

**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 Judiciary Committee

BILL: CS/SB 1690

INTRODUCER: Criminal Justice Committee and Senator Crist

SUBJECT: Capital Collateral Representation

DATE: April 7, 2008

REVISED: 04/08/08

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	Fav/CS
2.	Treadwell	Maclure	JU	Fav/1 amendment
3.			GO	
4.			JA	
5.			RC	
6.				

**Please see Section VIII. for Additional Information:**

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

**I. Summary:**

The bill revises aspects of the capital collateral representation system by changing the method of appointing and terminating capital collateral regional counsel (CCRC), clarifying that the system is a legislative entity, reorganizing the Commission on Capital Cases with regard to the membership and its responsibilities, resurrecting the northern region of the CCRC, and clarifying the Legislature's expectations of registry counsel.

This bill substantially amends the following sections of the Florida Statutes: 27.7001, 27.701, 27.702, 27.709, 27.710, and 27.711. The bill also reenacts section 27.7002, Florida Statutes.

**II. Present Situation:**

**Overview of Postconviction Proceedings in Capital Cases**

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

Second, if the U.S. Supreme Court rejects the appeal, state postconviction proceedings or collateral review begins. The capital collateral regional counsel (CCRC) or registry counsel usually represents defendants in postconviction proceedings.

State postconviction proceedings are governed by Rules 3.850, 3.851, and 3.852, Florida Rules of Criminal Procedure. Unlike a direct appeal that challenges the legal errors apparent from the trial transcripts or record on appeal, a postconviction proceeding is designed to raise claims that are collateral to what transpired in the trial court. Consequently, postconviction proceedings usually involve three categories of claims:

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

Because the consideration of these claims may require new fact-finding, Rule 3.850 and 3.851 motions are filed in the trial court that sentenced the defendant to death. Appeals from Rule 3.850 and 3.851 motions are to the Florida Supreme Court. (At this point, the CCRC or registry attorney, in a writ of habeas corpus, usually will raise the claim of ineffective assistance of appellate counsel for the direct appeal.)

The third, and what is intended to be the final stage, is federal habeas corpus, a proceeding controlled by 28 U.S.C. s. 2254(a). Once the Governor signs a death warrant, a defendant will typically file a second Rule 3.850 or 3.851 motion and a second federal habeas petition along with motions to stay the execution.

### **Commission on Capital Cases**

Current law creates the Commission on Capital Cases, which is tasked with reviewing the "administration of justice in capital collateral cases."<sup>1</sup> The Office of Legislative Services provides staff support for the commission. The commission is comprised of two members appointed by the Governor, two senators appointed by the President of the Senate, and two members of the House of Representatives appointed by the Speaker of the House of Representatives.<sup>2</sup>

---

<sup>1</sup> Section 27.709(2)(a), F.S.

<sup>2</sup> *Id.*

## Capital Collateral Regional Counsel

As described above, the CCRC represents inmates sentenced to death on collateral actions challenging the legality of the judgment and sentence in state and federal courts.<sup>3</sup> Currently, there are two CCRC offices that function independently – the middle region (Tampa)<sup>4</sup> and the southern region (Miami).<sup>5</sup>

Since 2003, postconviction representation of capital defendants in the northern region<sup>6</sup> has been provided by registry attorneys in a “pilot project” undertaken to determine whether capital collateral representation of indigent inmates could be provided in a more efficient manner.<sup>7</sup> The Auditor General conducted a performance review, which was submitted to the presiding officers of the Legislature in January 2007.<sup>8</sup> This review provided data from which a determination could be made regarding the overall cost-effectiveness and efficiency of the registry, compared to the CCRC system. The report denotes three substantive findings:

- The overall costs of delivering services were significantly higher with the CCRCs, which the review attributed to:
  - the administrative costs of the CCRC which do not factor into the cost of registry counsel;
  - the CCRCs spend more time investigating their cases, interview more experts and witnesses, and make more public records requests; and
  - the CCRCs provide an average of 355 hours of legal counsel per case, while the registry counsel spend an average of 196 hours per case.
- The overall length of time, under the direct control of counsel, for case completion in state court for the CCRCs is 2.0 years and 2.1 years for registry counsel.
- The CCRCs achieved a higher incidence of providing relief to their clients, with 14 instances over two years as compared to five for the registry. This statistic could vary from year to year, though, because of the nature of the cases. One of the legislative performance measures – number of factual issues raised – indicated that the CCRCs have a tendency to raise more factual issues than the registry attorneys.

The CCRC represents defendants sentenced within his or her region.<sup>9</sup> 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>10</sup>

It is unclear in which branch of state government the CCRC functions. Under current law, there is no definitive statement either statutorily or judicially placing the CCRC in a particular branch

---

<sup>3</sup> Section 27.702(1), F.S.

<sup>4</sup> The middle region consists of the Fifth, Sixth, Seventh, Ninth, Tenth, Twelfth, Thirteenth, and Eighteenth Judicial Circuits.

<sup>5</sup> Section 27.701(1), F.S. The southern region consists of the Eleventh, Fifteenth, Sixteenth, Seventeenth, Nineteenth, and Twentieth Judicial Circuits.

<sup>6</sup> The northern region consists of the First, Second, Third, Fourth, Eighth, and Fourteenth Judicial Circuits.

<sup>7</sup> Section 27.701(2), F.S.

<sup>8</sup> The Florida Auditor General, *Capital Collateral Regional Counsel –Pilot Project –Performance Review*, Report No. 2007-092 (January 29, 2007).

<sup>9</sup> Section 27.702(2), F.S.

<sup>10</sup> Section 27.703(1), F.S.

of state government. In an analysis of this issue, the Attorney General notes that the CCRC's predecessor, the Office of Capital Collateral Representative, was originally created within the judicial branch, then moved to the executive branch, and then finally taken out of both branches and placed on its own in order to avoid any undue influence by either of the branches.<sup>11</sup> The attorney general concluded that the CCRC more closely resembles an agency within the executive branch, but that it was beyond the attorney general's authority to reach such a conclusion, given the legislative history of the CCRC.<sup>12</sup>

### **Attorney Registry for Postconviction Representation**

The 1998 Legislature created a statewide registry of private attorneys to supplement the CCRC system and serve as a backup by alleviating any case backlog.<sup>13</sup> Backlog cases are those which are ready for the postconviction process to begin, yet no attorney is assigned to the case.

#### ***Attorney appointment***

The executive director of the Commission on Capital Cases compiles and maintains the statewide attorney registry.<sup>14</sup> An attorney from the statewide registry is appointed by the trial court that sentenced the defendant when it is notified by the executive director of the need for counsel to be appointed.<sup>15</sup>

#### ***Attorney qualifications***

To be eligible to contract with a CCRC office, be appointed on a pro bono basis by a CCRC, or for inclusion on the registry, an attorney must meet the minimum qualifications set forth in statute.<sup>16</sup> More specifically, the attorney must have at least three years experience in the practice of criminal law, and must have participated in at least five felony jury trials, five felony appeals, or five capital postconviction evidentiary hearings or any combination of at least five of these proceedings.<sup>17</sup> Additionally, a registry attorney must have attended 10 hours of continuing legal education devoted to the defense of capital cases within the year prior to his or her inclusion on the registry.<sup>18</sup>

The registry attorney must certify that, if appointed, he or she will continue such representation under the terms and conditions set forth in s. 27.711, F.S., until the sentence is reversed, reduced, or carried out, unless he or she is permitted by the trial court to withdraw.<sup>19</sup>

#### ***Attorney limitations***

Certain limitations are placed on attorneys who are appointed pursuant to the registry statute:

- An attorney may not represent more than five capital defendants at any one time;<sup>20</sup>

---

<sup>11</sup> AGO 2006-16, *Capital Collateral Regional Counsels* (April 25, 2006).

<sup>12</sup> *Id.*

<sup>13</sup> See s. 3, ch. 98-197, L.O.F.; ss. 27.710 and 27.711, F.S.

<sup>14</sup> Section 27.710(1), F.S.

<sup>15</sup> Section 27.710(5), F.S.

<sup>16</sup> Section 27.710(2), F.S.

<sup>17</sup> Section 27.704(2), F.S.

<sup>18</sup> Section 27.710(1), F.S.

<sup>19</sup> Section 27.710(3), F.S.

- An attorney may not file repetitive or frivolous pleadings that are not supported by law or facts;<sup>21</sup>
- An attorney may not represent the death-sentenced defendant during a retrial, a resentencing proceeding, a proceeding commenced under ch. 940, F.S. (executive clemency), or in a proceeding challenging a conviction or sentence other than the conviction and sentence of death for which the appointment was made;<sup>22</sup> and
- An attorney may not represent the death-sentenced defendant in any civil litigation other than habeas corpus proceedings.<sup>23</sup>

### ***Attorney contract***

Immediately after appointment by the trial court that sentenced the defendant to death, the attorney must file a notice of appearance with the trial court indicating acceptance of the appointment.<sup>24</sup> The attorney must specify that he or she will represent the defendant throughout all postconviction capital collateral proceedings, including federal habeas corpus proceedings, or until released by order of the trial court.<sup>25</sup> Additionally, the attorney must enter into a contract with the Chief Financial Officer.<sup>26</sup> The Chief Financial Officer develops the form of the contract and functions as contract manager, as well as enforces performance of the terms and conditions of the contract.<sup>27</sup>

### ***Fee and payment schedule***

A fee and payment schedule is provided by statute.<sup>28</sup> Upon approval by the trial court, and after certain stages in litigation are complete, a registry attorney is entitled to payment of \$2,500 upon accepting the appointment and filing the notice of appearance and \$100 per hour by the Chief Financial Officer, up to a maximum of:

- \$20,000 after timely filing in the trial court the capital defendant's complete original motion for postconviction relief, or if the trial court schedules a hearing on the matter that makes the filing of the motion unnecessary or otherwise disposes of the case;
- \$20,000 after the trial court issues a final order granting or denying the defendant's motion for postconviction relief;
- \$20,000 after timely filing in the Supreme Court the defendant's briefs that address the trial court's final order granting or denying the defendant's motion for postconviction relief and the state petition for writ of habeas corpus;
- \$10,000 after the trial court issues an order, pursuant to a remand from the Supreme Court, which directs the trial court to hold further proceedings on the motion for postconviction relief;
- \$4,000 after the appeal of the trial court's denial of the motion for postconviction relief and the state petition for writ of habeas corpus become final in the Supreme Court;

---

<sup>20</sup> Section 27.711(9), F.S.

<sup>21</sup> Section 27.711(10), F.S.

<sup>22</sup> Section 27.711(11), F.S.

<sup>23</sup> *Id.*

<sup>24</sup> Section 27.711(2), F.S.

<sup>25</sup> *Id.*

<sup>26</sup> Section 27.710(4), F.S.

<sup>27</sup> *Id.*

<sup>28</sup> Section 27.711(4), F.S.

- \$2,500 at the conclusion of the defendant's postconviction capital collateral proceeding in state court, after filing a petition for writ of certiorari in the U.S. Supreme Court; and
- \$5,000, if, at any time a death warrant is signed.

In addition, the attorney is authorized to hire an investigator for \$40 per hour, up to a maximum of \$15,000, to assist in the defendant's representation.<sup>29</sup> The attorney is entitled to a maximum of \$15,000 for miscellaneous expenses, such as transcript preparation, expert witnesses, and copy costs, unless the trial court finds that extraordinary circumstances exist, in which case the attorney is entitled to payment in excess of \$15,000.<sup>30</sup>

A payment of up to \$500 per fiscal year to an attorney who is actively representing a capital defendant for tuition and expenses for continuing legal education is also authorized.<sup>31</sup> The curriculum is not specified by the statute.

### ***Litigation on Attorney's Fees, Fee Payment Caps***

It should be noted that the Florida Supreme Court, in *Makemson v. Martin County*, has held that the statutory fee caps, while not facially unconstitutional, could be unconstitutional if applied "in such a manner as to curtail the court's inherent power to ensure the adequate representation of the criminally accused."<sup>32</sup> However, *Makemson* involved the representation of criminal defendants at trial and on direct appeal where there is a constitutional right to counsel, unlike postconviction proceedings where the right to counsel is by statutory authorization and not a constitutional right.

Despite the lack of a constitutional right to counsel in postconviction proceedings, the Court in *Olive v. Maas* extended the reasoning of *Makemson* to the capital collateral context.<sup>33</sup> The Court's holding in *Olive* was not based on a constitutional right to postconviction counsel; rather, it interpreted the legislative history and staff analysis to allow for fees exceeding the statutory caps in cases where unusual or extraordinary circumstances exist.<sup>34</sup>

### ***Consideration of Minimum Continuing Legal Education Standards***

The Florida Supreme Court has considered and opted not to set minimum requirements for counsel in capital postconviction cases that might vary from those enacted by the Legislature in this area. The Court, however, has shared concerns with the commission about deficiencies the Court has observed among registry counsel, and has endorsed the need for increased standards for registry counsel.<sup>35</sup>

---

<sup>29</sup> Section 27.711(5), F.S.

<sup>30</sup> Section 27.711(6), F.S.

<sup>31</sup> Section 27.711(7), F.S.

<sup>32</sup> *Makemson v. Martin County*, 491 So. 2d 1109, 1112 (Fla. 1986).

<sup>33</sup> *Olive v. Maas*, 811 So. 2d 644 (Fla. 2002)

<sup>34</sup> *Id.* at 654.

<sup>35</sup> Remarks by Justice Cantero at the Commission's February 2005 Meeting, Tallahassee, Florida; Letter to Executive Director of the Commission, February 8, 2005, Chief Justice Pariente; see Jan Pudlow, *Justice Rips Shoddy Work of Private Capital Case Lawyers*, The Florida Bar News Online (Mar. 1, 2005), at <http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/76d28aa8f2ee03e185256aa9005d8d9a/6d34a7c218ae74c385256fb0004f3311?OpenDocument> (last visited Feb. 3, 2006) (reporting on remarks of Justice Cantero and letter from Chief Justice Pariente to Roger Maas, executive director of the Commission on Capital Cases).

### III. Effect of Proposed Changes:

The bill makes several changes to the capital collateral representation system. These revisions include changing the composition and powers of the Commission on Capital Cases and resurrecting the northern region of capital collateral regional counsel (CCRC), as well as making substantial changes to procedures related to registry counsel. Following is a section-by-section analysis of the bill.

**Section 1.** This section amends s. 27.7001, F.S., to establish that the capital collateral representation system is a legislative entity. It also expresses the Legislature's finding that not all capital collateral cases are extraordinary or unusual.

**Section 2.** This section amends s. 27.701, F.S., to allow the Commission on Capital Cases (commission), rather than the Governor, to appoint the capital collateral regional counsel (CCRC) to a four-year term. The bill also increases the appointed term to four years from three years.

Under the provisions in the bill, the CCRCs will serve at the pleasure of the commission. A time limitation of 120 days is placed upon the appointment process, notwithstanding that the act of the Senate in confirming counsel may not be accomplished within that timeframe. The language in that section of current law which constrained former CCRCs from further public service in a state office for two years is deleted.

The pilot program, which replaced the northern region of the CCRC, is deleted from current law. The effect of this deletion is that the northern region is reinstated into the system.

**Section 3.** Section 27.702, F.S., is amended to clarify that CCRCs are housed with the Justice Administrative Commission (JAC) for administrative purposes.

Language referencing the pilot project is stricken. In addition, CCRCs' mandated report must be provided solely to the commission, rather than to the commission *and* the President of the Senate and the Speaker of the House of Representatives.

**Section 4.** The commission is reorganized and given additional powers in this section of the bill.

The membership of the commission is increased to seven from six members. Three members will be appointed by the Governor, and President of the Senate and the Speaker of the House of Representatives will appoint two members each. Language indicating that the legislative appointees will be members of each house from both the majority and minority party is removed. Presumably, the purpose of striking this language is to preclude legislators from improperly sitting on the commission and performing expanded tasks that constitute implementation of the laws.

In addition to the changes in commission membership, the JAC is required to provide staff support for the commission, rather than the Office of Legislative Services. It is unclear why the commission is to be housed for administrative purposes within the JAC, with the JAC providing

staff support rather than the Office of Legislative Services, when under section 1 the system is declared a *legislative* branch entity.

The commission is also given investigative and subpoena powers under this section of the bill and is authorized to request reports from state attorneys, circuit court judges, and the Office of the Attorney General. The subject matter and scope of these reports is not defined in the bill. Under these expanded powers, it appears the commission could attempt to require circuit judges to provide testimony or reports related to pending capital cases. The Legislature may wish to clarify the scope of these expanded powers.

The commission is also tasked with undertaking projects as approved by the members, and the commission may sponsor legal education programs should it choose to do so. Finally, this amendment to current law provides that CCRCs are not only appointed by the commission, but may be terminated by the commission at any time as well.

**Section 5.** The amendments to s. 27.710, F.S., affect the registry of private lawyers who represent capital collateral clients (registry attorneys) with regard to minimum requirements for qualification, appointment, contractual matters, reporting requirements, and removal from the registry.

With regard to qualifications, when the number of qualified attorneys on the registry falls below 50, the executive director of the commission is allowed to forward the application of an attorney who does not meet the minimum qualifications to the full commission for approval. Under the bill, a registry attorney must be a member of good standing with the Florida Bar and must:

- Be an active, practicing attorney with at least five years' experience in criminal law;
- Have completed 12 hours of continuing legal education programs within the previous two years devoted to defense of capital cases;
- Have tried at least nine state or federal jury trials to completion, two of which must have been capital cases, and:
  - Three of which must have been murder trials;
  - One of which must have been a murder trial and five of which must have been other felony trials; or
  - One of which must have included a postconviction evidentiary hearing and five of which must have been other felony trials.
- Have appealed one capital conviction<sup>36</sup> and appealed:
  - At least three felony convictions, one of which must have been a murder conviction;
  - At least three felony convictions and participated in one capital postconviction evidentiary hearing; or

---

<sup>36</sup> Appeal of a "capital conviction" may involve a case where the defendant was not sentenced to death (i.e., sexual battery). If it is the intent of the Legislature to require appellate experience with defendants actually sentenced to death, the Legislature may wish to modify the qualification to require experience with an appeal of "one capital conviction resulting in a sentence of death."

- At least six felony convictions, two of which must have been murder convictions; or
- Have litigated as a first chair attorney at least three capital collateral evidentiary hearings.

It is not immediately clear how the prescribed qualifications relating to appellate experience interact under the bill. (See lines 332-337.) As currently written, it appears that a person may satisfy any one of the three conditions, because they are joined by the disjunctive “or.” However, it appears that a person who satisfies the third condition (appeal of six felony convictions, two of which must have been murder convictions) would also automatically satisfy the first condition (appeal of at least three felony convictions, one of which must have been a murder conviction). Thus, it is not known if the bill intends for both of the first two conditions to be satisfied and for the third condition to be an alternative to them.

Under exceptional circumstances, an attorney who does not meet the criteria listed above may be appointed if the trial court enters a written order specifying the particular circumstances and making explicit findings that the attorney is capable of providing competent representation.

**Section 6.** This section amends s. 27.711, F.S., by providing for pro bono attorneys to receive payments, under contract with the Chief Financial Officer (CFO), for costs and investigative services.

It also provides for payment, up to \$2,500, for an attorney to review a case prior to accepting appointment and entering into the payment contract with the CFO. This payment system may have the potential for abuse by some attorneys who review files with no intention of accepting representation.

The amendment to s. 27.711, F.S., also authorizes payment of \$100 per hour, up to a maximum of \$20,000, after the final hearing on the capital defendant’s motion for postconviction relief rather than when the trial court issues a final order granting or denying the defendant’s motion. In some cases, judges take an extended amount of time in ruling on a postconviction motion after the evidentiary hearing is held. This provision will authorize payment to the attorney sooner.

The bill authorizes payment of \$100 per hour, up to a maximum of \$2,500, for the preparation of the initial federal pleading. The bill clarifies that a registry attorney who is representing at least one capital defendant is entitled to a maximum of \$500 per fiscal year for tuition and expenses for continuing legal education that pertains to the representation of capital defendants.

The bill increases the number of inmates an attorney may represent in capital postconviction litigation from 5 to 7. This includes contract cases with the CCRC, pro bono cases, and cases where the attorney is privately retained by an inmate. The CCRCs may not enter into employment contracts with attorneys who are representing more than 7 clients in the specified categories.

The bill also provides that a judge may award fees exceeding those outlined in the statutes, but when a judge intends to award fees in excess of the statutorily authorized amounts, the judge must make written findings of fact that specifically state the reasons that set the particular case

apart from other capital collateral cases. This language appears to comply with the holding in *Makemson*.

**Section 7.** This section of the bill reenacts s. 27.7002, F.S., for the purpose of incorporating amendments made by the bill to sections of the Florida Statutes that are referenced in that section.

The effective date of this bill is July 1, 2008.

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

See the discussion on *Litigation on Attorney's Fees, Fee Payment Caps*, in the Present Situation portion of the analysis.

#### **V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Court-appointed capital collateral counsel should receive certain fees more quickly than under current law, in that the bill provides for payment after the final hearing on the original motion for postconviction relief, rather than upon the issuance of the court's order on the motion.

C. Government Sector Impact:

The fiscal impact associated with reinstating the northern region of the CCRC is unknown at this time.

The Justice Administrative Commission reports that the new requirement to provide support staff to the Commission on Capital Cases will necessitate 1 FTE.

**VI. Technical Deficiencies:**

On line 339, the bill references “capital collateral evidentiary hearings.” This is inconsistent with other references in the bill to “capital postconviction evidentiary hearings.” The Legislature may wish to consider changing “collateral” to “postconviction” for consistency within the bill.

**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 Criminal Justice on March 25, 2008:**

The committee substitute:

- Establishes that the capital collateral representation system is a legislative branch entity.
- Increases the term of the CCRCs from 3 years to 4 years, provided a time limitation on the appointment process leading up to confirmation by the Senate, and eliminated the two-year prohibition on further public service by former CCRCs.
- Allows the President of the Senate and the Speaker of the House of Representatives to appoint two members each to membership of the Commission on Capital Cases, but eliminates the requirement that they be members of the Legislature.
- Establishes the vote counts by which CCRCs shall be appointed and their employment terminated.

- B. Amendments:

**Barcode 553208 by Judiciary on April 8, 2008:**

Changes a reference from “capital collateral evidentiary hearings” to “capital *postconviction* evidentiary hearings” for consistency within the bill as noted in Section VI, Technical Deficiencies.