

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 7083 PCB CRJS 13-05 Postconviction Capital Case Proceedings
SPONSOR(S): Judiciary Committee; Justice Appropriations Subcommittee; Criminal Justice Subcommittee; Gaetz and others
TIED BILLS: HJR 7081 **IDEN./SIM. BILLS:** CS/SB 1750

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Criminal Justice Subcommittee	9 Y, 4 N	Cunningham	Cunningham
1) Justice Appropriations Subcommittee	8 Y, 3 N, As CS	Toms	Jones Darity
2) Judiciary Committee	14 Y, 4 N, As CS	Cunningham	Havlicak

SUMMARY ANALYSIS

The bill amends a variety of statutes relating to capital cases. Specifically, the bill:

- Eliminates the registry attorney "pilot program" and reestablishes the capital collateral regional counsel (CCRC) in the northern region of the state;
- Increases the minimum qualifications of registry attorneys;
- Prohibits registry attorneys from representing more than ten, rather than five, defendants in capital postconviction litigation at any one time;
- Requires the Justice Administrative Commission (JAC), rather than the Chief Financial Officer, to be responsible for contracting with, billing, and paying registry attorneys;
- Prohibits registry attorneys and attorneys employed by the state from representing a person charged with a capital offense at trial or on direct appeal or a person sentenced to death in a postconviction proceeding if, in two separate instances, a court, in a capital postconviction proceeding, determined that such attorney provided constitutionally deficient representation and relief was granted as a result;
- Authorizes the court to appoint the CCRC, rather than a public defender, to represent a person sentenced to death in clemency proceedings;
- Creates another method in which a death warrant may be issued;
- Repeals all of the provisions of the Death Penalty Reform Act that were held unconstitutional by the Florida Supreme Court; and
- Creates reporting requirements that hold courts accountable for delays in the postconviction process.

The bill appropriates \$432,170 in general revenue to reestablish the capital collateral regional counsel (CCRC) in the northern region of the state. The bill creates another method in which a death warrant may be issued, that could result in executions occurring more quickly and have a positive fiscal impact on the Department of Corrections (DOC). The bill also authorizes the court to appoint the CCRC, rather than the public defender, in capital clemency proceedings, and requires the JAC, rather than DOC, to pay for private court-appointed attorney representation in clemency proceedings. This will result in a positive fiscal impact to the public defenders and DOC, and a negative fiscal impact on the CCRC and the JAC.

The bill is effective July 1, 2013.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Death Row Statistics

Florida is currently one of 33 states that impose the death penalty.¹ As of March 3, 2013, there were 404 people on death row in Florida – more than any other state aside from California.² On average, Florida death row inmates spend 13.22 years on death row prior to execution.³ Of the 404 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 Case Proceedings - Generally

Trial

A person charged with a capital offense is eligible for appointed qualified⁸ counsel (either a public defender⁹ or private court-appointed counsel¹⁰) if the person is indigent¹¹ and desires representation. Capital trials are heard before the circuit court and conducted in two phases: the guilt/innocence phase and, if the defendant is found guilty, the penalty phase. During the penalty phase, both the judge and jury are involved in determining whether the appropriate sentence for a defendant convicted of a capital felony is life without the possibility of parole or death.¹² The jury's sentencing recommendation serves as an advisory sentence to the judge who ultimately makes the sentencing decision.¹³

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.¹⁴ 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 which are raised on direct appeal include evidentiary rulings made by the trial court during the course of the defendant's trial, and other matters objected to during the course of the trial such as the jury instructions, prosecutorial misconduct, and procedural rulings made by the trial court.

¹ The other states are California, Texas, Pennsylvania, Alabama, North Carolina, Ohio, Arizona, Georgia, Louisiana, Tennessee, Nevada, Oklahoma, South Carolina, Mississippi, Missouri, Arkansas, Oregon, Kentucky, Delaware, Idaho, Indiana, Virginia, Nebraska, Kansas, Utah, Washington, Maryland, South Dakota, Colorado, Montana, New Hampshire, and Wyoming. *Facts About the Death Penalty* (updated December 28, 2012), Death Penalty Information Center, www.deathpenaltyinfo.org/FactSheet.pdf (last visited on March 3, 2013).

² California has 724 inmates on death row. *Facts About the Death Penalty* (updated December 28, 2012), Death Penalty Information Center, www.deathpenaltyinfo.org/FactSheet.pdf (last visited on March 3, 2013). *Also see*, <http://www.dc.state.fl.us/activeinmates/deathrowroster.asp> (last visited on March 3, 2013).

³ <http://www.dc.state.fl.us/oth/deathrow/index.html#Statistics> (last visited on March 3, 2013).

⁴ <http://www.dc.state.fl.us/activeinmates/deathrowroster.asp> (last visited on March 3, 2013).

⁵ <http://www.dc.state.fl.us/oth/deathrow/index.html#Statistics> (last visited on March 3, 2013).

⁶ *Facts About the Death Penalty* (updated December 28, 2012), Death Penalty Information Center, www.deathpenaltyinfo.org/FactSheet.pdf (last visited on March 3, 2013).

⁷ *Id.*

⁸ Fla. R. Crim. Proc. 3.112 (providing minimum standards for trial attorneys in capital cases).

⁹ Section 27.51, F.S. (detailing the duties of public defenders).

¹⁰ Section 27.5304, F.S., (detailing the maximum fees for private court-appointed counsel who defended capital cases—the maximum payment at the trial level is \$15,000).

¹¹ An applicant is indigent if the applicant's income is equal to or below 200 percent of the then-current federal poverty guidelines prescribed for the size of the household of the applicant by the United States Department of Health and Human Services or if the person is receiving Temporary Assistance for Needy Families-Cash Assistance, poverty-related veterans' benefits, or Supplemental Security Income. Section 27.52(2), F.S.

¹² Section 921.141(1), F.S.

¹³ Section 921.141(2) and (3), F.S.

¹⁴ Section 921.141(4), F.S.; Art. 5, Sec. 3, FLA. CONST.; Fla. R. App. Proc. 9.030(a)(1)(A)(i).

The Florida Supreme Court must render a judgment within two years of the filing of the notice of appeal.¹⁵ 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.¹⁶ If the United States Supreme Court denies the case, the direct appeal has concluded, and the defendant may begin state postconviction proceedings.

State Postconviction Proceedings

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 and/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 which 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). Since the consideration of these claims often require new fact finding, postconviction motions are filed in the trial court which sentenced the defendant to death. Appeals from the grant or denial of postconviction motions are to the Florida Supreme Court.

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. Federal habeas proceedings may require an evidentiary hearing and may, in specified instances, be appealed to the Eleventh Circuit Court of Appeals and the United States Supreme Court.¹⁷

State Postconviction Proceedings - Public Records

Rule 3.852 of the Florida Rules of Criminal Procedure establishes the timeframes and procedures that apply to the production of public records in capital postconviction proceedings. 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.^{18,19}

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 of receiving the notice.²²

Within 90 days of 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

¹⁵ Section 921.141(4), F.S.

¹⁶ 28 U.S.C. s. 1257; Sup. Ct. R. 13.

¹⁷ See 28 U.S.C. ss. 2161-2166.

¹⁸ Fla. R. Crim. Proc. 3.852(d)(1).

¹⁹ 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).

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).

records or information pertinent to the case which has not previously been provided to defendant's postconviction counsel.²³ Within 15 days of 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 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 Art. I, Sec. 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 appear pro bono, counsel must send a written demand for additional public records to each entity described above.³⁰ Within 90 days of an entity receiving 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 of receiving the demand.³² In such instances, the trial court must hold a hearing and rule within 30 days of 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

Postconviction counsel that 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

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

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 of appointment, etc. 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.*

Within 30 days of 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

Effect of the Bill

The bill amends s. 27.7081, F.S., to codify the majority⁴¹ of Rule 3.852 of the Florida Rules of Criminal Procedure, relating to the production of public records in capital postconviction proceedings. The bill retains language currently in s. 27.7081, F.S., requiring the Secretary of State to establish and maintain a public records repository for the purpose of archiving capital postconviction public records.

Capital Collateral Regional Counsel – Pilot Program and Conflicts of Interest

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)⁴² to represent the inmate during postconviction proceedings.⁴³ If the regional counsel determines that there is a conflict of interest and the postconviction judge accepts their 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 another CCRC attorney or an attorney from the statewide registry⁴⁴ to represent the inmate in postconviction proceedings.⁴⁵

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(l)(2).

³⁹ *Id.*

⁴⁰ Fla. R. Crim. Proc. 3.852(l)(3).

⁴¹ The portions of the Rule that are procedural in nature are not codified in s. 27.7081, F.S.

⁴² 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.

⁴³ Fla. R. Crim. Proc. 3.851(b)(1).

⁴⁴ 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.

⁴⁵ Fla. R. Crim. Proc. 3.851(b)(1); sections. 27.701(2), 27.703(1), and 27.710(5), F.S.

Section 27.701, F.S., provides for three capital collateral regional offices. However, legislation passed in 2003 created a pilot program using a registry of attorneys instead of the capital collateral regional counsel in the northern region of the state.⁴⁶ The pilot program was extended indefinitely in 2004.⁴⁷

Effect of the Bill

The bill amends ss. 27.701, 27.702, and 27.7091, F.S., to eliminate the "pilot program" and reestablish the capital collateral regional counsel in the northern region of the state. The bill appropriates \$432,170 in general revenue to do so.

The bill also amends s. 27.703, F.S., to prohibit the CCRC from accepting an appointment or take an action that will create an *actual* conflict of interest. If the CRRC alleges that an actual conflict exists, the court, after determining that an actual conflict exists, must appoint another CCRC, or a qualified registry attorney. An actual conflict exists when an attorney actively represents conflicting interests. A possible, speculative, or merely hypothetical conflict is insufficient to support an allegation that a conflict of interest exists.

Registry Attorney – Qualifications, Caseload Limitations, and Payment

Section 27.710, F.S., requires the executive director of the Justice Administrative Commission to compile and maintain a statewide registry of attorneys in private practice who:

- Have certified that they meet the minimum requirements of s. 27.704(2), F.S.;
- Are available for appointment by the court to represent persons convicted and sentenced to death in this state in postconviction collateral proceedings; and
- Have attended within the last year a continuing legal education program of at least 10 hours duration devoted specifically to the defense of capital cases, if available.

Registry attorneys cannot represent more than five defendants in capital postconviction litigation at any one time.⁴⁸ Additionally, the Chief Financial Officer is currently responsible for contracting with, billing, and paying registry attorneys.⁴⁹

Effect of the Bill

The bill amends s. 27.710, F.S., to require registry attorneys to have participated in at least two capital trials or two capital sentencing proceedings (in addition to the above-described criteria). The bill also increases the number of defendants a registry attorney can represent from five to ten, and specifies that the Justice Administrative Commission, rather than the Chief Financial Officer, is responsible for contracting with, billing, and paying registry attorneys.

Constitutionally Deficient Representation

The bill creates s. 27.7045, F.S., to prohibit registry attorneys and attorneys employed by the state from representing a person charged with a capital offense at trial or on direct appeal or a person sentenced to death in a postconviction proceeding if, in two separate instances, a court, in a capital postconviction proceeding, determined that such attorney provided constitutionally deficient representation and relief was granted as a result. The prohibition is for a period of five years, which commences at the time relief is granted after the highest court having jurisdiction to review the deficient representation determination issues a final order affirming the second such determination.

Clemency

Clemency is an act of mercy that absolves the individual upon whom it is bestowed from all or any part of the punishment that the law imposed.⁵⁰ Types of clemency include pardons, commutation of sentence, remission of fines or forfeitures, restoration of the authority to possess a firearm, and restoration of civil rights.⁵¹

⁴⁶ Chapter 2003-399, L.O.F.

⁴⁷ Chapter 2004-240, L.O.F.

⁴⁸ Section 27.711(9), F.S.

⁴⁹ Section 27.711, F.S.

⁵⁰ Rule 1, Rules of Executive Clemency. March 9, 2011.

⁵¹ Section 940.01, F.S. Also see Rule 4 I., Rules of Executive Clemency. March 9, 2011.

The Governor and members of the Cabinet collectively are the Board of Executive Clemency. Pursuant to the Florida Constitution, the Governor has the power to grant clemency with the consent of at least two Cabinet members.⁵² The Florida Parole Commission acts as the agent of the Board of Executive Clemency in determining whether offenders are eligible for clemency, investigating clemency applications, conducting hearings when required, and making recommendations to the Board.⁵³

Currently, ss. 27.40, 27.51, 27.511, 27.5303, and 27.5304, F.S., authorize the trial court to appoint a public defender, private attorney, or a registry attorney to represent a person who has been convicted and sentenced to death in clemency proceedings. A private court-appointed attorney is entitled to no more than \$1,000 for such representation, which is paid by the Department of Corrections (DOC).⁵⁴

Effect of the Bill

As noted above, the court is authorized to appoint a public defender, private attorney, or a registry attorney to represent a person who has been convicted and sentenced to death in clemency proceedings. The bill amends a variety of statutes to authorize the court to appoint the CCRC, rather than the public defender, in such clemency proceedings. The bill also requires the Justice Administrative Commission, rather than DOC, to pay for private court-appointed attorney representation in clemency proceedings.

Death Warrants

When a person is sentenced to death, the clerk of the sentencing court must prepare a certified copy of the record, which the sheriff is required to send to the Governor.⁵⁵ A death sentence may not be carried out until the Governor issues a death warrant, attaches it to a copy of the record, and transmits it to the warden, directing the warden to execute the sentence at a time specified in the warrant.⁵⁶

If a death sentence is not executed because of unjustified failure of the Governor to issue a warrant, or for any other unjustifiable reason, on application of the Attorney General's Office, the Florida Supreme court must issue a warrant directing the sentence to be executed during a week designated in the warrant.⁵⁷

Effect of the Bill

The bill creates another method in which a death warrant may be issued. The bill requires the clerk of the Florida Supreme Court to send a letter to the Secretary of DOC certifying that a person convicted and sentenced to death, before or after the effective date of this act, has:

- Completed such person's direct appeal and initial postconviction proceeding in state court, and habeas corpus proceeding and appeal therefrom in federal court; or
- Allowed the time permitted for filing an initial postconviction motion in state court, and habeas corpus petition in federal court to expire.

Upon receiving the letter of certification from the clerk, the Secretary must immediately issue a warrant for execution, directing the warden to execute the sentence within 180 days, at a time designated in the warrant. The Secretary may not issue more than three warrants in any 90-day period, regardless of how many letters of certification he or she receives. If in any 90-day period the Secretary receives more than three letters of certification, the Secretary must issue warrants on the three persons who were sentenced to death earliest.

Death Penalty Reform Act of 2000

During a special session in January of 2000, the Legislature passed the Death Penalty Reform Act (DPRA).⁵⁸ 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

⁵² Article IV, Section 8(a), FLA. CONST.

⁵³ Annual Report 2009-2010. Florida Parole Commission, p. 23.

⁵⁴ Section 27.5304(5), F.S.

⁵⁵ Section 922.052, F.S.

⁵⁶ *Id.*

⁵⁷ Section 922.14, F.S.

⁵⁸ Chapter 2000-3, L.O.F.

DPRA based on a separation of powers claim.^{59,60} 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.’”⁶¹ 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”⁶² 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 grants this Court the exclusive authority to set deadlines for postconviction motions.⁶³

Effect of the Bill

The bill repeals (or deletes) all of the provisions of the DPRA that were held unconstitutional by the Florida Supreme Court.

Legislative Intent

The bill provides the following legislative intent:

The legislature acknowledges the past efforts made by the judicial branch in establishing rules of criminal procedure that make the capital postconviction process fair and more efficient. The legislature also recognizes and commends the judicial branch for continuing these efforts by issuing Administrative Order AOSC13-11, which creates a Capital Postconviction Proceedings Subcommittee of the Criminal Court Steering Committee, and directs the Subcommittee to undertake a comprehensive review of capital postconviction proceedings, and to make recommendations to the Florida Supreme Court whether court rules should be amended to improve the overall efficiency of the capital postconviction process. In support of these efforts, the legislature expresses its intent that capital postconviction proceedings be conducted in accordance with court rules, and that courts strictly adhere to the timeframes and postconviction motion content requirements established therein.

Reporting Requirements

The bill amends s. 924.056, F.S., to require the Florida Supreme Court to annually report to the Legislature the status of each capital case in which a postconviction action has been filed that has been continuously pending for more than three years. The report must include the name of the state court judge assigned to the case.

This section of statute also specifies that in any capital postconviction action in which it has been determined that an attorney of record provided constitutionally deficient representation and relief has been granted as a result of such determination, the court making the determination must furnish a copy of the findings of ineffectiveness to the Florida Bar for appropriate disciplinary action. This reporting

⁵⁹ 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.

⁶⁰ *Allen v. Butterworth*, 756 So.2d 52, 59 (Fla. 2000).

⁶¹ *Id.* at 54.

⁶² *Id.* at 61 (citations omitted).

⁶³ *Id.* at 62.

requirement only applies after the highest court having jurisdiction to review such determination has issued its final order affirming the determination.

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.

B. SECTION DIRECTORY:

Section 1. Entitles the bill the "Timely Justice Act of 2013."

Section 2. Amends s. 27.40, F.S., relating to court-appointed counsel; circuit registries; minimum requirements; appointment by court.

Section 3. Amends s. 27.51, F.S., relating to duties of public defender.

Section 4. Amends s. 27.511, F.S., relating to offices of criminal conflict and civil regional counsel; legislative intent; qualifications; appointment; duties.

Section 5. Amends s. 27.5303, F.S., relating to public defenders; criminal conflict and civil regional counsel; conflict of interest.

Section 6. Amends s. 27.5304, F.S., relating to private court-appointed counsel; compensation; notice.

Section 7. Amends s. 27.7001, F.S., relating to legislative intent and findings.

Section 8. Amends s. 27.701, F.S., relating to capital collateral regional counsel.

Section 9. Amends s. 27.702, F.S., relating to duties of the capital collateral regional counsel; reports.

Section 10. Amends s. 27.703, F.S., relating to conflict of interest and substitute counsel.

Section 11. Creates s. 27.7045, F.S., relating to capital case proceedings; constitutionally deficient representation.

Section 12. Amends s. 27.7081, F.S., relating to capital postconviction public records production.

Section 13. Amends s. 27.710, F.S., relating to registry of attorneys applying to represent persons in postconviction capital collateral proceedings; certification of minimum requirements; appointment by trial court.

Section 14. Amends s. 27.711, F.S., relating to terms and conditions of appointment of attorneys as counsel in postconviction capital collateral proceedings.

Section 15. Amends s. 922.095, F.S., relating to grounds for death warrant; limitations of actions.

Section 16. Amends s. 922.052, F.S., relating to issuance of warrant of execution.

Section 17. Amends s. 922.11, F.S., relating to regulation of execution.

Section 18. Amends s. 922.12, F.S., relating to return of warrant of execution issued by Governor.

Section 19. Amends s. 922.14, F.S., relating to sentence of death unexecuted for unjustifiable reasons.

Section 20. Amends s. 924.055, F.S., relating to postconviction review in capital cases; legislative findings and intent.

Section 21. Amends s. 924.056, F.S., relating to commencement of capital postconviction actions for which sentence of death is imposed on or after January 14, 2000; limitations on actions.

Section 22. Amends s. 924.057, F.S., relating to limitation on postconviction cases in which the death sentence was imposed before January 14, 2000.

Section 23. Repeals s. 924.058, F.S., relating to capital postconviction claims; s. 924.059, F.S., relating to time limitations and judicial review in capital postconviction actions; and s. 924.395, F.S., relating to sanctions.

Section 24. Provides a severability clause.

Section 25. Appropriates \$432,170 in general revenue to the Justice Administration Commission.

Section 26. Provides an effective date of July 1, 2013.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

See "Fiscal Comments."

2. Expenditures:

See "Fiscal Comments."

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have an impact on local government revenues.

2. Expenditures:

The bill does not appear to have an impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

Death Warrants

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.

The bill creates another method in which a death warrant may be issued, that could result in executions occurring more quickly. To the extent the bill shortens the time an inmate spends on death row prior to execution, the bill would have a positive fiscal impact on DOC.

Clemency

The bill authorizes the court to appoint the CCRC, rather than the public defender, in capital clemency proceedings. The bill also requires the Justice Administrative Commission, rather than DOC, to pay for private court-appointed attorney representation in clemency proceedings. This will result in a positive fiscal impact to the public defenders and DOC, and a negative fiscal impact on the CCRC and the Justice Administrative Commission.

Capital Collateral Regional Counsel

The bill eliminates the registry attorney "pilot program" and appropriates \$432,170 in general revenue to reestablish the capital collateral regional counsel (CCRC) in the northern region of the state.

For FY 2013-14, the base budget for the South Region CCRC office is \$3 million with 32 positions and \$3.6 million with 41 positions for the Middle Region CCRC office. In FY 2011-12, 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).

Reestablishing the North Region CCRC will have an annualized fiscal impact of \$417,338 recurring on the General Revenue Fund and a \$14,832 nonrecurring impact. The funding includes \$306,832 for salaries and benefits for a director, an attorney, an investigator, and support staff; \$32,806 for routine expenses, such as telephones, office supplies, building rental, and data communication. The estimate also includes \$77,700 for due process-related expenses, such as expert witness fees, and funding for court transcripts. The \$14,832 in nonrecurring costs will go towards the purchase of telephones, office furniture, computer equipment and the costs of training staff.

The North Region CCRC would only be appointed to new cases, making the staff and funding minimal to start. The current private appointed attorneys would continue to work on the cases they have already been appointed to. Over the next few years the legislature will decrease the funding for the private appointed attorneys and increase the funding for the North Region CCRC as they are appointed to more cases. In FY 2002-03, the last year the North Region existed, the legislature appropriated \$125K for private attorneys who were appointed to conflict capital collateral cases. In FY 2002-03 the GAA appropriated \$2.7 million for the North Region, \$3.6 million for the Middle Region and \$3 million for the South Region.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On April 4, 2013, the Justice Appropriations Subcommittee adopted one amendment and one amendment to the amendment and reported the bill favorably as a committee substitute. The amendment, as amended, appropriates \$432,170 in general revenue to reestablish the capital collateral regional counsel (CCRC) in the northern region of the state.

On April 16, 2013, the Judiciary Committee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The strike-all amendment:

- Removed all of the portions of the bill that codified procedural Rules of Criminal Procedure;
- Authorized the court to appoint the CCRC, rather than a public defender, to represent a person sentenced to death in clemency proceedings;
- Prohibited registry attorneys from representing more than ten, rather than five, defendants in capital postconviction litigation at any one time;
- Required the Justice Administrative Commission, rather than the Chief Financial Officer, to be responsible for contracting with, billing, and paying registry attorneys;
- Prohibited registry attorneys and attorneys employed by the state from representing a person charged with a capital offense at trial or on direct appeal or a person sentenced to death in a postconviction proceeding if, in two separate instances, a court, in a capital postconviction proceeding, determined that such attorney provided constitutionally deficient representation and relief was granted as a result;
- Created another method in which a death warrant may be issued;
- Repealed (or deleted) all of the provisions of the DPRA that were held unconstitutional by the Florida Supreme Court; and
- Provided legislative intent.

This analysis is drafted to the committee substitute as passed by the Judiciary Committee.