

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCB JUAS 14-03 Counsel in Proceedings for Executive Clemency

**SPONSOR(S):** Justice Appropriations Subcommittee

**TIED BILLS:** **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Justice Appropriations Subcommittee		McAuliffe	Lloyd

### SUMMARY ANALYSIS

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.

PCB JUAS 14-03 conforms to the House of Representatives proposed Fiscal Year 2014-15 General Appropriations Act by removing the authority of the trial courts to appoint a public defender, criminal conflict and civil regional counsel or other attorneys to represent an indigent defendant in death penalty executive clemency proceedings and giving the Board of Executive Clemency the authority to appoint private counsel in such cases.

The Board of Executive Clemency may appoint private counsel to represent a person sentenced to death for relief by executive clemency at such time as the Board deems appropriate for clemency consideration. The bill requires the Board to maintain a list of private counsel available for appointment and provides that attorney compensation may not exceed \$10,000.

The bill specifies that the provision of counsel for executive clemency does not create a statutory right to counsel in such proceedings.

The Board of Executive Clemency projects that approximately 12 people will be provided counsel for executive clemency in Fiscal Year 2014-15. At \$10,000 per case, this would have a fiscal impact of \$120,000 on the Board of Executive Clemency's agent, the Parole Commission. The House of Representatives proposed FY 2014-15 GAA appropriates \$120,000 to the Parole Commission to compensate attorneys representing persons seeking executive clemency, and makes an equal reduction to the public defenders budget as the public defenders will no longer be performing this function.

## 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.<sup>1</sup> As of March 3, 2013, there were 404 people on death row in Florida – more than any other state aside from California.<sup>2</sup> On average, Florida death row inmates spend 13.22 years on death row prior to execution.<sup>3</sup> 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.<sup>4</sup> Between 1976-2012, Florida executed 74 inmates.<sup>5</sup> During the same period, Texas executed 492 inmates, Virginia executed 109 inmates, and Oklahoma executed 102 inmates.<sup>6</sup> Florida executed 2 death row inmates in 2011, and 3 in 2012.<sup>7</sup>

##### **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.<sup>8</sup> 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.

The Florida Supreme Court must render a judgment within two years of the filing of the notice of appeal.<sup>9</sup> 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.<sup>10</sup> 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

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<sup>1</sup> 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](http://www.deathpenaltyinfo.org/FactSheet.pdf) (last visited on March 3, 2013).

<sup>2</sup> 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](http://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).

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

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

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

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

<sup>7</sup> *Id.*

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

<sup>9</sup> Section 921.141(4), F.S.

<sup>10</sup> 28 U.S.C. s. 1257; Sup. Ct. R. 13.

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 relief are to the Florida Supreme Court.

#### 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)<sup>11</sup> to represent the inmate during postconviction proceedings.<sup>12</sup> If the regional counsel has a conflict of interest and the postconviction judge accepts their motion to withdraw the chief judge of the circuit court must appoint an attorney from the statewide registry<sup>13</sup> to represent the inmate in postconviction proceedings.<sup>14</sup>

Within 45 days of appointment of postconviction counsel, 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.<sup>15</sup>

Within 30 days of 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.<sup>16</sup> Within 90 days of 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, has been completed; or
- The motion has been ruled on without a hearing.<sup>17</sup>

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

#### **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.<sup>19</sup> 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.<sup>20</sup>

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.<sup>21</sup> 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.<sup>22</sup>

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<sup>11</sup> 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.

<sup>12</sup> Fla. R. Crim. Proc. 3.851(b)(1).

<sup>13</sup> 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.

<sup>14</sup> Fla. R. Crim. Proc. 3.851(b)(1); sections. 27.701(2), 27.703(1), and 27.710(5), F.S.

<sup>15</sup> Fla. R. Crim. Proc. 3.851(c)(4).

<sup>16</sup> Fla. R. Crim. Proc. 3.851(c)(1).

<sup>17</sup> Fla. R. Crim. Proc. 3.851(c)(2).

<sup>18</sup> *Id.*

<sup>19</sup> Rule 1, Rules of Executive Clemency. March 9, 2011.

<sup>20</sup> Section 940.01, F.S. Also see Rule 4 I., Rules of Executive Clemency. March 9, 2011.

<sup>21</sup> Article IV, Section 8(a), FLA. CONST.

<sup>22</sup> Annual Report 2009-2010. Florida Parole Commission, p. 23.

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.

### **Effect of the Bill**

The bill removes the authority of the trial courts to appoint a public defender, criminal conflict and civil regional counsel or other attorneys to represent an indigent defendant in death penalty executive clemency proceedings.

The bill authorizes the Board of Executive Clemency to appoint private counsel to represent a person sentenced to death for relief by executive clemency at such time as the Board deems appropriate for clemency consideration. The bill requires the Board to maintain a list of private counsel available for appointment and provides that attorney compensation may not exceed \$10,000.

The bill specifies that the provision of counsel for executive clemency does not create a statutory right to counsel in such proceedings.

#### **B. SECTION DIRECTORY:**

Section 1. Amends s. 27.51, F.S., to remove the authority of the trial courts to appoint a public defender other attorneys to represent an indigent defendant in death penalty executive clemency proceedings.

Section 2. Amends s. 27.511, F.S., to remove the authority of the trial courts to appoint a criminal conflict and civil regional counsel to represent an indigent defendant in death penalty executive clemency proceedings.

Section 3. Amends s. 27.5303, F.S., to conform to the bill.

Section 4. Amends s. 27.5304, F.S., to conform to the bill.

Section 5. Creates s. 940.031, F.S., authorizing the Board of Executive Clemency to appoint private counsel to represent an indigent defendant in death penalty executive clemency proceedings.

Section 6. Provides an effective date.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

##### **1. Revenues:**

None.

##### **2. Expenditures:**

The Board of Executive Clemency projects that approximately 12 people will be provided counsel for executive clemency in Fiscal Year 2014-2015. At \$10,000 per case, this would have a fiscal impact of \$120,000 on the Board of Executive Clemency's agent, the Parole Commission. The sum of \$120,000 for executive clemency counsel for the public defenders and criminal conflict and civil regional counsel would be transferred to the Parole Commission.

The House of Representatives proposed Fiscal Year 2014-15 GAA transfers \$120,000 of executive clemency counsel funding from the public defenders and appropriates those funds to the Parole Commission to compensate attorneys representing persons seeking executive clemency.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

None.

**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**