

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Appropriations

BILL: CS/SB 1750

INTRODUCER: Appropriations Committee (Recommended by Appropriations Subcommittee on Criminal and Civil Justice) and Senator Negron

SUBJECT: Postconviction Capital Case Proceedings

DATE: April 22, 2013 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brown	Cibula	JU	Favorable
2.	Harkness	Sadberry	ACJ	Fav/CS
3.	Harkness	Hansen	AP	Fav/CS
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

CS/CS/SB 1750 revises laws governing the postconviction or collateral review of capital cases resulting in a death sentence.

This bill has an indeterminate fiscal impact. Provisions to terminate the registry attorney pilot program and reestablish the CCRC in the northern region will cost \$423,338 in recurring general revenue funds in Fiscal Year 2013-2014.

The bill:

- Provides legislative intent that all postconviction actions be resolved as quickly as possible.
- Provides a greater role for the court in conflict of interest determinations, and requires attorneys when requesting withdrawals from cases based on conflicts to have an actual conflict, rather than a hypothetical or speculative conflict.
- Addresses consistent legal representation through:

- Reinstating the Capital Collateral Regional Counsel in the northern region of the state and eliminating the pilot program which provided for the representation of persons sentenced to death through attorneys appointed from a registry.
- Requiring as a condition of inclusion on the private counsel registry, participation in at least two capital trials or sentencing proceedings.
- Prohibiting attorneys compensated by the state who have previously provided constitutionally deficient representation resulting in relief by the court from representing a person charged with a capital offense at trial or on direct appeal.
- Requires the Governor to issue a death warrant within 30 days after the clerk of the Florida Supreme Court certifies the conclusion of certain legal proceedings or the exhaustion of certain time frames, and to specify in the death warrant a time within 180 days after issuance for the warden to carry out the sentence.

This bill replaces the Chief Financial Officer with the Justice Administration Commission as the entity responsible for administering the contracts with private registry attorneys representing defendants in postconviction capital collateral proceedings.

The bill requires the Florida Supreme Court to report findings of attorneys with a record of constitutionally deficient representation in capital cases to The Florida Bar for discipline.

This bill substantially amends the following sections of the Florida Statutes: 27.40, 27.51, 27.511, 27.5303, 27.5304, 27.7001, 27.702, 27.703, 27.7045, 27.7081, 27.710, 27.711, 922.052, 924.055, 924.056, and 924.057.

The bill creates section 940.031, Florida Statutes.

This bill repeals the following sections of the Florida Statutes: 27.701(2), 924.058, 924.059, and 924.395.

II. Present Situation:

Florida State Constitution

The State Constitution grants the Supreme Court jurisdiction over all aspects of practice and procedure in state courts. The constitutional authority includes jurisdiction over the administration of capital cases.

Section 2, Article V of the State Constitution provides, in part:

Administration; practice and procedure.—

(a) 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.

Current Death Row Statistics

Florida is one of 33 states that impose the death penalty.¹ As of April 2, 2013, 406 people were on death row in Florida, more than any other state except California.² On average, Florida death row inmates spend 13.22 years on death row before execution.³ Of the 406 inmates on death row, 155 have been in custody for more than 20 years, and ten have been on death row for more than 35 years.⁴ Between 1976-2012, Florida executed 74 inmates.⁵ During the same period, Texas executed 492 inmates, Virginia executed 109 inmates, and Oklahoma executed 102 inmates.⁶ Florida executed 2 death row inmates in 2011 and 3 in 2012.⁷

Capital Cases – Direct Appeal

A defendant who is convicted of a crime and sentenced to death automatically receives a direct appeal of his or her conviction and sentence to the Florida Supreme Court.⁸ During the direct appeal, the defendant is represented by the public defender's office, if the defendant is indigent, or by a private attorney. Matters 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 trial such as the jury instructions, prosecutorial misconduct, and procedural rulings made by the trial court.

The Florida Supreme Court must render a judgment within two years of the filing of the notice of appeal.⁹ If the Florida Supreme Court affirms the appellant's conviction and sentence, the appellant has 90 days after the decision is entered to file a petition for a writ of certiorari with the United States Supreme Court seeking discretionary review of the Florida Supreme Court's decision.¹⁰ If the United States Supreme Court denies the appeal, the direct appeal has concluded, and the defendant may begin state postconviction proceedings.

¹ The other states are Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. *Facts About the Death Penalty* (updated December 28, 2012), Death Penalty Information Center, www.deathpenaltyinfo.org/FactSheet.pdf.

² California has 724 inmates on death row. *Facts About the Death Penalty* (updated December 28, 2012), Death Penalty Information Center. Available at: www.deathpenaltyinfo.org/FactSheet.pdf. See also: <http://www.dc.state.fl.us/activeinmates/deathrowroster.asp> (last visited on March 25, 2013).

³ Florida Department of Corrections, *Death Row Fact Sheet*. Available at: <http://www.dc.state.fl.us/oth/deathrow/index.html#Statistics> (last visited on April 2, 2013).

⁴ Florida Department of Corrections, *Death Row Fact Sheet*. Available at: <http://www.dc.state.fl.us/activeinmates/deathrowroster.asp> (last visited on March 25, 2013).

⁵ Florida Department of Corrections, *Death Row Fact Sheet*. Available at: <http://www.dc.state.fl.us/oth/deathrow/index.html#Statistics> (last visited on March 25, 2013).

⁶ Death Penalty Information Center, *Facts About the Death Penalty* (December 28, 2012), Available at: www.deathpenaltyinfo.org/FactSheet.pdf (last visited on March 25, 2013).

⁷ Florida Department of Corrections, *Death Row Fact Sheet*. Available at: <http://www.dc.state.fl.us/oth/deathrow/index.html#Statistics> (last visited March 25, 2013).

⁸ Section 921.141(4), F.S.; Art. 5, Sec. 3, FLA. CONST.; and Fla. R. App. Proc. 9.030(a)(1)(A)(i).

⁹ Section 921.141(4), F.S.

¹⁰ 28 U.S.C. s. 1257; and Sup. Ct. R. 13.

Rules of Procedure Governing State Postconviction Proceedings

The court rules committees of The Florida Bar, separated by subject area, submit proposals to the Florida Supreme Court on new rules of procedure and amendments to existing rules.¹¹ The Florida Supreme Court then adopts or rejects the proposals submitted by each Court Rules Committee. Rules of procedure apply to the areas of appellate, civil, criminal, family, judicial administration, juvenile, probate, small claims, and traffic court practice.¹²

Rules 3.811, 3.812, 3.850, 3.851, and 3.852 of the Florida Rules of Criminal Procedure, and Rule 9.142 of the Florida Rules of Appellate Procedure govern all state postconviction proceedings initiated by death row inmates challenging a conviction or death sentence. Unlike a direct appeal, which challenges the legal errors apparent from the trial transcripts or record on appeal, state postconviction proceedings are designed to address claims that are “collateral” to what transpired in the trial court (e.g., claims that the defendant’s trial counsel was ineffective, claims of newly discovered evidence, or claims that the prosecution failed to disclose exculpatory evidence). Because the consideration of these claims often require new fact finding, postconviction motions are filed in the trial court that sentenced the defendant to death. Appeals from the grant or denial of postconviction relief are filed with the Florida Supreme Court. A detailed review of state postconviction proceedings follows.

Appointment of Counsel, Judge, and other Preliminary Matters

When the Florida Supreme Court affirms a judgment and sentence of death on direct appeal, the court must simultaneously appoint the appropriate office of the Capital Collateral Regional Counsel (CCRC)¹³ to represent the inmate during postconviction proceedings.¹⁴ If the regional counsel has a conflict of interest and the postconviction judge accepts his or her motion to withdraw, or the inmate was convicted and sentenced to death in the northern region of Florida (which no longer has a CCRC office), the chief judge of the circuit court must appoint an attorney from the statewide registry¹⁵ to represent the inmate in postconviction proceedings.¹⁶

Within 45 days after appointment, the inmate’s trial counsel must provide postconviction counsel with all information pertaining to the inmate’s capital case and postconviction counsel must maintain the confidentiality of all confidential information received.

¹¹ See, i.e., the Florida Bar website page on the Appellate Court Rules Committee, at:

<http://www.floridabar.org/DIVEXE/BD/CMStanding.nsf/2021e58ed0c7505585256e45004b060d/15e0fcc0829efd6585256c5b00554844!OpenDocument> (last visited March 22, 2013).

¹² Online at:

<http://www.floridabar.org/tfb/TFBLegalRes.nsf/basic+view/E1A89A0DC5248D1785256B2F006CCCEE?OpenDocument#FLORIDA%20RULES%20OF%20PROCEDURE%3A> (last visited March 22, 2013).

¹³ The CCRC represents persons convicted and sentenced to death for the sole purpose of instituting and prosecuting collateral actions challenging the legality of the judgment and sentence imposed against such person in the state courts, federal courts in this state, the United States Court of Appeals for the Eleventh Circuit, and the United States Supreme Court. Each regional office is administered by a regional counsel. Section 27.701(1), F.S.

¹⁴ Fla. R. Crim. Proc. 3.851(b)(1).

¹⁵ Section 27.701(2), F.S., requires the responsibilities of the northern region CCRC office to be met through a pilot program using only attorneys from the registry of attorneys maintained pursuant to s. 27.710, F.S.

¹⁶ Fla. R. Crim. Proc. 3.851(b)(1); ss. 27.701(2), 27.703(1), and 27.710(5), F.S.

Within 30 days after the judgment of conviction and sentence of death being affirmed on direct appeal, the chief judge must assign the case to a judge qualified to conduct capital proceedings. Within 90 days after the assignment, the judge must hold a status hearing and thereafter hold status conferences at least every 90 days until:

- An evidentiary hearing, if ordered, is completed; or
- Any pending motion has been ruled on without a hearing.¹⁷

At the status hearing and conferences, the judge will entertain pending motions, disputes involving public records, or any other matters ordered by the court.¹⁸

Public Records

Rule 3.852 of the Florida Rules of Criminal Procedure establishes the timeframes and procedures that apply to the production of capital postconviction public records. The rule requires the Attorney General (AG), within 15 days after receiving notification of the Florida Supreme Court's mandate affirming the sentence of death, to file a written notice of the mandate with the trial court and serve a copy of it on:

- The state attorney who prosecuted the case;
- The Department of Corrections (DOC); and
- The defendant's trial counsel.¹⁹

The notice to the state attorney and to DOC must direct them to submit public records to the records repository within 90 days after receipt of the notice.²⁰ The notice to the state attorney must also direct the state attorney to notify each law enforcement agency involved in the investigation of the capital case to submit public records to the records repository²¹ within 90 days after receiving the notice.²²

Within 90 days after receiving the AG's notice of the mandate, the state attorney and the defendant's trial counsel must provide the AG with the name and address of any person or agency that has public records or information pertinent to the case which has not previously been provided to defendant's postconviction counsel.²³ Within 15 days after receiving this information, the AG must notify the additional persons or agencies that they are required to copy, index, and deliver to the records repository all public records pertaining to the case that are

¹⁷ Fla. R. Crim. Proc. 3.851(c)(2).

¹⁸ *Id.*

¹⁹ Fla. R. Crim. Proc. 3.852(d)(1). The original of all notices, requests, or objections filed under Rule 3.852 must be filed with the clerk of the trial court. Copies must be served on the trial court, the AG, the state attorney, postconviction counsel, and any affected person or agency, unless otherwise required by this section. Service must be made pursuant to Florida Rule of Criminal Procedure 3.030. In all instances requiring written notification or request, the party who has the obligation of providing a notification or request shall provide proof of receipt. Fla. R. Crim. Proc. 3.852(c)(3).

²⁰ Fla. R. Crim. Proc. 3.852(d)(2) and (3), and (e)(2) and (3).

²¹ Section 27.7081, F.S., requires the Secretary of State to establish and maintain a records repository for the purpose of archiving capital postconviction public records.

²² Fla. R. Crim. Proc. 3.852(e)(1) and (4).

²³ Fla. R. Crim. Proc. 3.852(d)(2) and (3).

in their possession.²⁴ The additional entities have 90 days from the receipt of the AG's notice to produce the records.^{25, 26}

Records delivered to the repository that are confidential or exempt pursuant to s. 119.07(1), F.S., or Article I, Section 24(a) of the Florida Constitution must be separately contained, without being redacted, and sealed.²⁷ The outside of the container must clearly identify:

- That the public record is confidential or exempt;
- That the seal may not be broken without an order from the trial court; and
- The nature of the public records and the legal basis for the exemption.²⁸

Upon court order, sealed containers must be shipped to the clerk of the court and may only be opened by the trial court in camera.²⁹

Within 240 days after postconviction counsel is appointed, retained, or appears pro bono, counsel must send a written demand for additional public records to each entity described above.³⁰ Within 90 days after an entity receives such demand, the entity must deliver to the records repository any additional public records in the entity's possession that pertain to the case, and certify that all such records have been provided (or that records previously provided were complete).³¹ The entity may object to the demand for additional public records within 60 days after receiving the demand.³² In such instances, the trial court must hold a hearing and rule within 30 days after the filing of the objection.³³ The court must order an entity to produce additional public records if the court determines each of the following exists:

- Postconviction counsel has made a timely and diligent search;
- Postconviction counsel's written demand identifies, with specificity, those additional public records that are not at the records repository;
- The additional public records sought are relevant to the subject matter of a postconviction proceeding under Rule 3.851 or appear reasonably calculated to lead to the discovery of admissible evidence; and
- The additional public records request is not overly broad or unduly burdensome.³⁴

²⁴ Fla. R. Crim. Proc. 3.852(d)(4).

²⁵ Fla. R. Crim. Proc. 3.852(e)(5).

²⁶ Persons and agencies required to produce records pursuant to Rule 3.852 must bear the costs of doing so, must provide written notification of compliance to the AG, and certify that to the best of their knowledge, all public records in their possession have been copied, indexed, and delivered to the records repository. Fla. R. Crim. Proc. 3.852(e).

²⁷ Fla. R. Crim. Proc. 3.852(f)(1).

²⁸ *Id.*

²⁹ The moving party bears the costs associated with the transportation and inspection of the records by the trial court. Fla. R. Crim. Proc. 3.852(f)(2).

³⁰ If counsel was appointed before October 1, 2001, counsel must submit the demand within 90 days after appointment. Fla. R. Crim. Proc. 3.852(g)(1).

³¹ Fla. R. Crim. Proc. 3.852(g)(2).

³² Fla. R. Crim. Proc. 3.852(g)(3).

³³ *Id.*

³⁴ *Id.*

Postconviction counsel who seeks to obtain public records in addition to those described above must file an affidavit in the trial court which:

- Attests that postconviction counsel has made a timely and diligent search of the records repository;
- Identifies with specificity those public records not at the records repository;
- Establishes that the additional public records are either relevant to the subject matter of the postconviction proceeding or are reasonably calculated to lead to the discovery of admissible evidence; and
- Must be served on the AG, state attorney, and any affected person or agency.³⁵

Within 30 days after the filing of the affidavit, the trial court must order a person or agency to produce additional public records, but only if the court finds:

- Postconviction counsel has made a timely and diligent search of the records repository;
- Postconviction counsel's affidavit identifies with specificity those additional public records that are not at the records repository;
- The additional public records sought are either relevant to the subject matter of a capital postconviction proceeding or appear reasonably calculated to lead to the discovery of admissible evidence; and
- The additional records request is not overly broad or unduly burdensome.³⁶

In any capital postconviction public records proceeding, the trial court may:

- Compel or deny disclosure of records;
- Conduct an in-camera inspection;
- Extend established timeframes upon a showing of good cause;
- Impose sanctions upon any party, person, or agency affected by this section including initiating contempt proceedings, taxing expenses, extending time, ordering facts to be established, and granting other relief; and
- Resolve any dispute unless jurisdiction is in an appellate court.³⁷

Any objections or motions to compel production of public records must be filed within 30 days after the end of the production time period provided.³⁸ Counsel for the party objecting or moving to compel must file a copy of the objection or motion directly with the trial court, which must hold a hearing on the objection or motion on an expedited basis.³⁹ The trial court may order mediation for any controversy as to public records production in accordance with Florida Rules of Civil Procedure 1.700, 1.710, 1.720, 1.730, or the trial court may refer any such controversy to a magistrate in accordance with Florida Rule of Civil Procedure 1.490.⁴⁰

³⁵ Fla. R. Crim. Proc. 3.852(i)(1).

³⁶ Fla. R. Crim. Proc. 3.852(i)(2).

³⁷ Fla. R. Crim. Proc. 3.852(k).

³⁸ Fla. R. Crim. Proc. 3.852(1)(2).

³⁹ *Id.*

⁴⁰ Fla. R. Crim. Proc. 3.852(1)(3).

Time Limits for Filing an Initial Postconviction Motion

Any person sentenced to death whose judgment of conviction and sentence have been affirmed on direct appeal may file an initial Rule 3.851 motion, under oath, seeking postconviction relief.⁴¹ This motion must be filed within 1 year after the inmate's judgment and sentence become final. A judgment and sentence become final:

- On the expiration of the time permitted to file in the United States Supreme Court a petition for writ of certiorari seeking review of the Florida Supreme Court's decision affirming the inmate's judgment and sentence of death (90 days after the opinion becomes final); or
- On the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed.⁴²

The Florida Supreme Court may grant an extension of time for the filing of a postconviction motion if the inmate's counsel can demonstrate good cause as to why counsel could not file the motion within the 1-year time limit.⁴³

A motion filed after the 1-year time limit will not be entertained unless the movant alleges that:

- The facts on which the claim is predicated were not known to the movant or his/her attorney and could not have been ascertained within the 1-year time limit by the exercise of due diligence;⁴⁴
- The fundamental constitutional right asserted was not established within the 1-year time limit and has been held to apply retroactively; or
- His/her postconviction counsel, through neglect, failed to file the motion.⁴⁵

In addition to the aforementioned exceptions, Florida law allows a litigant to overcome a valid procedural bar by claiming that the alleged error constitutes "fundamental error." In order for an error to be fundamental and justify consideration—despite being otherwise barred—"the error must reach down into the validity of the trial itself to the extent that a verdict of guilty [or sentence of death] could not have been obtained without the assistance of the alleged error."⁴⁶ For instance, improper comments made in the closing arguments of the penalty phase only constitute fundamental error if they are so prejudicial as to taint the jury's sentencing recommendation.⁴⁷ Fundamental error can be raised at any time,⁴⁸ including to collaterally attack a conviction or sentence in postconviction proceedings.⁴⁹

⁴¹ Fla. R. Crim. Proc. 3.851(a).

⁴² Fla. R. Crim. P. 3.851(d)(1)(A) and (B).

⁴³ Fla. R. Crim. Proc. 3.851(d)(5).

⁴⁴ In order for evidence to be "newly discovered," the movant must demonstrate that: (1) the asserted facts must have been unknown by the trial court, the party, or counsel at the time of trial, and it must appear that the movant or his/her counsel could not have known them by being diligent; and (2) the newly discovered evidence must be of such nature that it would probably result in an acquittal on retrial. See *Scott v. Dugger*, 604 So. 2d 465, 468 (Fla. 1992); see also *Miller v. State*, 926 So. 2d 1243, 1258 (Fla. 2006), quoting *Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991).

⁴⁵ Fla. R. Crim. Proc. 3.851(d)(2).

⁴⁶ *Miller*, 926 So. 2d at 1261, quoting *Brown v. State*, 124 So. 2d 481, 484 (Fla. 1960).

⁴⁷ *Id.* Fundamental error can never be found harmless. *Johnson v. State*, 460 So. 2d 954, 958 (Fla. 5th DCA 1984).

⁴⁸ *Moore v. State*, 924 So. 2d 840, 841 (Fla. 4th DCA 2006).

⁴⁹ *Johnson*, 460 So. 2d at 958.

Timely filed motions may be amended or supplemented outside of the one-year time limit.⁵⁰ To accomplish this, the movant must file a motion to amend no later than 30 days before the evidentiary hearing, including in the motion the reasons additional claims were not raised upon the initial filing and attaching to the motion the claims sought to be added.⁵¹ If the motion is allowed, the state has 20 days after the amended motion is filed to file an amended answer.⁵²

Contents of an Initial Postconviction Motion

An initial postconviction motion must include:

- A statement specifying the judgment and sentence under attack and the name of the court that rendered the judgment and sentence;
- A statement of each issue raised on appeal and the disposition of each issue;
- The nature of the relief sought;
- A detailed allegation of the factual basis for any claim for which an evidentiary hearing is sought; and
- A detailed allegation as to the basis for any purely legal or constitutional claims for which an evidentiary hearing is not required and the reason that these claims could not have been or were not raised on direct appeal.⁵³

The movant must also attach to the motion a memorandum of law setting forth the relevant case law supporting relief on each asserted claim.⁵⁴ The memorandum of law must also state why claims that should have or could have been raised on direct appeal are being raised for the first time in the postconviction motion.⁵⁵

The state has 60 days from the filing of the initial postconviction motion to file its answer.⁵⁶

Discovery and the Evidentiary Hearing

Within 90 days after the state files its answer to an initial postconviction motion, the court must hold a case management conference where both parties must “disclose all documentary exhibits that they intend to offer at the evidentiary hearing, provide an exhibit list of all such exhibits, and exchange a witness list with the names and addresses of any potential witnesses.”⁵⁷ At this conference, the court must also:

- Schedule an evidentiary hearing, to be held within 90 days, on claims asserted by the movant which require a factual determination;

⁵⁰ Fla. R. Crim. Proc. 3.851(d)(4) and (5) and (f)(4).

⁵¹ Fla. R. Crim. Proc. 3.851(f)(4).

⁵² *Id.*

⁵³ Fla. R. Crim. P. 3.851(e)(1).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Fla. R. Crim. Proc. 3.851(f)(3)(A).

⁵⁷ The list of potential witnesses must include expert witnesses and the parties must attach reports of any potential expert witnesses to the list. Fla. R. Crim. Proc. 3.851(f)(5)(A).

- Hear argument on purely legal claims not based on disputed facts; and
- Resolve any discovery disputes.⁵⁸

The court, upon a showing of good cause by either party, may extend the time for holding an evidentiary hearing on the initial postconviction motion for up to 90 days.⁵⁹

The court may dispose of an initial postconviction motion without holding an evidentiary hearing if:

- The motion, files, and records in the case conclusively show that the movant is not entitled to any relief; or
- The motion or a particular claim is legally insufficient.⁶⁰

The movant must support the motion with specific factual allegations.⁶¹ Conclusory allegations will not justify an evidentiary hearing.⁶²

When an evidentiary hearing is held, the court must immediately request a transcript of the hearing at its conclusion.⁶³ Within 30 days after receiving the transcript, the court must render its order, including:

- A ruling on each claim considered at the evidentiary hearing and all other claims asserted in the motion;
- Detailed findings of fact and conclusions of law with respect to each claim; and
- Attached or referenced portions of the record as are necessary for meaningful appellate review.⁶⁴

Either party may move for a rehearing within 15 days after the rendition of the court's order on the postconviction motion.⁶⁵ Responses to such motions must be made within 10 days, and the court must render an order disposing of the motion for rehearing within 15 days.⁶⁶

The movant may appeal the court's decision to the Florida Supreme Court within 30 days after the date the court rendered its order on the postconviction motion.⁶⁷ If the Florida Supreme Court affirms the lower court's decision, the movant may file a petition for a writ of certiorari with the United States Supreme Court.⁶⁸ If the United States Supreme Court declines review or affirms the lower's court decision, the postconviction appeal is complete.

⁵⁸ *Id.*

⁵⁹ Fla. R. Crim. Proc. 3.851(f)(5)(C).

⁶⁰ *Johnson v. State*, 904 So. 2d 400, 403 (Fla. 2005).

⁶¹ *Id.* at 404 (citing *Thompson v. State*, 759 So. 2d 650, 659 (Fla. 2000)).

⁶² *Id.* (citing *Kennedy v. State*, 547 So. 2d 912, 913 (Fla. 1989)).

⁶³ Fla. R. Crim. Proc. 3.851(f)(5)(D).

⁶⁴ *Id.*

⁶⁵ Fla. R. Crim. Proc. 3.851(f)(7).

⁶⁶ *Id.*

⁶⁷ Fla. R. App. Proc. 9.110(b), Fla. R. App. Proc. 9.140(b)(1)(D) and (b)(3).

⁶⁸ 28 U.S.C. s. 1257.

Successive Motions

If the state court previously ruled on a postconviction motion, a motion filed thereafter challenging the same judgment and sentence is considered a “successive motion.”⁶⁹ In addition to the contents required for an initial motion, a successive motion must include:

- The disposition of all previous claims raised in postconviction proceedings and the reason(s) the claims in the present motion were not raised in the former motion(s); and
- The following, if the claims are based on newly discovered evidence:
 - The names, addresses, and telephone numbers of all witnesses supporting the claim;
 - A statement that the witness will be available to testify under oath to the facts alleged in the motion, should an evidentiary hearing be held on that issue;
 - If evidentiary support is in the form of documents, copies of relevant documents, and affidavits must be attached to the motion; and
 - As to any witness or document in the motion or attachment to the motion, an explanation as to why the witness or document was not previously available.⁷⁰

The state has 20 days after the filing of a successive motion to file its answer.⁷¹

Within 30 days after the state files its answer to a successive postconviction motion, the court must hold a case management conference, at which the court must determine whether an evidentiary hearing should be held and hear arguments on any purely legal claims not based on disputed facts.⁷² As with initial postconviction motions, the court may dispose of any successive motion without holding an evidentiary hearing if the motion, files, and records in the case conclusively show that the movant is not entitled to any relief.⁷³ Additionally, the court may dismiss successive motions without an evidentiary hearing if:

- The movant does not provide a reason for failing to raise the successive claims in his/her previous Rule 3.851 motion; or⁷⁴
- The motion raises claims that have already been asserted and adjudicated on the merits in a previous Rule 3.851 proceeding.⁷⁵

If, however, the court determines that an evidentiary hearing should be held, the hearing should be scheduled and held within 60 days.⁷⁶ The court, upon a showing of good cause by either party,

⁶⁹ Fla. R. Crim. Proc. 3.851(e)(2).

⁷⁰ *Id.*

⁷¹ Fla. R. Crim. Proc. 3.851(f)(3)(B).

⁷² Fla. R. Crim. Proc. 3.851(f)(5)(B).

⁷³ *Id.*

⁷⁴ *See, e.g., Hill v. State*, 921 So. 2d 579, 584 (Fla. 2006)(holding that the movant’s successive claim alleging that he was mentally retarded and, therefore, could not be executed pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002), was procedurally barred because the movant gave no reason why the claim could not have been raised in his 2003 Rule 3.851 motion, which was filed after the issuance of the *Atkins* decision).

⁷⁵ *See, e.g., Johnson v. State*, 904 So. 2d 400, 412 (Fla. 2005)(rejecting the movant’s successive claim that lethal injection constitutes cruel and unusual punishment because it was raised and rejected in the movant’s previous postconviction proceeding).

⁷⁶ Fla. R. Crim. Proc. 3.851(f)(5)(B).

may extend the time for holding an evidentiary hearing on a successive motion for up to 90 days.⁷⁷

The deadlines for requesting transcripts and rendering orders after an evidentiary hearing on a successive postconviction motion are the same as those applicable to initial postconviction motions.⁷⁸ The rules relating to motions for rehearing and appealing an initial postconviction motion also apply to successive motions.⁷⁹

Appeal to the Florida Supreme Court

Postconviction Motions

Any party to a Rule 3.851 motion may appeal a trial court's final order to the Florida Supreme Court (Court) by filing a notice of appeal with the trial clerk within 30 days after the rendition of the order.⁸⁰ When the notice of appeal is filed, the Court's chief justice directs the appropriate chief judge of the circuit court to monitor the preparation of the complete record⁸¹ for timely filing in the Court.⁸²

After the record is filed, the clerk establishes a briefing schedule that gives the defendant 30 days to serve an initial brief.⁸³ The answer brief must be served within 20 days after service of the initial brief, and the reply brief, if any, must be served within 20 days after service of the answer brief. If any brief is delinquent, an order to show cause may be issued,⁸⁴ and sanctions may be imposed.⁸⁵ Oral argument is scheduled after the filing of the defendant's reply brief.⁸⁶ The rules do not prescribe when the Court must rule on the appeal.

Petitions for Extraordinary Relief

Petitions for extraordinary relief are generally treated as original proceedings.⁸⁷ Such petitions must be in the form prescribed by Rule 9.100 of the Rules of Appellate Procedure, may include supporting documents, and must include in the statement of facts:

- The date and nature of the lower tribunal's order sought to be reviewed;
- The name of the lower tribunal rendering the order;
- The nature, disposition, and dates of all previous court proceedings;

⁷⁷ Fla. R. Crim. Proc. 3.851(f)(5)(C).

⁷⁸ Fla. R. Crim. Proc. 3.851(f)(5)(D).

⁷⁹ Fla. R. Crim. Proc. 3.851(f)(7) and (8).

⁸⁰ Fla. R. Crim. Proc. 3.851(f)(8).

⁸¹ The complete record in a death penalty appeal includes all items required by Rule 9.200 of the Florida Rules of Appellate Procedure and by any order issued by the Court. In any appeal following the initial direct appeal, the record that is electronically transmitted must begin with the most recent mandate issued by the Court, or the most recent filing not already electronically transmitted in a prior record in the event the preceding appeal was disposed of without a mandate, and excludes any materials already transmitted to the Court as the record in any prior appeal. Fla. R. App. Proc. 9.142(a)(1)(B).

⁸² Fla. R. App. Proc. 9.142(a)(1).

⁸³ Fla. R. App. Proc. 9.142(a)(2).

⁸⁴ Pursuant to Fla. R. Crim. Proc. 3.840.

⁸⁵ Fla. R. App. Proc. 9.142(a)(3).

⁸⁶ Fla. R. App. Proc. 9.142(a)(4).

⁸⁷ Fla. R. App. Proc. 9.142(b)(1).

- If a previous petition was filed, the reason the claim in the present petition was not raised previously; and
- The nature of the relief sought.⁸⁸

Petitions seeking a belated appeal must include a detailed allegation of the specific acts, sworn to by the petitioner or petitioner's counsel, that constitute the basis for entitlement to belated appeal, including:

- Whether petitioner requested counsel to proceed with the appeal and the date of any such request;
- Whether counsel misadvised the petitioner as to the availability of appellate review or the filing of the notice of appeal; or
- Whether there were circumstances unrelated to counsel's action or inaction, including names of individuals involved and dates of the occurrences, that were beyond the petitioner's control and otherwise interfered with the petitioner's ability to file a timely appeal.⁸⁹

A petition for belated appeal may not be filed more than 1 year after the expiration of time for filing the notice of appeal from a final order denying Rule 3.851 relief, unless it alleges under oath with a specific factual basis that the petitioner:

- Was unaware an appeal had not been timely filed, was not advised of the right to an appeal, was misadvised as to the rights to an appeal, or was prevented from timely filing a notice of appeal due to circumstances beyond the petitioner's control; and
- Could not have ascertained such facts by the exercise of due diligence.⁹⁰

A petition alleging ineffective assistance of direct appeal counsel must include detailed allegations of the specific acts that constitute the alleged ineffective assistance of counsel and must be filed simultaneously with the initial brief in the appeal from the lower tribunal's order on the defendant's application for postconviction relief.⁹¹

Petitions Seeking Review of Nonfinal Orders in Death Penalty Postconviction Proceedings

Petitions seeking review of nonfinal orders in postconviction proceedings are generally treated as original proceedings. Such petitions must be filed within 30 days after rendition of the nonfinal order to be reviewed.⁹² Either party to the proceeding may file a petition, but must serve it on the opposing party and the judge who issued the nonfinal order being reviewed.⁹³

The petition must be in the form prescribed by Rule 9.100 of the Florida Rules of Appellate Procedure and must contain:

- The basis for invoking the jurisdiction of the court;

⁸⁸ Fla. R. App. Proc. 9.142(b)(2).

⁸⁹ Fla. R. App. Proc. 9.142(b)(3)(A).

⁹⁰ Fla. R. App. Proc. 9.142(b)(3)(B).

⁹¹ Fla. R. App. Proc. 9.142(b)(4).

⁹² Fla. R. App. Proc. 9.142(c)(2) and (c)(3)(A).

⁹³ Fla. R. App. Proc. 9.142(c)(3).

- The date and nature of the order sought to be reviewed;
- The name of the lower tribunal rendering the order;
- The name, disposition, and dates of all previous trial, appellate, and postconviction proceedings relating to the conviction and death sentence that are the subject of the proceedings in which the order sought to be reviewed was entered;
- The facts on which the petitioner relies, with references to the appropriate pages of the supporting appendix;
- Argument in support of the petition, including an explanation of why the order departs from the essential requirements of law and how the order may cause material injury for which there is no adequate remedy on appeal, and appropriate citations of authority; and
- The nature of the relief sought.⁹⁴

The petition must be accompanied by an appendix⁹⁵ containing the portions of the record necessary for a determination of the issues presented.⁹⁶

If the petition demonstrates a preliminary basis for relief or a departure from the essential requirements of law that may cause material injury for which there is no adequate remedy by appeal, the Court may issue an order directing the respondent to show cause, within the time set by the Court, why relief should not be granted.⁹⁷ No response is permitted unless ordered by the Court.⁹⁸ Within 20 days after service of the response or such other time set by the Court, the petitioner may serve a reply, which may not exceed 15 pages in length, and supplemental appendix.⁹⁹

A stay of proceedings is not automatic - the party seeking a stay must petition the Court for a stay.¹⁰⁰ During the pendency of a review of a nonfinal order, unless a stay is granted by the Court, the lower tribunal may proceed with all matters, except that the lower tribunal may not render a final order disposing of the cause pending review of the nonfinal order.¹⁰¹

Inmate's Motion to Dismiss Postconviction Proceedings and to Discharge Postconviction Counsel

An inmate may file a motion to dismiss pending postconviction proceedings and to discharge postconviction counsel *pro se*.¹⁰² In such instances, the clerk must serve copies of the motion on counsel of record for both the inmate and the state, and counsel of record may file responses within 10 days.¹⁰³

⁹⁴ Fla. R. App. Proc. 9.142(c)(4).

⁹⁵ As prescribed by Fla. R. App. Proc. 9.220.

⁹⁶ Fla. R. App. Proc. 9.142(c)(5).

⁹⁷ Fla. R. App. Proc. 9.142(c)(6).

⁹⁸ Fla. R. App. Proc. 9.142(c)(7).

⁹⁹ Fla. R. App. Proc. 9.142(c)(8).

¹⁰⁰ Fla. R. App. Proc. 9.142(c)(9).

¹⁰¹ *Id.*

¹⁰² Fla. R. Crim. Proc. 3.851(i)(2).

¹⁰³ *Id.*

The trial judge must review the motion and the responses and schedule a hearing at which the inmate, collateral counsel, and the state must be present.¹⁰⁴ At the hearing, the judge must examine the inmate and hear the arguments of the inmate, postconviction counsel, and the state. If the judge concludes that there are reasonable grounds to believe the inmate is not mentally competent, no fewer than two or more than three qualified experts shall be appointed to examine the inmate.¹⁰⁵ The experts must file reports with the trial court setting forth their findings. The trial court must then conduct an evidentiary hearing and enter an order setting forth findings of competency or incompetency.¹⁰⁶

If the inmate is found to be incompetent, the trial court must deny the motion without prejudice.¹⁰⁷ If the inmate is found to be competent, the trial court must conduct a complete inquiry to determine whether the inmate knowingly, freely, and voluntarily wants to dismiss pending postconviction proceedings and discharge postconviction counsel.¹⁰⁸

If the trial court determines that the inmate has made the decision to dismiss pending postconviction proceedings and discharge collateral counsel knowingly, freely, and voluntarily, the court must enter an order dismissing all pending postconviction proceedings and discharging collateral counsel.¹⁰⁹ If the trial court determines that the opposite is true, it must enter an order denying the motion without prejudice.¹¹⁰

If the trial court grants the motion:

- A copy of the motion, the order, and the transcript of the hearing or hearings conducted on the motion shall be electronically forwarded to the clerk of the Florida Supreme Court within 30 days; and
- Discharged counsel shall, within 10 days after issuance of the order, file with the clerk of the circuit court two copies of a notice seeking review in the Florida Supreme Court, and must, within 20 days after the filing of the transcript, serve an initial brief.¹¹¹

If the trial court denies the motion, the inmate may seek review as prescribed by Florida Rule of Appellate Procedure 9.142(b).¹¹²

Special Procedures for Postconviction Motions Filed After a Death Warrant is Signed

In cases in which the Governor signs a death warrant prior to the 1-year filing deadline, the Florida Supreme Court is required, on the movant's request, to grant a stay of execution to allow postconviction motions to proceed in a timely and orderly manner.¹¹³ In practice, however, this

¹⁰⁴ Fla. R. Crim. Proc. 3.851(i)(3).

¹⁰⁵ Fla. R. Crim. Proc. 3.851(i)(4).

¹⁰⁶ *Id.*

¹⁰⁷ Fla. R. Crim. Proc. 3.851(i)(5).

¹⁰⁸ Fla. R. Crim. Proc. 3.851(i)(6).

¹⁰⁹ Fla. R. Crim. Proc. 3.851(i)(7).

¹¹⁰ *Id.*

¹¹¹ Both the inmate and the state may serve responsive briefs. Fla. R. Crim. Proc. 3.851(i)(8). *Also see*, Fla. R. App. Proc. 9.142(d)(2)(A).

¹¹² Fla. R. Crim. Proc. 3.851(i)(9).

¹¹³ Fla. R. Crim. Proc. 3.851(d)(4).

requirement is unnecessary because the Governor has agreed that, absent the circumstance where a competent death-sentenced individual voluntarily requests that a death warrant be signed, no death warrants will be issued during the initial round of federal and state review, provided that counsel for the death penalty movant is proceeding in a timely and diligent manner.¹¹⁴

Once the 1-year filing deadline has passed and after the initial round of state and federal collateral review is over, the Governor may sign a death warrant. At this point, any subsequently-filed postconviction motions, initial or successive, are subject to the following expedited procedures:

- The chief judge of the circuit court is required to assign the case to a judge as soon as the judge receives notification of the death warrant.
- Proceedings after a death warrant has been issued are required to take precedence over all other cases.
- The normal time limitations in Rule 3.851 do not apply after a death warrant has been signed; instead, all motions must be heard expeditiously considering the time limitations set by the execution date and the time required for appellate review.
- The assigned judge must schedule a case management conference as soon as reasonably possible after receiving notification that a death warrant has been signed.
- At the conference, the court must set a deadline for the filing of a Rule 3.851 postconviction motion, schedule a hearing to determine whether an evidentiary hearing should be held, and hear arguments on any purely legal claims not based on disputed facts.¹¹⁵

All motions for postconviction relief filed after a death warrant is issued are considered successive motions and must comply with the content requirements for successive motions.¹¹⁶ If the motion, files, and records in the case conclusively show that the movant is not entitled to relief, the motion may be denied without an evidentiary hearing.¹¹⁷ If, however, the trial court determines that an evidentiary hearing should be held, it must hold the evidentiary hearing as soon as reasonably possible considering the time limitations set by the date of execution and the time required for appellate review.¹¹⁸

After the evidentiary hearing is completed, the court must immediately obtain a transcript of all proceedings and, as soon as possible after the hearing is concluded, render its order.¹¹⁹ A copy of the final order must immediately be electronically transmitted to the Florida Supreme Court and to the attorneys of record.¹²⁰ The record must also be sent to the Florida Supreme Court, electronically, if possible.¹²¹

¹¹⁴ Fla. R. Crim. Proc. 3.851 (comment).

¹¹⁵ Fla. R. Crim. Proc. 3.851(h).

¹¹⁶ Fla. R. Crim. Proc. 3.851(h)(5).

¹¹⁷ Fla. R. Crim. Proc. 3.851(h)(6).

¹¹⁸ *Id.*

¹¹⁹ Fla. R. Crim. Proc. 3.851(h)(8).

¹²⁰ *Id.*

¹²¹ Fla. R. Crim. Proc. 3.851(h)(9).

Federal Habeas Corpus

After state postconviction proceedings have been completed, a capital defendant is entitled to file a petition for writ of habeas corpus in federal court. In habeas proceedings, 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.

Execution

An inmate's death sentence may not be carried out until the Governor issues a death warrant.¹²² A death warrant may be issued after the inmate has pursued all possible collateral remedies in a timely manner or after the inmate has failed to pursue said remedies within specified time limits.¹²³ Upon issuance of a death warrant, the Governor must transmit the warrant and the record to the warden and direct the warden to execute the sentence at a time designated in the warrant.¹²⁴

An inmate's death sentence will be carried out by lethal injection unless the inmate requests to be executed by electrocution.¹²⁵ The warden of the state prison designates the executioner.¹²⁶ The warden (or a deputy) must be present at the execution and must select twelve individuals to witness the execution.¹²⁷ A qualified physician must be present, and the inmate's counsel, ministers of religion, representatives of the media, and prison and correctional officers may be present.¹²⁸ Immediately before the inmate's execution, the death warrant must be read to the inmate.¹²⁹ The physician must announce when death has occurred.¹³⁰

After the death sentence has been executed, the warden must send the warrant and a signed statement of the execution to the Secretary of State and file an attested copy of the warrant and statement with the clerk of the court that imposed the sentence.¹³¹

Sixty days after a capital sentence is carried out, after a defendant is released from incarceration following the granting of a pardon or reversal of the sentence, or after a defendant has been resentenced to a term of years, the AG must provide written notification of this occurrence to the Secretary of State.¹³² After the expiration of the 60 days, the Secretary of State may destroy the copies of the public records held by the records repository that pertain to that case, unless an

¹²² Section 922.052(1), F.S.

¹²³ Section 922.095, F.S.

¹²⁴ Section 922.052(1), F.S.

¹²⁵ Section 922.105, F.S.

¹²⁶ Section 922.10, F.S. A person authorized by state law to prepare, compound, or dispense medication and designated by the Department of Corrections may prepare, compound, or dispense a lethal injection. Section 922.105(6), F.S.

¹²⁷ Section 922.11(1) and (2), F.S.

¹²⁸ Section 922.11(2), F.S.

¹²⁹ Section 922.10, F.S.

¹³⁰ Section 922.11(2), F.S.

¹³¹ Section 922.12, F.S.

¹³² Fla. R. Crim. Proc. 3.852(m).

objection to the destruction is filed in the trial court and served upon the Secretary of State. If an objection is served, the records may not be destroyed until a final disposition of the objection.¹³³

Justice Administration Commission

The Florida Legislature created the Justice Administration Commission (JAC) as a centralized office providing administrative services for the benefit of state attorneys, public defenders, capital collateral regional counsels, the criminal conflict and civil regional counsels, the guardian ad litem program and the clerks of court. A board governs the JAC, composed of two state attorneys and two public defenders, appointed respectively by the Florida Prosecuting Attorneys Association and the Florida Public Defenders Association.

Administrative duties of the JAC include:

- Provision of services related to budget, personnel, and payroll matters, payment of invoices for goods and services received by client agencies, and contracting with court-appointed counsel.
- Processing due process costs for counsel.
- Recording revenues from payments by cities and counties to state attorneys and public defenders for legal work on ordinance violations.¹³⁴

Death Penalty Reform Efforts

The capital postconviction process has often been cited as one of the areas that causes the most delays in capital cases.¹³⁵ There are several reasons for this. Delays can result from litigation over public records requests, or from sentencing courts which may not hear or rule on postconviction motions for several months, or sometimes years. Postconviction attorneys often amend their motions to introduce new claims, which, if allowed, require additional time to investigate and respond to. Sometimes these motions improperly attempt to revisit issues that were or could have been resolved at trial or during the first appeal.

In a 1998 Florida Supreme Court opinion reviewing the death penalty of an inmate convicted in 1974, Justice Wells strongly expressed his position that the process needs to be changed, stating that,

I do again state my view that such an extended time period to finally adjudicate these cases is totally unacceptable and is this Court's and the State's prime responsibility to correct. (citation omitted). . . . The courts

¹³³ *Id.*

¹³⁴ The Legislature established the JAC in 1965 (Chapter 65-328, L.O.F.) Office of Program Policy Analysis & Government Accountability, *Government Program Summaries, Justice Administration Commission*, available at <http://www.oppaga.state.fl.us/profiles/1022/> (last visited April 19, 2013).

¹³⁵ See, *In Rule of Criminal Procedure 3.851 (Collateral Relief after Death Sentence Has Been Imposed)*, 626 So. 2d. 198, 199 (Fla. 1993)(stating that the Supreme Court Committee on Postconviction Relief in Capital Cases was created because of the substantial delays in the death penalty postconviction relief process).

and the State must be able to do better, and any explanation of why we are unable to do so is insufficient.¹³⁶

Numerous reforms have been made over the years in an effort to improve the capital postconviction process. In 1993, the Florida Supreme Court created Rule 3.851 of the Florida Rules of Criminal Procedure and adopted the recommendation of the “Florida Supreme Court Committee on Postconviction Relief” to require that postconviction motions be filed within 1-year after the date the direct appeal became final.¹³⁷ In March of 1999, Chief Justice Harding established by administrative order a Supreme Court Committee on Postconviction Relief in Capital Cases (the “Morris Committee”), to assist the Court in identifying inherent delays in the current postconviction process and recommend improvements.¹³⁸ While the Court was considering the Morris Committee’s report, the Florida Legislature passed the Death Penalty Reform Act of 2000.

Death Penalty Reform Act of 2000

During a special session in January of 2000, the Legislature passed the Death Penalty Reform Act (DPRA).¹³⁹ DPRA made a number of significant statutory changes to the capital postconviction process. However, on April 14, 2000, the Florida Supreme Court struck down the majority of the provisions of DPRA based on a separation of powers claim.^{140, 141} Specifically, the Court held that that the “DPRA is an unconstitutional encroachment on the Court’s exclusive power to ‘adopt rules for the practice and procedure in all courts.’”¹⁴² The Court held that the provisions of the DPRA were “procedural” (rather than substantive) and ruled that because the Constitution gives the court the authority to adopt rules of practice and procedure, the Legislature was not permitted to act in this area.

The Court rejected the state’s argument that the deadlines for filing postconviction motions in DPRA were statutes of limitations which are substantive. The Court stated that Florida Rule of Criminal Procedure 3.850 is a “procedural vehicle for the collateral remedy otherwise available by a writ of habeas corpus”¹⁴³ and further held that:

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 the Florida Constitution

¹³⁶ *Knight v. State*, 746 So. 2d 423, 439-440 (Fla. 1998). (Wells, J. concurring).

¹³⁷ *In Rule of Criminal Procedure 3.851 (Collateral Relief after Death Sentence Has Been Imposed)*, 626 So. 2d. 198 (Fla. 1993).

¹³⁸ *Amendments to Florida Rules Criminal Procedure 3.851, 3.852, and 3.993*, 772 So. 2d 488 (Fla. 2000).

¹³⁹ Chapter 2000-3, L.O.F.

¹⁴⁰ Article II, Section 3 of the Florida Constitution provides, “The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.” Further, Article V, Section 2 authorizes the Florida Supreme Court to “adopt rules of practice and procedure in all courts.” This same section of the constitution authorizes the Legislature to repeal court rules of procedure with a 2/3 vote of the membership of both houses.

¹⁴¹ *Allen v. Butterworth*, 756 So. 2d 52, 59 (Fla. 2000).

¹⁴² *Id.* at 54.

¹⁴³ *Id.* at 61 (citations omitted).

grants this Court the exclusive authority to set deadlines for postconviction motions.¹⁴⁴

2001 Florida Supreme Court Rule Revisions

Shortly after the DPRA was held unconstitutional, the Florida Supreme Court made a variety of revisions to the rules applicable to postconviction proceedings in capital cases. For example:

- Rule 3.851(b) was added to ensure appointment of postconviction counsel upon the Florida Supreme Court's issuance of mandate on direct appeal.
- Rule 3.851(c) was added to provide for, among other things, the assignment of a qualified judge within 30 days after mandate issues on direct appeal and status conferences every 90 days after the assignment until the evidentiary hearing has been completed or the motion has been ruled on without a hearing. These status conferences are intended to provide a forum for the timely resolution of public records issues and other preliminary matters.
- Rule 3.851(f) was added to set forth general procedures relating to evidentiary hearings. Most significantly, to require an evidentiary hearing on claims listed in an initial motion as requiring a factual determination. The Court has identified the failure to hold evidentiary hearings on initial motions as a major cause of delay in the capital postconviction process and has determined that, in most cases, requiring an evidentiary hearing on initial motions presenting factually based claims will avoid this cause of delay.¹⁴⁵

Florida Supreme Court Administrative Order

On March 22, 2013, through administrative order the Florida Supreme Court established a Capital Postconviction Proceedings Subcommittee of the Criminal Court Steering Committee. The Court tasked the Subcommittee with undertaking a comprehensive review of capital postconviction proceedings. In consultation with the Criminal Procedure Rules Committee, the CCRC, and the Office of the Attorney General, the Subcommittee will recommend to the Court whether any rules can be amended towards the goal of increased efficiency in the postconviction process.¹⁴⁶

III. Effect of Proposed Changes:

This bill is titled the "Timely Justice Act of 2013."

This bill revises laws governing the postconviction or collateral review phase of capital cases. The bill acknowledges, through legislative intent, the Supreme Court's efforts towards these goals in issuing Administrative Order AOSC13-11.

¹⁴⁴ *Id.* at 62.

¹⁴⁵ *Amendments to Florida Rules of Criminal Procedure 3.851, 3.852 and 3.993*, 772 So. 2d 488, 491 (Fla. 2000).

¹⁴⁶ The Administrative Order is available online at <http://www.floridasupremecourt.org/clerk/adminorders/2013/AOSC13-11.pdf>

Capital Collateral Regional Counsel (CCRC)

The bill eliminates the registry attorney “pilot program,” originally established in 1993, and reestablishes the CCRC in the northern region of the state. The Florida Legislature initiated the pilot program as a replacement to the northern region CCRC.

Public Records

This bill revises s. 27.7081, F.S., by incorporating almost the entire substance of Rule 3.852 of the Florida Rules of Criminal Procedure, which addresses public records in capital postconviction proceedings. The bill retains the provision in s. 27.7081, F.S., which requires the Secretary of State to establish and maintain a public records repository to archive capital postconviction public records. The bill also requires the Secretary of State, however, rather than the CCRC, as is provided in Rule 3.852, to provide personnel, supplies, and any necessary equipment to copy records held at the records repository.

Appointment of Counsel and Conflicts of Interest

As a prerequisite to being included on the registry of conflict counsel, counsel must have experience in capital casework. Specifically, counsel must have participated in at least two capital trials or two capital sentencing proceedings. This bill increases the cap from four to nine the number of current proceedings in which an attorney of record can have while applying to the court to be appointed as counsel of record in a new case.

Attorneys found by the court to have twice provided constitutionally deficient legal representation in a capital case resulting in relief are disqualified from further representation for 5 years. Additionally, if the highest court with jurisdiction has conclusively determined that counsel of record provided constitutionally deficient representation, the court must provide a copy of its finding to The Florida Bar for appropriate disciplinary sanction.

This bill establishes a more active role for the court in conflict of interest situations. If the CCRC alleges the existence of a conflict of interest in a case, the court must make a determination that an actual conflict exists. If the court confirms the conflict of interest, the court will designate another regional counsel. The new counsel appointed must not have been found by a court to have twice provided constitutionally deficient representation, resulting in relief. The bill defines an actual conflict as greater than a possible, speculative, or merely hypothetical conflict.

Justice Administration Commission

This bill replaces the Chief Financial Officer with the Justice Administration Commission as the entity responsible in all aspects of contracting for counsel in postconviction capital cases. Duties of the JAC will include:

- Entering into contracts with private counsel.
- Enforcing contract performance.
- Approving uniform contract forms for use in contracting the services of private conflict counsel.

- Paying private counsel for representation pursuant to contract.
- Notifying the court if additional appropriation is necessary.

The JAC has standing to contest any motion for an order approving payment of attorney fees, costs, or related expenses.

Evidentiary Hearings

Section 924.055(1), F.S., expresses intent that postconviction actions in capital cases be resolved within 5 years after a person is sentenced. This bill, instead, expresses intent that such actions be resolved as quickly as possible.

Issuance of Warrant of Execution

The bill requires that the clerk of the Florida Supreme Court notify the Governor in writing that a person convicted and sentenced to death has exhausted all appeals, or allowed the time for filing a habeas corpus writ in federal court to run. Within 30 days after receiving the letter, the Governor must issue a warrant for execution, directing the warden to execute sentence within 180 days, at a time certain specified in the warrant. The Governor may sign a warrant of execution based on exhaustion of appeals or expiration of time, without compliance of the clerk.

Representation in Clemency Cases in which a Sentence of Death is Imposed

This bill requires the Governor and Cabinet, in their capacity as the Board of Executive Clemency, to appoint private registry counsel to represent the inmate. The cap on compensation is increased from \$1,000 to \$10,000 for attorney fees and costs. Compensation is to be paid from General Revenue from funds budgeted to the Parole Commission. This provision, however, may conflict with another provision of the bill which requires the CCRC to represent inmates in clemency cases.

Reporting Requirement

The bill requires the Florida Supreme Court to annually report to the Florida Legislature any case in which a filed postconviction action has not been completed within 3 years.

Severability

The bill contains a severability clause specifying that if any provision of the act or the application thereof is held invalid, the invalidity does not affect other provisions or applications of the act which can be given effect without the invalid provision or application.

Effective Dates

The bill takes effect July 1, 2013.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Capital Postconviction Proceedings

The bill duplicates from rule almost all of the current procedures that relate to public records production in capital postconviction proceedings. However, the bill creates new provisions designed to make the postconviction process more efficient. For example, the bill:

- Changes the intent that all postconviction actions in capital cases be resolved within 5 years to being resolved as soon as possible.
- Provides a greater role for the court in conflict of interest determinations, and limits attorneys representing a conflict on the basis for withdrawal to an actual conflict.
- Addresses consistent legal representation through:
 - Reinstating the CCRC in the northern region of the state.
 - Requiring as a condition to inclusion on the private registry, participation in at least two capital trials or sentencings.
 - Prohibiting attorneys who have previously provided constitutionally deficient representation resulting in relief by the court from continuing to serve.
- Requires the Governor to issue a death warrant and to order the execution of the death sentence within certain time periods.

To the extent that these provisions shorten the postconviction process, they will likely result in a cost savings to the state.

Death Row Inmates

Death row inmates are currently housed at Union Correctional Institution and Florida State Prison. The average per diem for inmates housed at these facilities is \$67.58 and \$61.35, respectively, per day. It should be noted that these figures are not specific to death row inmates but instead apply to the entire inmate populations at those facilities.

On average, Florida death row inmates spend 13.22 years on death row prior to execution. Using the per diem figures above, Florida spends anywhere between \$326,093 and \$296,032 housing a death row inmate prior to his or her execution. To the extent, the bill shortens the postconviction process and thereby the time an inmate spends on death row prior to execution, the bill would have a positive fiscal impact on DOC.

Capital Collateral Regional Counsel

The bill eliminates the registry attorney “pilot program” and reestablishes the CCRC in the northern region of the state.

For FY 13/14, the base budget for the Middle and Southern Region CCRC offices is \$7,020,537. In FY 2011/2012, the Department of Financial Services spent \$1.6 million compensating registry attorneys, who are paid based on the amounts set forth in s. 27.711, F.S. (note that this figure represents the amount paid to registry attorneys appointed in postconviction proceedings throughout the state, not just those in the northern region).

According to the bill analysis for SPB 7050, reestablishing the CCRC in the northern region will have an estimated fiscal impact of \$423,338 in recurring general revenue in Fiscal Year 2013-2014.¹⁴⁷ This estimate assumes staffing for 4 full-time equivalent (FTE) positions – an interim director (who will serve as first chair), a second attorney (who will serve as second chair), an investigator, and a support staff. The estimate includes funding for routine expenses, such as telephones, office supplies, building rental, and data communication. The estimate also includes funding for due process-related expenses, such as expert witness fees, and funding for court transcripts.¹⁴⁸

VI. Technical Deficiencies:

The bill appears to have conflicting provisions regarding the entity responsible for providing legal representation in executive clemency cases. Section 2 of the bill, amending subsection (1) of s. 27.40, F.S., provides for capital collateral regional counsel (CCRC) to be appointed to represent inmates in clemency cases. Consistent with this, Section 3 of the bill, amending

¹⁴⁷ This fiscal impact is predicated on the assumption that the newly-formed northern regional office will be assigned new cases as they are handed down by the courts after July 1, 2013; currently assigned cases will continue to be handled by registry attorneys. According to the Justice Administrative Commission, the northern region registry received 5 new cases in Fiscal Year 2010-2011, 3 new cases in Fiscal Year 2011-2012, and 3 new cases in the first half of Fiscal Year 2012-2013.

¹⁴⁸ Information contained in this portion of the bill analysis is from the analysis for SPB 7050 by the Senate Committee on Appropriations (Mar. 28, 2013) (on file with the Senate Committee on Appropriations).

paragraph (a) of subsection (5) of s. 27.51, F.S., deletes language which requires the trial court to retain the authority to appoint the public defender or another attorney not employed by the CCRC.

Alternatively, section 19 of the bill, creating s. 940.031, F.S., provides for the Board of Executive Clemency to appoint counsel through a private registry, funded through General Revenue. These provisions expressly prohibit the Board from appointing a public defender, an office of criminal conflict and civil regional counsel, or any CCRC.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes: (Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Appropriations on April 18, 2013:

- Removes procedural provisions from the bill which would have required the approval of an amendment to the constitution to take effect.
- Defines what is meant by an actual conflict of interest.
- Requires the Secretary of State, rather than the Capital Collateral Regional Counsel, to provide personnel, supplies and equipment to copy records held at the records repository.
- Restores current law, which recommends that the Supreme Court adopt by rule the provisions of s. 924.055, to limit the time for postconviction proceedings in capital cases.
- Requires that to qualify to be on the conflict counsel registry, attorneys must have experience in at least two capital trials or sentencing proceedings.
- Disqualifies for a period of 5 years attorneys previously found twice by the court to have provided constitutionally deficient representation, and requires the Supreme Court to report findings to The Florida Bar of attorneys who have provided constitutionally deficient representation.
- Increases from a cap of four to nine the number of trials in which an attorney is actively counsel of record in currently requesting an appointment to a case.
- Replaces the Chief Financial Officer with the Justice Administration Commission as the entity responsible for all aspects of contracting and compensation for conflict counsel.
- Requires the clerk of the Florida Supreme Court to provide written notice to the Governor that an inmate's capital postconviction process has concluded, and requires the Governor to issue a death warrant within 30 days, with a time specified for execution of sentence within 180 days.
- Recognizes the Supreme Court's efforts to increase efficiency in capital cases, through its issuance of an administrative order establishing a subcommittee to examine these issues and propose rule amendments.

- Requires the Governor and Cabinet, in their capacity as the Board of Executive Clemency, to appoint private registry counsel in clemency hearings when a sentence of death has been imposed, and increases the cap on compensation.

B. Amendments:

None.

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