

# 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: Criminal Justice Committee

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BILL: CS/SB 360

INTRODUCER: Criminal Justice Committee and Senator Campbell

SUBJECT: Capital Collateral Representation

DATE: January 12, 2006

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

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

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## I. Summary:

The bill amends the current statutory experience and continuing legal education requirements in order for an attorney to be appointed by the court to represent an inmate in capital collateral litigation.

The bill also requires registry counsel to execute a contract with the Chief Financial Officer, who is responsible for payment of fees and contract monitoring and enforcement, within a specified period of time or be removed from the registry. Registry counsel are also required to submit certification of compliance with the minimum experience and education criteria, and quarterly reports to the Commission on Capital Cases, or be removed from the registry and potentially have court-ordered sanctions imposed.

The bill amends the number of inmates an attorney may be appointed to represent in capital postconviction litigation from 5 to 7.

The current fee payment schedule is adjusted to provide for fee payment to registry attorneys upon completion of a final hearing in the original postconviction motion, rather than upon the issuance of the court's final order.

The bill also includes payment for costs incurred in pro bono cases. The bill specifies that these funds shall come from registry funds by the Chief Financial Officer.

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 substantially amends sections 27.7001, 27.709, 27.710, and 27.711, Florida Statutes.

## 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 which 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 require new fact-finding, Rule 3.850 and 3.851 motions are filed in the trial court which 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 is 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 -- 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 Auditor General is conducting a Performance Review, to be submitted to the presiding officers of the Legislature, by January 30, 2007. This review should provide data from which a determination could be made regarding the overall cost-effectiveness and efficiency of the registry, compared to the CCRC system.

The CCRC represents defendants sentenced within his or her 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 the 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, 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 any 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, 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 to contract with a CCRC office, be appointed on a pro bono basis by a CCRC, or for inclusion on the registry, an attorney must meet the minimum qualifications specified in s. 27.704(2), F.S. That is, the attorney must have at least 3 years

experience in the practice of criminal law, and must have participated in at least five felony jury trials, five felony appeals, or five capital postconviction evidentiary hearings or any combination of at least five such proceedings.

Additionally, a registry attorney must have attended 10 hours of continuing legal education devoted to the defense of capital cases within the year prior to his or her inclusion on the registry. s. 27.710(1), F.S.

The registry 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 he or she is 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:

- An attorney may not represent more than 5 capital defendants at any one time, (ss. 27.710(3), and 27.711(9), F.S.)
- An attorney may not file repetitive or frivolous pleadings that are not supported by law or facts, (s. 27.711(10), F.S.)
- An attorney may not represent the death-sentenced defendant during a retrial, a resentencing proceeding, a proceeding commenced under ch. 940, F.S. (executive clemency), or 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
- An attorney may not 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, Fee Payment Caps***

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 and reasoning in the *Makemson v. Martin County* case seemed to look 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 on February 14, 2002, in the case of *Olive v. Maas*, 811 So.2d 644 (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 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:**

Section 1 of the bill states the Legislative finding that "not all capital collateral cases are extraordinary or unusual." This clear statement addresses the fee payment issues outlined above in the *Litigation on Attorney's Fees* section. The Legislative finding sets forth the Legislature's view that, while some capital collateral cases may indeed rise to the level of extraordinary or unusual, as a routine matter they should not be considered to be such by the courts, therefore the courts should not automatically award fees in excess of the statutory limits.

Section 2 revises the responsibilities of the Commission on Capital Cases to include any project recommended or approved by the commission members. It also allows the Commission on Capital Cases to sponsor continuing legal education programs devoted specifically to capital cases.

Section 3 sets forth minimum statutory requirements and responsibilities for registry counsel, and provides for removal of attorneys not meeting those requirements from the Registry. It also provides for the potential for removal of the attorney from the case by the judge, or a court-imposed fine.

Currently, to be on the Registry maintained by the Commission on Capital Cases, an attorney must certify that he or she satisfies the minimum requirements in s. 27.704 (2), F.S. These requirements consist of being a member in good standing of the Florida Bar, 3 years' experience in the practice of criminal law, and either five felony trials, felony appeals, capital postconviction evidentiary hearings, or a combination thereof.

The bill 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 new

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 bill requires that a lawyer be a member in good standing of The Florida Bar, and:

- Be an active practitioner who has at least 5 years' experience in the practice of criminal law;
  - 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;
  - Has attended a minimum of 12 hours of continuing legal education programs within the previous two years which were devoted to the defense of capital cases;
  - Has tried at least nine state or federal jury trials to completion, two of which must have been capital cases and
    - three of which must have been murder trials;
    - one of which must have been a murder trial and five of which must have been other felony trials; or
    - one of which must have included a postconviction evidentiary hearing and five of which must have been other felony trials;
- OR
- Has appealed one capital conviction and
    - appealed at least three felony convictions, one of which must have been a murder;
    - appealed at least three felony convictions and participated in one capital postconviction evidentiary hearing; or
    - six felony convictions, two of which must have been murders.

The attorney must certify his or her compliance with the statutory criteria for appointment as counsel on an application submitted to the commission. This requirement will be satisfied by the submission of the application by electronic mail without a signature. Under the provisions of the bill, failure to comply may be cause to remove an attorney from the registry until he or she complies.

The bill further provides that a court-appointed registry attorney's failure to execute the statutorily required contract with the Chief Financial Officer, within 30 days of the contract being mailed to the attorney, will result in the attorney's removal from the list of registry counsel.

The bill also requires a court-appointed registry attorney 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 shall remove the attorney from the registry. The bill also provides that the court may remove counsel from a case or impose a fine for failure to comply with this requirement.

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 person in finding replacement counsel who meets the federal requirements to represent a capital defendant in federal proceedings.

Section 4 of the bill also amends s. 27.711, F.S., to modify the current payment schedule to provide for the payment of costs incurred in pro bono cases. The bill specifies that the funds for such payment shall come from registry funds, paid by the Chief Financial Officer.

The bill authorizes payment of \$100 per hour, up to a maximum of \$20,000 after the final hearing on the capital defendant's motion for postconviction relief rather than when the trial court issues a final order granting or denying the defendant's motion. In some cases, judges take an extended amount of time in ruling on a postconviction motion after the evidentiary hearing is held – this provision will authorize payment of the attorney sooner.

The bill authorizes payment of \$100 per hour, up to a maximum of \$2,500 for the preparation of the initial federal pleading.

The bill clarifies that a registry attorney who is representing at least one 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 increases the number of inmates an attorney may represent in capital postconviction litigation from 5 to 7. This includes contract cases with the Capital Collateral Regional Counsel, pro bono cases, and cases where the attorney is privately retained by an inmate.

The bill also provides that when a judge intends to award fees in excess of the statutorily authorized amounts, the judge must make written findings of fact that specifically state the reasons that set the particular case apart from other capital collateral 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 Bill Analysis.

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

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

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.

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:**

The Chief Financial Officer (CFO) is responsible for the payment of fees to registry attorneys. s. 27.711 (4), F.S. The Department of Financial Services (DFS) manages the registry contracts. There are 128 active contracts at the time of the writing of this analysis. Section 27.711(4), F.S., specifies that: “Each private attorney who is appointed by the court to represent a capital defendant must enter into a contract with the Chief Financial Officer. ... The Chief Financial Officer shall develop the form of the contract, function as contract manager, and enforce performance of the terms and conditions of the contract.” *Id.*

The CFO acts in a “ministerial” capacity only, not in an “adversarial” role, when an attorney requests that the statutory caps on fees be exceeded. There is no provision in current law that bestows the adversarial position upon a particular agency. For the CFO to act in anything other than a ministerial capacity would likely be a violation of the Separation of Powers doctrine.

Since the registry came into existence, the statutory caps have been exceeded in 28 cases as follows:

Attorney Fees	\$343,880.00
Investigative Fees	18,058.00
Misc. Expenses	<u>293,149.71</u>
TOTAL	\$655,087.71

Although the CFO attends the hearings before the courts on the issue of fee payment beyond the statutory caps, the CFO is not authorized to “test” the request of capital collateral counsel. The decision whether to award fees that exceed the caps is left to the discretion of the court, sometimes with virtually no argument from the “State” to counter the request.

A recent example of the awkwardness of the CFO’s strictly ministerial position is found in the *Florida Department of Financial Services v. Freeman* case which is pending before the Florida Supreme Court (Case No. SC04-1492). In that case, the trial court awarded fees in excess of the caps. No sworn testimony was presented, no witnesses were brought forth, and there was very little discussion about the justification for counsel’s request for nearly nine times the statutory cap for the particular fee allotment for the task completed by counsel. Counsel for DFS objected to the requested fees and referred the judge to the statutory caps. The judge granted the capital collateral attorney’s request in its entirety, in contravention of the statute, and did not make a factual or legal finding that “extraordinary or unusual circumstances” existed in the case that justified the payment. (See the discussion on Litigation on Attorney’s Fees, Fee Payment Caps, and *Olive v. Maas*, above.)

The Court’s Order was appealed by DFS, oral argument was heard by the Florida Supreme Court, and a ruling by the court has not yet been issued. The awkwardness of DFS’s ministerial position in these cases where the fee cap is exceeded was discussed extensively at oral argument. It is apparent that there may be a “gap” in the system that could be closed by either granting the CFO - or some other entity with experience in matters such as fee payments in criminal cases, or capital litigation, or capital collateral litigation - legislative authority to fully contest requests for fees or costs above the statutory caps.

The provision of the bill (on page 12, lines 26-31) that would require a trial judge to make specific findings of fact stating the “extraordinary nature of the time, energy, and talents of the attorney in the case which are not ordinarily expended in other capital collateral cases” may solve the true legal issue raised in the *Freeman* case (the sufficiency of the trial court’s order). It may not, however, eliminate the need for the facts upon which the request for excessive fees is based to be contested at an adversarial hearing.

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

None.

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

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