FINAL BILL ANALYSIS

BILL #: CS/HJR 7111

FINAL HOUSE FLOOR ACTION:
80 Y's 38 N's

SPONSOR: Rep. Eisnaugle

GOVERNOR'S ACTION: N/A

COMPANION BILLS: SJR 1664, SJR 2084

SUMMARY ANALYSIS

CS/HJR 7111 passed the House on May 3, 2011, by the required three-fifths margin, and subsequently passed the Senate on May 5, 2011, by the required three-fifths margin. The joint resolution is not subject to any action by the Governor. If adopted by the voters, the amendment will take effect on January 8, 2013.

The joint resolution proposes a constitutional amendment regarding the state courts as follows:

- Currently, justices are selected by the Governor from a list of qualified candidates selected by a nominating commission. This joint resolution adds a requirement that a Supreme Court justice nominated by the Governor must be confirmed by the Senate to take office. If the Senate does not reject a nominee within 90 days, the nominee is deemed confirmed.

- Current law allows the Supreme Court to adopt rules for the practice and procedure in all courts. Court rules may be repealed by a two-thirds vote of the Legislature. This proposed amendment provides for repeal of a court rule by general law (a simple majority), provided that the Legislature give reasons for the repeal. The court may not readopt a rule without conforming the rule to the reasons for repeal, and if repealed again it may not be readopted absent legislative approval.

- Investigative files of the Judicial Qualifications Commission are confidential. This joint resolution would allow the House of Representatives, at the Speaker's request, to review all investigative files of the Judicial Qualifications Commission.

This joint resolution requires a nonrecurring expenditure for publication in FY 2012-2013 of approximately $275,000 payable from the General Revenue Fund. This joint resolution does not appear to have a recurring fiscal impact on state government. The joint resolution does not appear to have a fiscal impact on local governments.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

Overview of the Florida Supreme Court

Article V, section 1 of the state Constitution currently provides that "[t]he judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts." The state is divided into five appellate districts and twenty judicial circuits according to general law.[1] The Supreme Court is the state's highest court and consists of seven justices, five of which constitute a quorum.[2] The Constitution requires four justices to concur in order for the Court to reach a decision.[3] Justices are appointed by the Governor from a list provided by the Supreme Court Judicial Nominating Commission. A justice is subject to merit retention at the first general election conducted more than one year after appointment, and thereafter the justice serves six year terms, subject to merit retention at the conclusion of each term.[4] Justices are subject to the same mandatory retirement provisions as judges.[5] The Chief Justice is chosen by a majority of the members of the court,[6] although in practice, the justices select the Chief Justice by rotating the position every two years to the most senior justice who has not previously served as chief.[7]

Historical Background of the Appellate Courts

From 1846 until 1851, the first state Constitution created a Supreme Court but gave it no justices of its own. At that time, the Supreme Court was simply a panel consisting of all of the state's circuit judges. The circuit judges were elected by the Legislature, collectively serving in the capacity of Justices of the Supreme Court. Pursuant to an 1848 constitutional amendment, in 1851 the first justices were named to the Supreme Court. These justices were elected by the Legislature for the term of their "good behavior." In 1853 an amendment provided for popular election of justices for six-year terms. The 1861 Constitution provided for the appointment of the justices by the Governor, with the advice and consent of the Senate, to serve for six-year terms. The 1868 Constitution changed the terms of justices to "life or during good behavior," and the 1885 Constitution returned to popular election of justices.

In 1902, an amendment allowed the Legislature to increase the Supreme Court membership from three to as many six justices. Initially there were six, but the 1911 Legislature reduced the number of justices to five. In 1923 the number was again raised to six and continued to be six until a 1940 constitutional amendment increased the size of the court to seven justices.[8]

In 1956, three intermediate appellate courts (district courts of appeal) were created to ease the workload of the Supreme Court. A fourth district court of appeal was added in 1965, and a fifth was added in 1979.[9]

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[1] Fla.Const. art V. s. 3; and ss. 26.01 and 35.01, F.S.
[2] Fla.Const. art. V. s. 3.
[3] *Id*.
[4] Fla.Const. art. V. s. 10.
[5] A judge or justice must retire upon reaching his or her 70th birthday, unless there is less than half of the term of office remaining, in which case the justice or judge may serve out the remainder of the term of office. *See* Fla.Const. art. V, s. 8.
[6] Fla.Const. art. V. s. 2.
[7] Florida Supreme Court, Manual of Internal Operating Procedures, Section 1, B.
[8] http://www.floridasupremecourt.org/about/history/schistory.shtml, accessed April 8, 2011.
[9] HJR 810 (1955); SJR 261 (1965); Ch. 65-294, L.O.F.; SJR 52-D (1971); Ch. 79-413, L.O.F.

In FY 1979-80, there were 39 judges for the district courts of appeal, 302 circuit court judges and 198 county court judges. In FY 2010-2011, there were 61 judges for the district courts of appeal, 599 circuit court judges and 322 county court judges. The size of the Supreme Court has not changed in those 31 years while the number of judges creating possibly appealable orders and judgments has nearly doubled.

Appointment of Supreme Court Justices

Justices of the Supreme Court and judges of the district courts of appeal are appointed by the Governor from a list of nominees provided by a judicial nominating commission (JNCs).[10] When a position becomes vacant, candidates submit their applications to the JNC for that court. The commission sends a list of three to six nominees to the Governor and the Governor fills the vacancy by selecting from that list.[11] At the next general election occurring at least a year after appointment, justices and district court judges sit for a retention election. If a majority of voters choose to retain the justice or judge, the justice or judge is elected to a six year term.[12]

Nominations must be submitted to the Governor within 30 days of the vacancy unless the Governor extends the period by an additional 30 days.[13] The Governor must make the appointment within 60 days of receiving the list of nominees from the JNC.[14]

History of Judicial Selection in Florida

When Florida became a state in 1845, the Constitution vested the judicial power in the judges of the circuit courts. The circuit judges were elected by the Legislature and also served as justices of the Supreme Court from 1846 until 1851. The 1848 Constitution and subsequent implementing legislation provided that the Supreme Court should have a chief justice and two associate justices. In 1853, the Constitution provided for the election of the justices for six-year terms. The 1861 Constitution provided for the appointment of the justices by the Governor, with the advice and consent of the Senate, to serve for six-year terms. In 1868, the Constitution provided for a Supreme Court appointed by the Governor and confirmed by the Senate.[15] The 1885 Constitution provided for election of Supreme Court justices. The system of appointment of all Supreme Court justices and district court of appeal judges was approved by the voters at the 1976 general election.[16]

Judicial Selection in Federal Courts and in the Other States

Justices of the United States Supreme Court, judges on the federal circuit courts,[17] and judges on the federal district courts[18] are appointed by the President of the United States and must be confirmed by the United States Senate.[19] There is a great deal of variation among the states in how they select

[10] Fla.Const. art. V, s.11.
[11] Fla.Const. art. V, s. 11(a).
[12] Fla.Const. art. V, s. 10.
[13] Fla.Const. art. V, s. 11(c).
[14] *Id*.
[15] This information is found on the Florida Supreme Court's website at http://www.floridasupremecourt.org/about/history/schistory.shtml (accessed March 15, 2011).
[16] *See* CS/SJR 49 & 81 (1976).
[17] Circuit courts at the federal level are appellate courts.
[18] District courts at the federal level are trial courts.
[19] *See* art. II, s. 2, U.S. Const.

justices and judges. Some states choose justices and judges by direct election, which can be partisan or non-partisan. Some states have a system similar to Florida's merit selection/retention system of selecting appellate judges, with a nomination by a judicial nominating commission and appointment by the governor system. At least eight states, including Delaware, Hawaii, Maine, Maryland, New Jersey, New York, Rhode Island, and Vermont, have systems where the governor selects a justice for the state supreme court who must be confirmed by the state senate.

Effect of the Joint Resolution - Selection of Supreme Court Justices

This joint resolution adds a requirement for Senate confirmation before a Supreme Court Justice can take office after appointment by the Governor. If the Senate does not reject the appointment within 90 days of receipt of the nomination, the nominee is deemed confirmed. This creates the following three possible results:

- If the Senate votes to confirm, the justice takes office immediately upon confirmation.
- If the Senate votes to reject the confirmation, the Supreme Court Judicial Nominating Commission must reconvene and give a new list to the Governor. The rejected person may not be renominated.
- If the Senate does not reject the appointment within 90 days of receipt of the nomination, the justice takes office on the 91st day.

This joint resolution provides that the Senate may sit for purposes of confirmation regardless of whether the House is in session.[20] Once confirmed, a justice is subject to future retention elections as provided under the current Constitution.

Rulemaking

Early state constitutions did not address whether the court had any rulemaking power. In the 1956 general election, the voters adopted a legislative proposal largely re-writing the judicial article of the constitution. Included in those changes was the first ever constitutional provision on court rules. Effective as of 1957, the new judicial article included:

> Section 3. Practice and Procedures. The practice and procedure in all courts shall be governed by rules adopted by the supreme court.

Article V, section 2(a) of the state Constitution, enacted in 1972, currently reads in part:

> The supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought. . . . Rules of court may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature.

[20] The House and Senate must generally meet in session at the same time. *See* Fla.Const. art. III, s. 3. However, the Senate may convene in special session whether or not the House is in session for purposes of conducting an impeachment trial. Fla.Const. art. III, s. 17(c).

Effectiveness of the Power to Repeal a Court Rule as a Check and Balance

The state Constitution provides that the Legislature can repeal rules of court by general law enacted by two-thirds vote of the membership of each house of the Legislature. However, the Constitution provides no remedy to the Legislature where the court ignores the repeal or even specifically readopts a repealed rule.

Just three years after the Constitution was amended to require a two-thirds vote of the membership to repeal a rule, the House of Representatives sought to lower the threshold. HJR 32 (1975), which proposed reducing the repeal threshold to a majority of the membership, passed the House 96-20,[21] but was not passed by the Senate.

Repealing a court rule is a rare occurrence. Since 1973, only 14 bills, repealing 21 rules, have passed. As two of those bills were identical and in the same session, it is probably fairer to say that there have been 13 bills repealing 19 rules. The results of those repeals are detailed here:

Specific Readoption After Repeal

In total, the court has specifically readopted 5 complete rules in two separate actions, and part of another repealed rule in a 3rd instance.

In 1979, the Legislature passed ch. 79-336, L.O.F., to amend laws relating to criminal defendants suffering from mental illness. Section 4 of the act unconditionally repealed Rule 3.210. The act, and the repeal, were effective October 1, 1979. On October 9, 1979, the Supreme Court adopted temporary rules regarding mentally ill defendants that specifically readopted part of the repealed rule 3.210.[22]

In 2000, the Legislature passed the Death Penalty Reform Act of 2000 ("DPRA"). The legislation was an attempt to increase efficiency in capital appellate and postconviction cases. It created a "dual-track" system so that direct appeals and postconviction proceedings could proceed at the same time and imposed time limits for the filing of postconviction pleadings. In order for the new procedure to function, the Legislature repealed two rules of court and repealed a third to the extent it was inconsistent with the DPRA. The DPRA became effective on January 14, 2000.[23] On February 7, 2000, 24 days later, the court readopted, retroactive to January 14, 2000, the repealed rules while it considered challenges to the DPRA.[24] In *Allen v. Butterworth*, [25] the court held that the DPRA was an unconstitutional encroachment on rulemaking and adopted its own rules on capital postconviction litigation. In *Allen*, the court held that it has exclusive jurisdiction to control capital collateral proceedings:

> Based on the foregoing, we conclude that the writ of habeas corpus and other postconviction remedies are not the type of "original civil action" described in *Williams* for which the Legislature can establish deadlines pursuant to a statute of limitations. Due to the constitutional and quasi-criminal nature of habeas proceedings and the fact that such proceedings are the primary avenue through which convicted defendants are able to challenge the validity of a conviction and sentence, we hold that article V, section 2(a) of

[21] 1975 Journal of the Florida House of Representatives, page 175.
[22] *In re Transition Rule 23 Competency to Stand Trial and be Sentenced: Insanity as a Defense*, 375 So.2d 855 (Fla. 1979).
[23] The DPRA was adopted during a special session held for the purpose of considering reform to death penalty cases.
[24] *See In re Rules Governing Capital Postconviction Actions,* 763 So.2d 273 (Fla. 2000).
[25] *Allen v. Butterworth*, 756 So.2d 52 (Fla. 2000).

> the Florida Constitution grants this Court the exclusive authority to set deadlines for postconviction motions.[26]

Another case where the court readopted a rule that had been repealed by the Legislature was in *State v. Raymond*.[27] In 2000, the Legislature enacted ch. 2000-178 and ch. 2000-229, L.O.F., to provide that "no person charged with a dangerous crime shall be granted nonmonetary pretrial release at a first appearance hearing." Both acts repealed conflicting court rules. The rule repeal was ignored, the rules continued to be printed in compilations of the rules, and the rules appeared to continue to govern actions in the trial courts. Five years later, the *Raymond* court held that the statute was unconstitutional because it was procedural and not a substantive law. The court readopted the repealed rules:

> Therefore, we temporarily readopt rules 3.131 and 3.132 in their entirety and publish the rules for comment concerning whether they should be amended to reflect the Legislature's intent as demonstrated in section 907.041. We are particularly concerned that we be fully informed as to the policy concerns of the Florida Legislature before we take any final action on these rules. For that reason, we expressly invite the Legislature to file comments particularly addressing the policy concerns that the Legislature was attempting to address by enacting section 907.041(4)(b).[28]

In summary, the *Raymond* court invalidated a statute, readopted a repealed rule, and asked the Legislature to justify its policy.

Results of Other Repeals

In addition to the readoptions described above, the Supreme Court has ignored 6 rule repeals[29], 3 rules were amended but not in compliance with the repealing act,[30] and in only 4 rule repeals has the court fully honored a legislative repeal of a court rule.[31] In only 21% of the court rules repealed by general law has the court fully implemented the will of two-thirds of the Legislature joined by the Governor.

Effect of the Joint Resolution - Rulemaking

This joint resolution changes the vote necessary to repeal a court rule to a simple majority.

This joint resolution also addresses the issue of readoption of a rule. In repealing a rule for the first time, the Legislature must express the policy behind the repeal. Thereafter, the Supreme Court may only readopt a rule if the rule is modified to conform to the expressed legislative policy. If the Legislature again repeals the rule, it is repealed permanently and may not be readopted absent legislative approval. The Legislature, not the courts, decide whether a rule has been repealed a second time.

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[26] *Allen v. Butterworth*, 756 So.2d 52, 62 (Fla. 2000).
[27] *State v. Raymond*, 906 So.2d 1045 (Fla. 2005)
[28] *State v. Raymond*, 906 So.2d 1045, 1051-52 (Fla. 2005).
[29] Repeals ignored in: ch. 77-312, L.O.F., ch. 79-69, L.O.F., ch. 80-72, L.O.F., and ch. 82-392, L.O.F.
[30] Repeals not honored in: ch. 73-84, L.O.F., ch. 98-194, L.O.F., and ch. 2006-292, L.O.F.
[31] Repeals honored in: ch. 76-138, L.O.F., ch. 2004-60, L.O.F., and ch. 2006-96, L.O.F.

Judicial Qualifications Commission

The Judicial Qualifications Commission (JQC) has constitutional authority to investigate any judge or justice for misconduct. If the JQC files charges against a justice or judge, the Supreme Court may remove a justice or judge from office if the misconduct demonstrates a present unfitness to hold office. Alternatively, the Supreme Court may impose a lesser disciplinary action (i.e. reprimand, fine or suspension) if the conduct warrants.[32] The Supreme Court receives recommendations from the JQC and may accept, reject or modify in whole or in part the findings, conclusions and recommendations of the JQC.[33] A justice or judge who is the subject of a JQC investigation may be suspended from office, with or without compensation, pending determination of an inquiry once a formal proceeding has commenced.

Article V, section 12(a)(4) of the state Constitution provides that all proceedings before the JQC are confidential until formal charges against a justice or judge are filed by the investigative panel with the Clerk of the Supreme Court. Once the formal charges have been filed the proceedings before the hearing panel and before the Supreme Court are open to the public. Therefore, if the investigative panel votes to not pursue formal charges regarding a complaint, then the records of the complaint and investigation never become public.

The disciplinary power of the JQC is in addition to, not in lieu of, the power of the Legislature to remove a justice or judge from office by impeachment. Recognizing that both the JQC and the House of Representatives may investigate judicial misconduct, Article V, section 12(a)(5) of the state Constitution allows the House of Representative and the JQC to request a copy of an investigative file from one another. However, the House of Representatives may only request a file "for use in consideration of impeachment." Accordingly, the House of Representatives cannot review the JQC files in general, and therefore does not know if meritorious complaints are being dismissed by the JQC.

Effect of the Joint Resolution - Judicial Qualifications Commission

This joint resolution amends Article V, section 12(a)(5) of the state Constitution to provide that the Speaker of the House of Representatives may request to review all of the records of the JQC. Such records will retain their confidential status unless the House of Representatives initiates impeachment proceedings.

The joint resolution also removes outdated references related to the Judicial Qualifications Commission.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

[32] Fla.Const. art. V. s. 12.
[33] Fla.Const. art. V, s. 12(c).

2. Expenditures:

This amendment requires publication prior to the election. The Florida Department of State estimates that required publication of a proposed constitutional amendment costs $106.14 per word. At 2,583 words, the estimated cost to publish the amendment is $274,160. This must be paid regardless of whether the amendment passes, and would be payable in FY 2012-2013 from General Revenue.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.