

**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.)

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Prepared By: The Professional Staff of the Committee on Appropriations

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BILL: SPB 7050

INTRODUCER: For consideration by the Appropriations Committee

SUBJECT: Postconviction Capital Collateral Representation

DATE: April 2, 2013

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

|    | ANALYST  | STAFF DIRECTOR | REFERENCE | ACTION             |
|----|----------|----------------|-----------|--------------------|
| 1. | Harkness | Hansen         |           | <b>Pre-meeting</b> |
| 2. |          |                |           |                    |
| 3. |          |                |           |                    |
| 4. |          |                |           |                    |
| 5. |          |                |           |                    |
| 6. |          |                |           |                    |

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**I. Summary:**

SPB 7050 discontinues the capital collateral representation pilot program in the Northern region and provides for the assumption of certain contracting and billing functions by the Justice Administrative Commission. The bill conforms the statutes relating to post conviction capital collateralization representation to the Senate Proposed General Appropriation for Fiscal Year 2013-2014.

This bill has an estimated fiscal impact of \$324,254 for the last three quarters of Fiscal Year 2013-2014; the annualized fiscal impact is \$423,338. The bill will also save approximately \$131,686 in recurring general revenue annually by transferring registry contracting and billing functions to the Justice Administrative Commission.

This bill provides an effective date of October 1, 2013.

This bill substantially amends the following sections of the Florida Statutes: 27.701, 27.702, 27.710, and 27.711.

**II. Present Situation:**

**Overview of Death Penalty Proceedings**

After a defendant has been sentenced to death, he or she is entitled to challenge the conviction and sentence in three distinct stages. First, the public defender or private counsel is required to file a direct appeal to the Florida Supreme Court. An appeal of the Florida Supreme Court's decision on direct appeal is to the United States Supreme Court by petition for certiorari.

Second, if the U.S. Supreme Court rejects the appeal, state postconviction proceedings, or collateral review, begins. The Capital Collateral Regional Counsel (CCRC) represents the defendants in postconviction proceedings. Rules 3.850 and 3851, Fla. R. Crim. P., control state postconviction proceedings. Unlike a direct appeal which challenges the legal errors apparent from the trial transcripts or record on appeal, a postconviction proceeding is designed to raise claims which are collateral to what transpired in the trial court. Consequently, postconviction proceedings usually involve three categories of claims:

- Ineffective assistance of trial counsel;
- Brady violations, i.e., a due process denial from the prosecution's suppression of material, exculpatory evidence; or,
- Newly discovered evidence, for example, post-trial recantation by a principal witness.

Since the consideration of these claims requires new fact-finding, state postconviction motions are filed in the trial court which sentenced the defendant to death. Appeals from postconviction motions are to the Florida Supreme Court. (At this point, the CCRC, in a writ of habeas corpus, usually will raise the claim of ineffective assistance of appellate counsel for the direct appeal.)

The third and final stage is federal habeas corpus, a proceeding controlled by 28 U.S.C. s. 2254 (a). Federal habeas corpus allows a defendant to petition the federal district court to review whether the conviction or sentence violates or was obtained in violation of federal law. Federal habeas corpus is limited to consideration of claims previously asserted in direct appeal or in state postconviction proceedings. Appeals of federal habeas are to the Circuit Court of Appeals and then to the United States Supreme Court.

### **Capital Collateral Regional Counsel**

The Capital Collateral Regional Counsel (CCRC) represents all death sentenced inmates on collateral actions challenging the legality of the judgment and sentence in state and federal courts.<sup>1</sup> Prior to 1997, one capital collateral representative represented all death sentenced inmates. The 1997 Legislature created three regional counsel offices which functioned independently – the Northern Region (Tallahassee), Middle Region (Tampa), and Southern Region (Miami).<sup>2</sup> Each CCRC represents defendants sentenced within his or her region. In the event that a CCRC has a conflict of interest with a client, the sentencing court may designate another CCRC or private counsel to represent the defendant.<sup>3</sup>

The 1998 Legislature created a statewide registry of private defense attorneys to supplement the CCRC system and serve as a backup by alleviating case backlogs.<sup>4</sup> Section 27.710, F.S., requires the Justice Administrative Commission to maintain a statewide registry of attorneys in private practice who have certified that they meet the minimum requirements to individuals sentenced to death in this state, as provided in s. 27.704(2), F.S.

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<sup>1</sup> Section 27.702(1), F.S.

<sup>2</sup> Chapter 97-313, Laws of Fla.

<sup>3</sup> Section 27.703(1)

<sup>4</sup> Chapter 98-197, Laws of Fla.

## **Registry Pilot Program and Auditor General Review**

Chapter 2003-399, Laws of Fla., amended s. 27.701(2), F.S., effective July 1, 2003, to establish a pilot program transferring the responsibilities of the CCRC – Northern region to a registry of private attorneys. The law also required the Auditor General to present a status report on the implementation of the pilot project to the President of the Senate and Speaker of the House of Representatives by February 27, 2004, and a performance audit to determine the effectiveness and efficiency of using attorneys from the registry compared to the CCRC.

In its 2007 report, the Auditor General found that the CCRC cost per case was higher than the registry cost per case.<sup>5</sup> The differences in costs were the result, in part, of the administrative costs of the CCRC, such as support staff, building rental, furniture, and utilities. The report also concluded that the higher cost for the CCRCs was attributed to more time expended on a per case basis by CCRC attorneys and investigators, numbers of witnesses interviewed, use of experts, and public record requests. The CCRCs provided an average of 355 hours of legal counsel per case and registry attorneys provided an average of 196 hours per case.

The report found that other measures of performance were difficult to interpret. For example, conclusive comparisons of timeliness were difficult to make due to the long duration of cases and the small number of cases available for comparison. The overall length of time under the direct control of the CCRC and registry attorneys required for a capital case to complete the capital collateral representation was 2.0 years for the CCRC cases and 2.1 years for the registry cases. In addition, the CCRCs achieved a higher incidence of providing relief to death row inmates with 14 instances over the 2 years as compared to 5 for the registry; however, this statistic can vary from year to year due to the length of the appellate process and limited number of cases.

The Florida Supreme Court has historically favored the CCRC structure. In response to the Auditor General findings, then Chief Justice R. Fred Lewis wrote “although the audit is principally an accounting analysis and does not include the qualitative analysis favoring the CCRC structure...it is our belief that that upon close analysis the audit report also supports our view that the CCRC structure is superior.”<sup>6</sup> In 2012, then Chief Justice Charles T. Canady wrote “[t]his Court continues to believe that the provision of representation through the Capital Collateral Regional Counsels (CCRC) structure is far superior to the private attorney registry approach.”<sup>7</sup>

## **Justice Administrative Commission**

The Justice Administrative Commission (JAC) serves 49 judicial-related entities and court appointed counsel by performing over 421,000 financial transactions for approximately 20,000

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<sup>5</sup> Office of the Auditor General, *Capital Collateral Regional Counsel Pilot Program: Performance Review*, Report 2007-092, January 2007.

<sup>6</sup> Letter to Chair of the Senate Criminal and Civil Justice Appropriations Committee from Chief Justice R. Fred Lewis, (February 11, 2007) (on file with the Senate Budget Subcommittee on Criminal and Civil Justice Appropriations).

<sup>7</sup> Letter to Chair of the Senate Criminal and Civil Justice Appropriations Committee from Chief Justice Charles T. Canady, (January 3, 2012) (on file with the Senate Budget Subcommittee on Criminal and Civil Justice Appropriations).

employees and vendors throughout the state. Among its responsibilities, the JAC contracts with attorneys who provide court-appointed representation, audits billings for attorney fees, participates in hearings when objecting to attorney fees or costs, and monitors budgetary needs for court-appointed counsel appropriations. The JAC has been processing court-appointed billings since July 1, 2004.

The Department of Financial Services, headed by the Chief Financial Officer, contracts with registry attorneys to provide postconviction representation in the Northern Region pilot program. The department also provides billing services for the registry attorneys. In 1998, when the Legislature created the registry, it tasked the department (at that time the comptroller) with these responsibilities. The department contracts with approximately 200 attorneys and processes, on average, 11 billings each month. The Legislature appropriates the registry attorney due process funding each year to the JAC, which is transferred to the department to process the registry attorney billing.

### **III. Effect of Proposed Changes:**

This bill strikes statutory language in s. 27.701, F.S., authorizing the CCRC registry attorney pilot program. This revision has the effect of restoring the CCRC – Northern Region office.

This bill also amends ss. 27.702, 27.710, and 27.711, F.S., replacing the Chief Financial Officer with the Justice Administrative Commission as the entity responsible for contracting with registry attorneys and processing their invoices for payment.

### **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:**

This bill eliminates a source of potential earnings for attorneys currently providing capital collateral representation in the Northern region.

**C. Government Sector Impact:**

Restoration of the CCRC-Northern regional office will have a fiscal impact of approximately \$324,254 in general revenue (nonrecurring \$14,832) for Fiscal Year 2013-14. This estimate is based on an October 1, 2013 start-up date; the annualized total is \$423,338. This funding includes the cost of an interim director (who will serve as first chair), a second attorney (who will serve as second chair), an investigator, and a support staff.<sup>8</sup> The estimate also includes funding for routine expenses, such as telephones, office supplies, building rental, and data communication, based on the approved 2013-14 Standard Expense Package in the Legislative Budget Request instructions. The estimate also includes funding for due process-related expenses, such as expert witness fees, and funding for court transcripts.

Transferring registry attorney contracting and billing responsibilities from the Department of Financial Services to the JAC will save approximately \$131,686 in general revenue annually. According to the JAC, the department spends \$131,686 in salaries and benefits to fund a full-time auditor and part-time attorney. The JAC contends that it will perform these contracting and billing functions with existing staff.

**VI. Technical Deficiencies:**

None.

**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.)

None.

**B. Amendments:**

None.

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

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<sup>8</sup> This fiscal impact is predicated on the assumption that the newly-formed Northern regional office would be assigned new cases as they are handed down from the courts; currently assigned cases will continue to be handled by registry attorneys. According to JAC data, 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.