

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 325 CS                      Commission on Capital Cases  
**SPONSOR(S):** Gelber  
**TIED BILLS:**                              **IDEN./SIM. BILLS:** SB 360

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Criminal Justice Committee</u>	<u>6 Y, 0 N, w/CS</u>	<u>Kramer</u>	<u>Kramer</u>
2) <u>Governmental Operations Committee</u>	<u></u>	<u>Mitchell</u>	<u>Williamson</u>
3) <u>Criminal Justice Appropriations Committee</u>	<u></u>	<u></u>	<u></u>
4) <u>Justice Council</u>	<u></u>	<u></u>	<u></u>
5) <u></u>	<u></u>	<u></u>	<u></u>

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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 five capital collateral defendants at one time. This bill authorizes a registry attorney to represent up to seven capital collateral defendants at one time.

The bill significantly modifies the minimum qualifications for registry attorneys. The bill requires registry attorneys to submit reports to the commission on a quarterly basis. The bill authorizes the commission to remove an attorney from the registry who has not executed a contract for postconviction representation or filed a quarterly report as required by law.

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 addresses issues with regard to the payment of fees by setting forth the Legislative finding that not all capital collateral cases are extraordinary or unusual, and requiring written findings of fact where a judge deviates upward from the statutorily authorized fee schedule.

This bill does not appear to create, modify, or eliminate rulemaking authority.

The bill does not appear to create, modify, amend, or eliminate revenues of state government or of local governments. The expenditure impact on state government is indeterminate, but expected to be minimal. The bill does not appear to create, modify, amend, or eliminate expenditures of local governments.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government: The bill authorizes an attorney to represent 7 capital postconviction defendants, rather than 5 as under current law.

#### B. EFFECT OF PROPOSED CHANGES:

##### **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,<sup>1</sup> two Senators appointed by the President of the Senate<sup>2</sup> and two members of the House of Representatives appointed by the Speaker of the House of Representatives.<sup>3</sup>

**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 or rejects the defendant's appeal, a defendant is entitled to begin state postconviction proceedings.

State postconviction proceedings are controlled by rules 3.850, 3.851 and 3.852 of the Florida Rules of Criminal Procedure. 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 completion of state postconviction proceedings, 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.

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<sup>1</sup> Judge Paul M. Hawkes, First District Court of Appeal, and Judge Leslie B. Rothenberg, Fourth District Court of Appeal, are the current appointees of the Governor. See Comm'n on Capital Cases, Members, available at <http://www.floridacapitalcases.state.fl.us/c-members.cfm> (last visited Mar. 1, 2006).

<sup>2</sup> Senators Walter G. "Skip" Campbell, Jr. and Victor D. Crist are the current appointees of the Senate President. See Comm'n on Capital Cases, Members, available at <http://www.floridacapitalcases.state.fl.us/c-members.cfm> (last visited Mar. 1, 2006).

<sup>3</sup> Representatives Dan Gelber and Juan-Carlos "J.C." Planas are the current appointees of the Speaker of the House. See Comm'n on Capital Cases, Members, available at <http://www.floridacapitalcases.state.fl.us/c-members.cfm> (last visited Mar. 1, 2006).

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>4</sup> In the northern region of the state, representation is provided by private attorneys appointed by the court.

### **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 maintained by the Commission on Capital Cases and is comprised of lawyers who have met certain statutory criteria.<sup>5</sup> A registry attorney must be a member in good standing in the Florida Bar, with not less than 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.<sup>6</sup> There are currently 138 registry attorneys who, along with 29 Public Defenders, are handling 412 postconviction collateral proceedings.<sup>7</sup>

A registry attorney is required to attend annually at least seven hours of continuing legal education specifically devoted to the defense of capital cases. A registry attorney is not permitted to represent more than five defendants in capital postconviction litigation at any one time.<sup>8</sup>

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;<sup>9</sup>
- \$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 Florida 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 Florida Supreme Court, which directs the trial court to hold further proceedings on the motion for postconviction relief;

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<sup>4</sup> s. 27.701, F.S.

<sup>5</sup> s. 27.710(2), F.S.

<sup>6</sup> s. 27.704(2), F.S.

<sup>7</sup> See Comm'n on Capital Cases, Registry Attorneys, available at <http://www.floridacapitalcases.state.fl.us/c-registry-attorney.cfm> (last visited Feb. 24, 2006) and Comm'n on Capital Cases, Inmate Legal Status, available at <http://www.floridacapitalcases.state.fl.us/c-inmate-status.cfm> (last visited Feb. 24, 2006).

<sup>8</sup> There are, however, approximately seven registry attorneys who have caseloads above even seven cases, four more than eleven cases. See Comm'n on Capital Cases, Registry Attorneys, available at <http://www.floridacapitalcases.state.fl.us/c-registry-attorney.cfm> (last visited Feb. 24, 2006). <http://www.floridacapitalcases.state.fl.us/c-members.cfm>

<sup>9</sup> This paragraph also entitles an attorney to fees if the court schedules a hearing on a matter that makes the filing of the original motion for postconviction relief unnecessary or if the court otherwise disposes of the case; s. 27.704(4)(b), F.S.

- \$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 Florida 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 at \$40 per hour, up to a maximum of \$15,000, to assist in the defendant's representation.<sup>10</sup> The attorney also is entitled to a maximum of \$15,000 for miscellaneous expenses, such as the cost of preparing transcripts, compensating expert witnesses and copying documents, although the trial court may approve additional expenses if extraordinary circumstances exist.

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 regarding the performance of assigned counsel.<sup>11</sup>

### **Fees in excess of statutory schedule**

Although fees do not normally exceed the statutory schedule,<sup>12</sup> there have been 15 cases since the inception of the registry program where excess attorneys' fees totaling \$356,755 were awarded.<sup>13</sup> There have been four cases where excess investigative fees totaling \$21,806 were awarded.<sup>14</sup> There have been 20 cases where trial courts authorized additional miscellaneous expenses totaling \$327,813.<sup>15</sup> These excess fee cases have occurred with increasing frequency over the last several years.<sup>16</sup>

Fees can exceed the statutory schedule based on court decisions such as the recent case of *Florida Department of Financial Services v. Freeman*<sup>17</sup>, the Florida Supreme Court reaffirmed the holding of several prior cases that it is "within the trial judge's discretion to grant fees beyond the statutory maximum to registry counsel in capital collateral cases when 'extraordinary or unusual circumstances exist.'" In *Freeman*, the Department of Financial Services appealed an order from a circuit court granting a registry attorney, who had signed the required contract for services, fees in excess of the statutory maximum. The trial court had granted \$27,940.74 in fees for services that were statutorily capped at \$2,500. The *Freeman* opinion reviewed the court's prior holdings on the issue of fees in excess of statutory caps. In *Olive v. Maas*,<sup>18</sup> the court held that "fees in excess of the statutory cap are not always awarded to registry counsel in capital collateral cases; however, registry counsel is not foreclosed from requesting excess compensation 'should he or she establish that, given the facts and circumstances of a particular case, compensation within the statutory cap would be confiscatory of this or her time, energy and talent'". The *Olive* court relied on the opinion of *Makemson v. Martin County*,<sup>19</sup> which related to compensation to attorneys representing capital defendants at the trial and during direct appeal.

<sup>10</sup> s. 27.711(5), F.S.

<sup>11</sup> s. 27.711(12), F.S.

<sup>12</sup> Conversation, Executive Dir., Comm'n on Capital Cases (Feb. 24, 2006).

<sup>13</sup> Comm'n on Capital Cases, Payments in Excess of Statutory Caps Since Inception of the Registry Program (spreadsheet) (last updated Jan 31, 2006) (on file the comm'n).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Conversation, Executive Dir., Comm'n on Capital Cases (Feb. 24, 2006).

<sup>17</sup> *Florida Department of Financial Services v. Freeman*, 2006 WL 176748 (Fla. January 26, 2006).

<sup>18</sup> *Olive v. Maas*, 811 So.2d 644 (Fla. 2002).

<sup>19</sup> 491 So.2d 1109 (Fla. 1986)

According to the *Freeman* court, the attorney requesting fees in excess of the statutory limits has the burden of establishing facts in support of the award. The Florida Supreme Court found that the record from the trial court provided “no evidence upon which the judge could rely to determine if extraordinary or unusual circumstances existed to support an award of excessive fees” and remanded the case back to the trial court for an evidentiary hearing.

### **Effect of HB 325**

Continuing legal education: HB 325 amends s. 27.709, F.S., to authorize the Commission on Capital Cases to sponsor continuing legal education training devoted specifically to capital cases and to undertake any project recommended or approved by the commission members.

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 two years.

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 amends s. 27.711, F.S., to clarify that a registry attorney is entitled to \$500 for CLE expenses, regardless of how many capital defendants the attorney represents.

Qualifications: 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 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. These requirements are the same as those for the Capital Collateral Regional Counsel. The bill substantially modifies the minimum requirements for registry counsel in s. 27.710, F.S., by requiring that a registry attorney to certify that he or she:

1. Is an active practitioner who has at least five years’ experience in the practice of criminal law;
2. Is familiar with the production of evidence and the use of expert witnesses, including psychiatric and forensic evidence;
3. Has demonstrated proficiency necessary for representation in capital cases including the investigation and presentation of mitigation evidence;
4. Has satisfied the above CLE requirements;
5. Has tried at least nine state or federal criminal jury trials to completion, two of which must have been capital cases and
  - a. Three of which must have been murder trials;
  - b. One of which must have been a murder trial and five of which must have been other felony trials; or
  - c. One of which must have included a postconviction evidentiary hearing and five of which must have been other felony trials
6. Alternatively, the attorney can certify that he or she has appealed one capital conviction and appealed at least:
  - a. Three felony convictions, one of which must have been murder;
  - b. Three felony convictions and participated in one capital postconviction evidentiary hearing; or
  - c. Felony convictions, two of which must have been murders.

If the trial court finds that exceptional circumstances exist requiring appointment of an attorney who does not meet the criteria set forth above, the trial court must enter a written order specifying the exceptional circumstances requiring appointment of the attorney and explicit findings that the attorney chosen will provide competent representation in accordance with the intent of the section.

Failure to comply with criterion set forth in the section may be cause to remove the attorney from the registry until the criterion is satisfied. 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.

These changes are consistent with rule 3.112 of the Rules of Criminal Procedure, which were promulgated by the Florida Supreme Court to set minimum standards for attorneys in capital cases. These changes also are not expected to adversely impact the number of registry attorneys.<sup>20</sup>

**Contracting:** Currently, a private attorney who is appointed by the court to represent a capital defendant must enter into a contract with the Chief Financial Officer. If an attorney fails to execute the contract within 30 days after the date the contract is mailed to the attorney, the executive director of the commission must notify the trial court. HB 325 requires the executive director to remove the attorney from the registry list.

**Quarterly reporting:** 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 remove the attorney from the registry and the court may impose a fine or remove the attorney from the case.

**Federal representation:** 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.

**Payment:** 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 – this provision will authorize payment to the attorney sooner. The bill authorizes payment of \$100 per hour, up to a maximum of \$2,500 for the preparation of an initial federal pleading rather than after filing a petition for writ of certiorari in the United States Supreme Court.

The bill provides that an attorney appointed under s. 27.710, F.S., or appointed by the court to replace a capital collateral regional counsel staff attorney or capital collateral regional counsel contract attorney, who incurs costs for representing capital defendants on a pro bono basis shall be paid from registry funds by the Chief Financial Officer if approved by the trial court.

The bill provides that if a trial court judge intends to award attorney fees in excess of those outlined in statute, the judge must include written findings of fact that specifically state the extraordinary nature of the expenditures of the time, energy, and talents of the attorney in the case which are not ordinarily expended in other capital collateral cases. The bill also amends s. 27.7001, F.S., to provide that the Legislature finds that not all capital collateral cases are extraordinary or unusual.

**Limitation on number of inmates represented:** The bill authorizes a registry attorney to represent up to seven inmates in capital postconviction litigation at any one time rather than only five inmates. The seven-inmate-representation limit includes capital postconviction cases proceeding under contract with the capital collateral regional counsel<sup>21</sup>, inmates represented pro bono and inmates privately retaining

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<sup>20</sup> Conversation, Executive Dir., Comm'n on Capital Cases (Feb. 24, 2006).

<sup>21</sup> Section 27.704(2), F.S. authorizes the CCRC to contact with private counsel or with public defenders to provide representation to death sentenced inmates.

the attorney. An attorney may not be appointed to additional capital postconviction cases until the attorney's representation total falls below the seven-case limit.

C. SECTION DIRECTORY:

Section 1. Amends s. 27.7001, F.S., to provide legislative findings.

Section 2. Amends s. 27.709, F.S., to authorize the Commission on Capital Cases to sponsor continuing legal education programs.

Section 3. Amends s. 27.710, F.S., to change the criteria for registry attorneys; to require quarterly reporting to commission; and to authorize executive director to remove attorney from registry in certain circumstances.

Section 4. Amends s. 27.711, F.S., to modify payment schedule for registry attorneys.

Section 5. Provides effective date of July 1, 2006.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

This bill does not appear to create, modify, amend, or eliminate revenues of state government.

2. Expenditures:

The impact of the bill on expenditures of state government is indeterminate. While authorizing additional cases per attorney, large changes to the number of death sentence cases are not expected.

Also, the bill provides that if a judge intends to award attorney fees in excess of those authorized by law, the judge must make findings of fact justifying the order. Courts are already allowing for fees in excess of statutory caps in certain circumstances. To the extent that judges are currently ordering fees in excess of the statutory maximum in cases that would not qualify as extraordinary, this bill may result in a limitation on excessive fees.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

This bill does not appear to create, modify, amend, or eliminate revenues of local governments.

2. Expenditures:

This bill does not appear to create, modify, amend, or eliminate expenditures of local government.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Court-appointed capital collateral counsel should receive certain fees more quickly than under current law, in that the bill provides for payment after the final hearing on the original motion for postconviction relief, rather than upon the issuance of the court's order on the motion. Further, costs incurred by an attorney who has taken a capital collateral case on a pro bono basis may be paid by the Chief Financial Officer, upon approval of the court.

D. FISCAL COMMENTS:

See above.

### 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:

There do not appear to be any other constitutional issues.

#### B. RULE-MAKING AUTHORITY:

This bill does not appear to create, modify, or eliminate rulemaking authority.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

##### Drafting Issue (Lines 180-200): Effect and Remedy for Removal

It is not clear what effect removing an attorney from the registry (for not entering into the required contract with the Department of Financial Services or not submitting the required quarterly report) will have on the current representation of clients by the registry attorney. Most likely, it will only serve as a barrier to future representation.

There also is the issue of whether an attorney who has been removed from the registry can get back on the registry. If an attorney does not submit a quarterly report within 30 days after the end of the quarter, the bill is clear that the executive director is required to remove that attorney from the registry, even if there was a valid reason (e.g. illness) for not submitting the report. Yet, there is no process for a removed attorney to return the registry. The current language could be interpreted as a bar: once removed from the registry, the attorney is permanently off the registry.

The sponsor may wish to amend this language if either of these outcomes are the intended result.

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

The Criminal Justice Committee adopted a strike-all amendment which:

- Changed the statutory limit on the number of inmates that a registry attorney is authorized to represent from ten to seven. [The current statutory limit is five.]
- Modified the minimum qualifications for registry attorneys.
- Authorized a judge to impose a fine or remove an attorney from the registry if the attorney does not submit a required quarterly report.