Legislature will be authorized to adopt, reject, or amend proposed rules by general law.

The joint resolution also provides that notwithstanding any other provision of the constitution, a court may not require or authorize collateral or postconviction review of a criminal judgment or

sentence except as authorized by general law or a rule of procedure approved in accordance with the constitution.

This bill, which is contingent on the approval of SJR 1942 by the voters of the state in the General Election of 2006, reenacts the provisions of the Death Penalty Reform Act which were struck down as being outside the Legislature's purview, by the court in April, 2000. Plainly stated, SJR 1942 shifts the current balance of power by amending the Constitution, and SB 1972 enacts certain procedural rules with regard to death penalty cases that, under the current constitutional balance of power, would be the Court's function. The constitutional amendment proposed in SJR 1942 would shift this power to the Legislature.

This bill substantially amends, creates, or repeals the following sections of the Florida Statutes, contingent upon the approval of the constitutional revision proposed in SJR 1942: 27.51, 27.702, 27.703, 27.709, 27.710, 27.711, 119.011, 119.19, 922.095, 922.108, 924.055, 924.056, 924.057, 924.058, 924.059, and 924.395.

II. Present Situation:

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 collateral 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. Collateral postconviction claims usually involve three types of claims, all of which invoke constitutional error:

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

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. (At this point, collateral

postconviction counsel will, in a petition for writ of habeas corpus, raise a claim of ineffectiveness of direct appeal counsel.)

After state postconviction proceedings have been completed, a capital defendant is entitled to file a petition for writ of habeas corpus in federal court. This proceeding is controlled by 28 U.S.C. s. 2254(a). 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.

Capital Case Collateral Representation

In the middle and southern regions of Florida, the Capital Collateral Regional Counsel provide postconviction representation to indigent capital defendants. In the northern region of the state, representation is provided by private attorneys appointed by the court. The Commission on Capital Cases (a legislative commission housed within the Office of Legislative Services) maintains a state registry of private attorneys who are qualified to provide capital postconviction representation. The northern region office of the CCRC was converted from CCRC to strictly private counsel representation as a pilot project to determine cost-effectiveness of the system.

Private counsel appointed pursuant to the registry requirements are paid according to a statutory payment plan, and must sign a contract for representation with the Chief Financial Officer. The offices of the CCRC are budget entity subject to annual review by the Legislature. The cost-effectiveness of registry attorneys versus the Capital Collateral Regional Counsel offices is the subject of a performance review currently being undertaken by the Auditor General. The review will be submitted to the presiding officers of the Legislature by January 30, 2007.

Death Penalty Reform Act of 2000

During a special session is January of 2000, the Legislature passed the Death Penalty Reform Act (DPRA). The DPRA made a number of statutory changes to the postconviction process. It was subsequently found to be unconstitutional by the Supreme Court of Florida, in April 2000 (see *Allen v. Butterworth*, 756 So.2d 52 (Fla. 2000)).

Legislative intent. Section 924.055, F.S., was amended by the DPRA to provide that it was the Legislature's intent to "reduce delays in capital cases and to ensure that all appeals and postconviction actions in capital cases are resolved within 5 years after the date a sentence of death is imposed in the circuit court." The section also provided the following legislative intent:

- all postconviction actions should be filed as early as possible after imposition of the death sentence, and that all such actions be filed in compliance with time limitations in ch. 924, F.S.
- no death-sentenced person or that person's capital postconviction counsel should file more than one postconviction action in a sentencing court and one appeal therefrom to the Florida Supreme Court
- no state resources be expended in violation of the act

- the Attorney General must deliver to the Speaker of the House of Representatives and the President of the Senate a copy of any court pleading or order that describes or adjudicates a violation of the act by any state employee or party contracting with the state

Appointment of counsel/actions of defendant. Prior to the DPRA, a postconviction attorney was not appointed until a defendant's direct appeal was completed. The DPRA provided for appointment of a defendant's postconviction lawyer shortly after the death sentence is imposed, while the case is still on direct appeal. This is known as a "dual-track" system.

The DPRA created s. 924.056, F.S., to provide that within 15 days after imposing a death sentence, a trial court is required to appoint postconviction counsel unless the defendant declines a postconviction lawyer.

Within 30 days after appointment, the attorney is required to file a notice of appearance, or move to withdraw if necessary. Private counsel must be provided upon motion of the capital collateral regional counsel to withdraw. Pursuant to s. 27.710, F.S., as amended by the DPRA, the court must appoint private postconviction counsel if 30 days has elapsed since the appointment of the capital collateral regional counsel and no notice of appearance has been filed or a defendant previously represented by private counsel is currently unrepresented. Other provisions contained in s. 924.056, F.S. are described as follows:

- A defendant who accepts the appointment of postconviction counsel must cooperate with and assist postconviction counsel. If the sentencing court finds that the defendant is obstructing the process, the defendant is not entitled to any further postconviction legal representation provided by the state.

- Each attorney participating in a capital case on behalf of the defendant must provide all information on the case the attorney obtained during the attorney's representation of the defendant to the defendant's capital postconviction counsel, who must maintain the confidentiality of that information and is subject to the same penalties as the providing attorney for violating confidentiality.

- If the defendant requests, without good cause, the removal or replacement of his or her appointed postconviction counsel, the court must notify the defendant that no further state resources will be expended on the defendant's postconviction representation, unless the request is withdrawn; if the request is not immediately withdrawn, counsel will be removed from the case and no further state resources will be expended on the defendant's postconviction representation.

- The prosecuting attorney and the defendant's trial counsel must provide the defendant or, if represented, defendant's capital postconviction counsel, with copies of all pretrial and trial discovery and all contents of the prosecuting attorney's file, except for information that the prosecuting attorney has a legal right under state or federal law to withhold from disclosure.

- The clerk of the court must provide a copy of the record on appeal to the capital postconviction counsel and the state attorney and Attorney General within 60 days after

the sentencing court appoints postconviction counsel. However, the court may grant an extension of up to 30 days when extraordinary circumstances exist.

Postconviction motions –limitations and contents. Section 924.056, F.S., as amended by the DPRA also provided the following relating to limitations on postconviction actions:

- With respect to all capital postconviction actions commenced after the effective date of the act, a capital postconviction action is not commenced until the defendant or the defendant's postconviction action in the sentencing court or, in cases alleging ineffective assistance of direct appeal counsel in the Florida Supreme Court. The defendant or defendant's capital postconviction counsel must file a fully pled postconviction action within 180 days after the filing of the appellant's initial brief in the direct appeal.

  Under the DPRA, the collateral attack would commence almost contemporaneously with the direct appeal, in contrast to the previous process in which the collateral attack did not commence until after federal proceedings relating to and following the issuance of the mandate in the direct appeal have run their course.

- The fully pled postconviction action must include all cognizable claims that the defendant's judgment or sentence was entered in violation of the State or Federal Constitution or in violation of state or federal law, including any claim of ineffective assistance of trial counsel, allegations of innocence, or any claim that the state withheld evidence favorable to the defendant.

- No claim may be considered in a capital postconviction action which could or should have been raised before trial, at trial, or if preserved, on direct appeal.

- No claim of ineffective assistance of capital postconviction counsel may be raised in a state court.

- The pendency of public records requests or litigation, or the pendency of other litigation, or the failure of the defendant or defendant's capital postconviction counsel to timely prosecute a case, shall not constitute cause for the court to grant any request for an extension of time. Further, no appeal may be taken from the denial of such extension.

- The time for commencement of the postconviction action may not be tolled for any reason or cause. All claims outside time limitations are barred.

- The defendant or defendant's capital postconviction counsel must file a fully pled postconviction action in the Florida Supreme Court raising any claim of ineffective assistance of direct appeal counsel within 45 days after mandate issues affirming the death sentence on direct appeal.

Successive motions. Section 924.056(5), F.S., created by the act, provided that regardless of when a sentence is imposed, all successive capital postconviction actions are barred unless commenced by filing a fully pled postconviction action within 90 days after the facts giving rise

to the cause of action were discovered or should have been discovered with the exercise of due diligence.

Such claim shall be barred unless the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the defendant guilty of the underlying offense. Additionally, the facts underlying this claim must have been unknown to the defendant or his or her attorney and must be such that they could not have been ascertained by the exercise of due diligence prior to filing the earlier postconviction motion. The time period allowed for filing a successive collateral postconviction action shall not be grounds for a stay.

Capital postconviction claims/state's response. Section 924.058, F.S., which was created by the act, generally related to the contents of the postconviction motion and the state's response and provided the following:

- Except as provided in statute, the defendant or defendant's postconviction counsel shall not file more than one capital postconviction motion in the sentencing court, one appeal therefrom in the Florida Supreme Court, and one original capital postconviction action in the Florida Supreme Court in which a claim is raised that direct appeal counsel was ineffective.

- The defendant's postconviction action must be filed under oath and "fully pled." The section includes specific information which must be included in order for the action to constitute a "fully pled" action.

- Any postconviction action that does not comply with these requirements shall not be considered in any state court. No amendment of the postconviction action shall be allowed after the expiration of statutory time limitations for the commencement of capital postconviction actions.

- The prosecuting attorney or Attorney General is authorized to file one response to any capital postconviction action within 60 days after receipt of the defendant's fully pled capital postconviction action.

Evidentiary hearing, court order and appeal. Section 924.059, F.S., which was created by the DPRA related to proceedings after the postconviction motion and answer were filed and provided the following:

- No amendment of a defendant's capital postconviction action shall be allowed by the court after the expiration of the time periods provided by statute for the filing of capital postconviction claims.

- Within 30 days following the receipt of the state's answer, the sentencing court must conduct a hearing to determine whether an evidentiary hearing is required, if a hearing has been requested by the defendant or defendant's capital postconviction counsel. Within 30 days thereafter, the court must rule on whether an evidentiary hearing is required, and if so, schedule such hearing to be held within 90 days. If the court

determines that the postconviction action is legally insufficient or that the defendant is not entitled to relief, the court must, within 45 days thereafter, deny such action with the order to include the rationale for the denial and the supporting record.

- Within 10 days of the order scheduling an evidentiary hearing, the defendant or defendant's capital postconviction counsel must disclose names and addresses of potential witness not previously disclosed and their affidavits or a proffer of their testimony. The state has 10 days following the defendant's disclosure to make a reciprocal disclosure.

- The state is entitled to have the defendant examined by its mental expert if the defense raises mental status issues. All of the defendant's mental status claims will be denied as a matter of law if the defendant fails to cooperate with the state's expert. All reports provided by expert witnesses must be disclosed by opposing counsel upon receipt.

- Following the evidentiary hearing, the court must order a transcription of the hearing which must be filed within 30 days following the hearing. Within 30 days of receipt of the transcript, the court must issue its final order granting or denying postconviction relief, making detailed findings of fact and conclusions of law with respect to any allegations asserted.

- An appeal may be taken to the Florida Supreme Court within 15 days from the entry of a final order on a capital postconviction action. Interlocutory appeals and motions for rehearing are prohibited. The clerk of the court must promptly serve all parties with a copy of the final order.

- If the sentencing court has denied the capital postconviction action without an evidentiary hearing, the appeal to the Florida Supreme Court will be expeditiously resolved in a "summary fashion." The Court must initially review the appeal to determine whether the sentencing court correctly resolved the defendant's claims without an evidentiary hearing; if the Court determines that an evidentiary hearing should have been held, it may remand by order without opinion and shall relinquish jurisdiction to the sentencing court for a specified period not to exceed 90 days to conduct the hearing, with the record thereafter supplemented with the hearing transcript.

- The Florida Supreme Court must render a final decision granting or denying postconviction relief within 180 days after the Court receives the record on appeal. The Governor may proceed to issue a warrant for execution if an appeal from a denial of postconviction relief is denied.

- A capital postconviction action filed in violation of the time limits provided by statute is barred, and all claims raised therein, are waived. A state court shall not consider any capital postconviction action in violation of s. 924.056, or s. 924.057, F.S. The Attorney General must deliver to the Governor, the President of the Senate, and the Speaker of the House of Representatives a copy of any pleading or order that alleges or adjudicates any violation of this provision.

Public records repository. The Secretary of State's office maintains a records repository for the purpose of archiving capital postconviction records. The state attorney, local law enforcement agencies, and the Department of Corrections are required to submit to the repository all relevant public records produced in a death penalty case. Other agencies are to submit records to the repository when they have public records relevant to the case. The records repository is intended to collect all relevant records while the case is "fresh" in everyone's mind and store them in a centralized location. The DPRA amended s. 119.19, F.S., to:

- Advance the public records production process to begin upon imposition of the death sentence, rather than upon issuance of the mandate on direct appeal.

- Compress existing time frames for agency responses to public records requests (most of the prior provisions requiring agency responses in 90 days were amended to require responses in 60 days).

- Require affected agencies to send public records claimed to be confidential or exempt directly to the Clerks of Court instead of to the records repository, the intended effect of which is to save the time and effort of requesting that the sealed records be shipped to the trial court for an in camera inspection, a procedure that happens with some frequency.

- Require that a written demand for public needs include requests for records associated with particular named individuals, and also a brief statement of information relevant to the person's identity and relationship to the defendant.

- Transfer the responsibilities of providing the personnel, supplies, and necessary equipment to copy records held at the records repository from the CCRC's or private counsel to the Secretary of State.

Limitations on capital postconviction actions that can be filed. Section 27.702, F.S., was amended to provide that the CCRC and private attorneys may file only those postconviction or collateral actions authorized by statute.

Time limitations and their effect on issuance of the death warrant. Section 922.095, F.S., was amended to provide that a person convicted and sentenced to death must pursue all possible collateral remedies within the time limits provided by statute. Failure to seek relief within the statutory time limits constitutes grounds for issuance of the death warrant. Any claim not pursued within the statutory time limits is barred, and no claim filed after the statutory time limits constitutes grounds for judicial stay of any death warrant.

Limitations and other requirements governing capital postconviction actions in which the death sentence was imposed before the effective date of the act. Section 924.057, F.S., was created by the DPRA to govern all capital postconviction actions in cases in which the trial court imposed the sentence before the effective date of the act.

Repeal of procedural rules. The act provided that Florida Rules of Criminal Procedure 3.850 was repealed to the extent that the rule was inconsistent with the act and Rules 3.851 and 3.852 were repealed in their entirety.

Appropriation of attorney registry fees. Section 27.703, F.S., was amended to provide that the appropriation for attorney registry fees goes directly to the Comptroller, the agency that performs the contract management functions, rather than the prior practice where the Justice Administrative Commission receives this appropriation and then passes it on to the Comptroller, thereby creating an unnecessary layer in the payment process.

Conflict of interest involving appellate public defender. Section 27.51, F.S., was amended by the DPRA to provide for reassignment of an appellate public defender when the appellate public defender served as defendant's trial counsel. This provision was designed to avoid a conflict of interest in representing a defendant on direct appeal contemporaneous with a collateral postconviction claim that the Public Defender's office handling the appeal was ineffective at trial.

Conflict of interest involving Capital Collateral Regional Counsel. Section 27.703, F.S., was amended to prohibit a CCRC from accepting an appointment or taking any other action that will create a conflict of interest. In addition, the section was amended to allow for withdraw of counsel in any case where there exists a conflict of interest and not just in cases where counsel represents a codefendant.

Case tracking. Section 27.709, F.S., was amended to require the Commission on Capital Cases to compile and analyze case-tracking reports produced by the Supreme Court. The commission was to analyze these reports to identify trends and changes in case management/processing, identify and evaluate "unproductive points of delay," and generally evaluate case progress through the judicial system. The commission was required to report its findings to the Legislature by January 1 of each year.

Registry attorneys' report of billings. The act amended s. 27.711, F.S., to require private attorneys to provide billing documentation to the Comptroller prior to submission to the court. The Comptroller has standing to object to payment.

Sanctions for abusive or dilatory practices. The DPRA created s. 924.395, F.S., to provide a statement of legislative policy in which the courts were strongly encouraged through their inherent powers and pursuant to the newly created section, to impose sanctions against any person within the court's jurisdiction who is found by a court to have engaged in abusive or dilatory practices in collateral postconviction proceedings. This section described a number of abusive or dilatory practices and sanctions available to the courts through their inherent powers.

Repeal of current statutory time limits for filing a motion for postconviction relief. The DPRA repealed time limitations for the filing of a motion for postconviction relief contained in s. 924.051, F.S., because these time limits conflict with time limits provided in the legislation.

Supreme Court study. The DPRA provided legislative findings that a centralized case management of capital postconviction actions has the potential to reduce delays and should be

considered and suggested that the Florida Supreme Court study the feasibility of a requirement that all capital postconviction actions be filed in the Supreme Court, rather than in the circuit court. The circuit courts would act as fact finders, submitting to the Supreme Court findings of fact and conclusions of law in those actions which the Supreme Court has remanded to the circuit courts for evidentiary hearings.

III. Effect of Proposed Changes:

Provisions of SJR 1942

This bill, which is contingent on the voter's approval of SJR 1942 by the voters of the state in the General Election of 2006, reenacts the provisions of the Death Penalty Reform Act which were struck down as being outside the Legislature's purview, by the court in April, 2000.

Plainly stated, SJR 1942 shifts the current balance of power by amending the Constitution, and SB 1972 enacts certain procedural rules with regard to death penalty cases that, under the current constitutional balance of power, would be the Court's function. The constitutional amendment proposed in SJR 1942 would shift this power to the Legislature.

The proposed joint resolution creates a process which is similar to the process used to create rules of practice and procedure for the federal courts. The joint resolution would not effect the Court's current constitutional authority to adopt rules of practice and procedure in other areas of the law.

The joint resolution would also create a judicial conference to propose rules of procedure governing violations of criminal law, violations of criminal law by juveniles, and postconviction proceedings. Rules proposed by the judicial conference would be submitted to the Supreme Court for consideration. The Supreme Court would then submit proposed rules to the Legislature by November 30 of the year preceding the effective date of the proposed rule. The Legislature may adopt, reject, or amend proposed rules by general law. If the Legislature does not act by the end of the next legislative session, the proposed rule shall be deemed approved.

The joint resolution also provides that a court may not require or authorize collateral or postconviction judicial review of a criminal judgment or sentence except as provided by general law or rule of procedure adopted in accordance with the amendment. It also provides that rules of practice and procedure may not be inconsistent with general law and shall not abridge, enlarge, or modify any substantive right.

If this joint resolution is passed by a 3/5 vote of both houses of the Legislature, it will be submitted to the voters in the next general election in November of 2006.

Provisions of SB 1972

This bill reenacts the sections of statute that were created or amended by the DPRA and were later struck down by the Florida Supreme Court in *Allen v. Butterworth*, 756 So.2d 52 (Fla. 2000). The bill does not reenact the sections of the original bill which were not struck down by the Court.

Public records. Section 119.07(6)(b), F.S., exempts active criminal intelligence and investigative information from disclosure as a public record. Criminal intelligence and criminal investigative information is considered "active" while such information is directly related to pending prosecutions or appeals. In other words, the information remains exempt until the direct appeal becomes final.

In the *Allen* case, the court noted that in order for the dual track system to work properly, the public records exemptions must expire upon imposition of the death sentence so that the postconviction counsel has the opportunity to use the records in the investigation. The bill amends s. 119.011, F.S., to provide that with respect to capital cases in which the defendant has been sentenced to death, upon the imposition of the death sentence criminal intelligence and criminal investigative information shall be considered to be not "active."

Proposed rules. The bill directs the Supreme Court to submit to the President of the Senate and the Speaker of the House of Representatives by March 1, 2007, rules proposed by the Judicial Conference for the implementation of this act.

Other provisions. The bill modifies some specific dates which were in the original bill in order to conform them to the new effective date of the bill. As in the original DPRA, the bill repeals Florida Rules of Criminal Procedure 3.850 and 3.851 to the extent that they are inconsistent with this act. The bill repeals Rule 3.852. The bill would take effect July 1, 2007, contingent on voter approval of SJR 1942 in the general election of 2006.

Section Directory:
Section 1. Provides that the act may be cited as the "Death Penalty Reform Act."

Section 2. Amends s. 27.51, F.S., to provide that the public defender may not represent the defendant in certain circumstances.

Section 3. Reenacts s. 27.702(1), F.S.

Section 4. Reenacts s. 27.703, F.S.

Section 5. Reenacts s. 27.709(2), F.S.

Section 6. Reenacts s. 27.710, F.S.

Section 7. Reenacts s. 27.711(3), (13), F.S.

Section 8. Amends s. 119.011(3)(d), F.S., to provide that criminal intelligence and criminal investigative information shall not be considered "active" in certain circumstances.

Section 9. Amends s. 119.19, F.S., to modify date contained in section.

Section 10. Reenacts s. 922.095, F.S.

Section 11. Reenacts s. 922.108, F.S.

Section 12. Reenacts s. 924.055, F.S.

Section 13. Amends s. 924.056, F.S., to change reference from January 14, 2000, to July 1, 2007; deletes reference to a capital postconviction motion not being fully pled unless it satisfies the requirements of any superseding rule of court.

Section 14. Amends s. 924.057, F.S., to modify references to specific dates; deletes reference to superseding rule.

Section 15. Amends s. 924.058, F.S., to modify references to specific dates; deletes reference to rules adopted by Florida Supreme Court.

Section 16. Amends s. 924.059, F.S., to modify references to specific dates; deletes reference to rules adopted by Florida Supreme Court.

Section 17. Reenacts s. 924.395, F.S.

Section 18. Requires supreme court to submit to the Legislature rules proposed by the judicial conference for the implementation of this act.

Section 19. Repeals Rule 3.850 and 3.851, Florida Rules of Criminal Procedure to the extent inconsistent with this act; repeals Rule 3.852.

Section 20. Provides severability clause.

Section 21. Provides that the act shall take effect July 1, 2007, contingent upon voter approval of SJR 1942 in the General Election of 2006; provides that repeal of rules of procedure shall take effect only if the act is passed by affirmative vote of 2/3 membership of each house of the Legislature.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Section 8 of the bill alters the definition of “active” criminal investigative or intelligence information, so that in cases where a defendant is sentenced to death, the exemption from disclosing those records as “public records” is terminated upon the sentence being handed down.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

I. Separation of Powers Doctrine

Generally
Under Art. II, Sec. 3, Fla. Const., no branch may exercise any powers appertaining to another branch unless expressly provided by the Constitution. This constitutional provision is essentially the embodiment of the separation of powers doctrine. Further, the fundamental idea of separation of powers is that the judiciary is the operative check on possible arbitrary action by legislative and executive officers. *Seminole County Board of County Commissioners v. Long*, 422 So.2d 938, 941-42 (Fla. 4th DCA 1982).

In *School Board of Broward County v. Surette*, 281 So.2d 481 (Fla. 1973), the Florida Supreme Court stated that "[w]here rules and construing opinions have been promulgated by this Court relating to the practice and procedure of all courts and a statutory provision provides a contrary practice or procedure . . . the statute must fall."

Art. V., Sec. 3, Fla. Const., states: "The practice and procedure in all courts shall be governed by rules adopted by the supreme court." *In R.J.A. v. Foster*, 603 So.2d 1167, 1171 (Fla. 1992) the Court stated:

> "When a lawsuit must be filed is, in our view, substantive; how it is to be tried in an orderly manner is procedural. *See Benyard v. Wainwright*, 322 So.2d 473, 475 (Fla. 1975) Substantive law prescribes the duties and rights under our system of government. . . . Procedural law concerns the means and method to apply and enforce those duties and rights."

In *Kalway v. State*, 730 So.2d 861, 862 (Fla. 1st DCA. 1999), the First District Court of Appeal found that a statute governing waiver of court costs for indigent prisoners, which the court determined was substantive law, also contained "directives, which are not binding on the supreme court, concerning the manner in which the substantive objectives are to be reached." While noting that only the Florida Supreme Court had the power to adopt rules of practice and procedure for all courts of this state, the Court found that the procedural aspects of the statute were minimal and did not void the statute as violative of the separation of powers doctrine because they were "intended to implement the substantive provisions of the law." The Court did not find any apparent conflict between the procedural portions of the section and any existing court rule or procedure. The Court further noted:

> "If the procedural elements of the statute were found to intrude impermissibly upon the procedural practice of the courts, the legislative provisions would have to give way to the court rules and procedures. Further, the legislative provisions do not bar the Florida Supreme Court's future adoption of specific rules designed to carry out the substantive goals of the [section]."

In *Kalway v. Singletary*, 708 So.2d 267 (Fla. 1998), the Florida Supreme Court affirmed the decision of the appellate court, finding the interplay between the statute and rule to be anomalous and not violative of the separation of powers doctrine. The Court found the "setting of an interim time-frame for challenging the Department of Corrections disciplinary action following the exhaustion of intra-departmental proceedings [to be] a technical matter not outside the purview of the legislature." The court did not view this action as an intrusion on its rulemaking authority. While noting the "potency" of the separation of powers doctrine, the court explained:

> "This does not mean, however, that two branches of state government cannot work hand in hand in promoting the public good or implementing the public will, as evidenced by our recent decision in *Amendments to the Florida Rules of Appellate Procedure*, 685 So.2d 773 (Fla. 1996) wherein we deferred to the legislature in limited matters relating to the constitutional right to appeal:
>
> [W]e believe that the legislature may implement this constitutional right and place reasonable conditions upon it so long as they do not thwart the litigants' legitimate appellate rights. Of course this Court continues to have jurisdiction over the practice and procedure relating to appeals. *[Id.* at 774-75.]"

The DPRA and Allen v. Butterworth

As previously mentioned in the bill analysis, the Supreme Court of Florida found the Death Penalty Reform Act unconstitutional in April 2000, based largely upon separation of powers grounds. *Allen v. Butterworth*, 756 So.2d 52 (Fla. 2000).

The Senate Joint Resolution that is tied to this bill (SJR 1942), if put on the ballot and approved by voters, would shift the constitutional powers of the court to the Legislature, in matters of criminal and postconviction rules of practice and procedure before the courts. This would effectively put an end to separation of powers claims (as an encroachment on the powers of the court) in criminal and postconviction matters of practice and procedure.

If approved, the constitutional amendment would then clear the way for the enactment of this bill, which is essentially the identical bill passed in the 2000 special session – the Death Penalty Reform Act.

II. Habeas Corpus

Generally

Art. I, Sec. 13, Fla. Const., provides that the right to relief through the petition for writ of habeas corpus must be "grantable of right, freely and without cost."

Florida Rule of Criminal Procedure 3.850 is the "procedural vehicle" for the collateral remedy available through the writ of habeas corpus. *State v. Bolyea*, 520 So.2d 562, 563 (Fla.1988). Courts addressing rule 3.850 issues "must be mindful that the right to habeas

relief protected by article I, section 13 of the Florida Constitution is implicated." *Haag v. State*, 591 So.2d 614, 616 (Fla.1992).

Fla.R.Crim.P. 3.850 is also the procedural vehicle for claims formerly brought by a petition for writ of error coram nobis. *See, e.g., Richardson v. State*, 546 So.2d 1037, 1039 (Fla. 1989) ("Claims of the suppression of evidence by the prosecution, which are in essence alleged violations of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), are also properly brought under rule 3.850, not in an application for a writ of error coram nobis.").

Rule 3.850 is repealed by the bill to the extent it is inconsistent with the bill. (see Section 19) Likewise, Rule 3.851 is repealed, to the extent it inconsistent with the bill, and Rule 3.852 is repealed in its entirety. The repeal of the Rules must be by two-thirds vote of both houses of the Legislature.

DPRA and Allen v. Butterworth
The *Allen* case explains, in detail, the history of the interplay between the constitutionally-derived right to the writ of habeas corpus and the court rules of procedure that followed. The organic right to the writ "shall never be suspended unless, in case of rebellion or invasion, suspension is essential to the public safety." *Art. I, sec. 13, Fla. Const.*

While it may be then, that the Legislature will be given the power to approve rules of court practice and procedure (by constitutional amendment through the approval of the Senate Joint Resolution 1942), the Legislature may not abrogate the constitutionally-derived right to seek redress through the writ of habeas corpus by the constitutional amendment proposed in SJR 1942. If this is the case, it remains to be seen whether the courts will be bound by the constitution to entertain emergency writs filed outside the time limits set forth within the rules. If the courts are so bound by the constitution, the actual effect of the joint resolution and the bill may be to inadvertently create a system where there are no time limitations for the filing of postconviction motions at all.

III. Due Process and Equal Protection

DPRA and Allen v. Butterworth
Although the Court did not fully analyze the issues, it found the Death Penalty Reform Act of 2000 violative of the Due Process and Equal Protection clauses. Due Process because "[t}he successive motion standard of the DPRA prohibits otherwise meritorious claims from being raised," and Equal Protection because "the successive motion standard applies only to capital prisoners." *Allen v. Butterworth*, 756 So.2d 52, 54 (Fla. 2000). As previously stated, this bill reenacts the portions of the 2000 DPRA the court addressed in *Allen*.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Staff has been provided a fiscal analysis of the bill by the Capital Collateral Regional Counsels, based upon the dual-track system going into effect under the provisions of the bill. The total costs related to receiving an estimated 41 new cases is $1,463,941. This figure includes the new staff, case-related expenses, and operating capital outlay.

It would be speculation to attempt to assign current and future costs to the other agencies involved in the criminal justice and postconviction appeals systems. For some sense of the costs, however, staff would direct the reader's attention to the fiscal analysis of the DPRA in the year 2000, where the estimated 3-year costs were nearly $12 million.

This bill has a component not contained in the DPRA that should not be overlooked in the cost analysis, and that is the process by which court rules would be adopted, rejected, or amended under the provisions of the bill. Currently, this process is strictly a function of volunteers from the legal practitioner community and other interested parties, along with the court. It is unknown what the costs related to interjecting a legislative component might be, and likewise, whether the judicial branch will incur additional costs due to the new rule-making process.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Federalism

The approach taken by the bill is to restrict state collateral attack and, with the exception of a limited right to raise a successor claim relating to newly discovered evidence, otherwise bars successor claims in state court. The implication and effect of this approach is that the federal courts will be the only judicial avenue to consider virtually all successor claims, which essentially raise federal constitutional claims. This approach departs from principles of federalism and the intent of recent federal legislation relating to federal habeas relief.

"The States . . . have great latitude to establish the structure and jurisdiction of their own courts. In addition, States may apply their own neutral procedural rules to federal claims, unless those rules are preempted by federal law. These principles are fundamental to a system of federalism in which the States share responsibility for the application and enforcement of federal law."

Howlett v. Rose, 496 U.S. 356, 372 (1990) (citations omitted). *See Royal Caribbean Corp. v. Modesto*, 614 So.2d 517, 519-20 (Fla. 3rd DCA 1992), quoting *Howlett*.

Capital Collateral Case Status – March 2005

As provided by the Executive Director of the Commission on Capital Cases the following indicates the status of pending cases in March 2005:

- 34 death cases on direct appeal
- 131 in Rule 3.850 circuit court (trial court, collateral matter) proceedings
- 119 in postconviction (collateral) appeal stage at the Florida Supreme Court
- 56 cases in federal court
- 6 inmates had exhausted their appeals and were eligible for death warrants
- Average number of new death sentences per year: 20
- Average direct appeal time of 312 cases is 2.5 years (date of filing to disposition)
- Average time from final direct appeal to filing 3.850/habeas is 1 year
- Average collateral appeal time of 189 cases is 3 years (date of filing to disposition)

It should be noted that at the time these numbers were provided, the commission had approximately 50 additional death cases to review for their current status. Also, in terms of the average time calculations, the Executive Director opines that the numbers would be lower if the cases that have been pending since before 1998 were not included in the group. In other words, cases that are technically on the list of postconviction cases, but that were "in the system" prior to 1998 when the new CCRC offices were created, are cases that have unusually long histories – therefore, counting those cases in the averages elevates the numbers and distorts the true picture of the length of time it is currently taking to bring postconviction litigation to a close.

VIII. Summary of Amendments:

Barcode 161038 by Criminal Justice:
Deletes a section of the bill requiring certain actions by the judicial conference created in Senate Joint Resolution 1942. The SJR is tied to this bill and the consideration of that Resolution was temporarily postponed in the Criminal Justice Committee on April 20, 2005. (WITH TITLE AMENDMENT)