

047

FILED

SID J. WHITE
MAY 24 1996

CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

ROBERT LEE
MCFADDEN,

Petitioner,

v.

CASE NO. 87,112

FOURTH DISTRICT
COURT OF APPEAL,

Respondent.

COMMENTS ON PROPOSED RULE

The Court has promulgated an emergency amendment to Florida Rule of Appellate Procedure 9.430 and invited comments prior to 27 May 1996. The gist of the emergency amendment is to provide an alternate method under which parties seeking the right to appeal without payment of costs could move the appellate court for an indigency determination. The motion would be supported by an affidavit "showing the party's inability either to pay fees and costs or to give security therefor" and "shall be sufficient without more for the court to rule on the appellant's indigency unless an objection is filed." If an objection is filed, the appellate court may either determine the issue or remand to the lower tribunal for determination. The following comments are submitted.

This office has reviewed the comments and recommendations of the District Court of Appeal, First District, State of Florida contained in its MOTION FOR LEAVE TO APPEAR AND TO STAY ENFORCEMENT OF MANDATE filed on 1 May 1996. Those comments are well-placed, particularly in pointing out the difficulty that appellate courts will have in making such determinations without the benefit of fact-finding and relevant records. In those instances where the appeal is pursued by a prisoner against the State of Florida in either a civil or criminal proceeding, the Office of the Attorney General would presumably represent the respondent/appellee State or its officers. As a practical matter, it would be difficult for counsel for the State to make an intelligent determination of whether to oppose the motion for indigency without investigating the financial status of the prisoner petitioner/appellant. The presumption of indigency which the amended rule establishes and the placing of the burden on the appellate court or this office to refute the allegations in the affidavit are similar to the problem which this Court addressed in State v. District Court of Appeal, First District, 569 So. 2d 439, 442 (Fla. 1990): both the appellate court and counsel for the State "are simply without knowledge concerning the allegations of fact" and "if the petitioner alleges a prima

facie case, the appellate court must then appoint a commissioner to take testimony and make findings and recommendations to the appellate court." This suggests that the emergency amendment can only work if the appellate court and opposing counsel accept the affidavit at face value without challenge or investigation. The State suggests that personal affidavits from criminal prisoners or other interested parties should not be the basis for the waiver of laws concerning the showing and determination of indigency.

There are at least two other points which the Court should consider.

1. The Florida Legislature has enacted Senate Bill 1316 which contains numerous provisions severely tightening the procedures and requirements concerning the certification of indigency. The emergency amendment appears to move in precisely the opposite direction of this legislation and appears to be contrary to its letter and spirit. The amendment to the procedural rule should be reviewed in light of this substantive legislation.

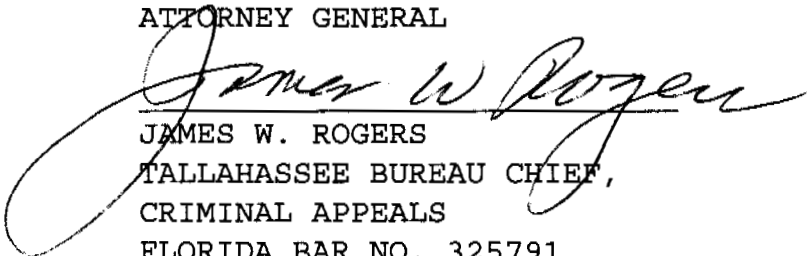
2. There has also been widespread concern about frivolous legal actions initiated by prisoners. In response, the Florida Legislature has adopted House Bill 37. The language of the act

and the statement of legislative intent make it unmistakably clear that the Legislature does not favor these frivolous actions¹ and intends to restrict the abuse by, among other provisions, tightening the requirements for obtaining certifications of indigency and the waiver of fees and costs. Again, the emergency amendment appears to be contrary to the letter and spirit of this act. [Copies of the referenced legislation are attached for convenience.]

For the above reasons, the State recommends that the emergency amendment be withdrawn and that rule 9.430 not be amended.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER
[AGO L96-1-1290]

¹A similar concern resulted in the enactment of the Criminal Appeal Reform Act of 1996. House Bill 211.

CERTIFICATE OF SERVICE

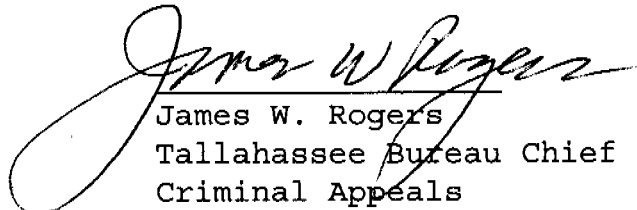
I HEREBY CERTIFY that a true and correct copy of the foregoing Motion has been furnished by U.S. Mail to the following list of persons, this 24th day of May, 1996.

Robert Lee McFadden
Jackson Correctional Institution
Post Office Box 4900
Malone, Florida 32445-4900

Chief Judge Bobby W. Gunther
Fourth District Court of Appeal
Post Office Box 3315
West Palm Beach, Florida 33402-3315

Marilyn N. Beuttenmuller, Clerk
Fourth District Court of Appeal
Post Office Box 3315
West Palm Beach, Florida 33402-3313

Acting Chief Judge Richard W. Ervin III
First District Court of Appeal
301 Martin Luther King Jr. Boulevard
Tallahassee, Florida 32399-1950


James W. Rogers
Tallahassee Bureau Chief
Criminal Appeals

[A:EMRULE --- 5/24/96,1:25 pm]

ENROLLED

SB 1316

First Engrossed

1 A bill to be entitled
2 An act relating to indigency in criminal
3 proceedings; amending s. 27.52, F.S.; revising
4 guidelines, procedures, and time limits
5 relating to determination of indigency;
6 imposing a fee upon an accused person, or
7 parent or legal guardian of a dependent accused
8 person, who asserts indigency and requests
9 representation by the public defender;
10 providing for disposition of the fees;
11 providing for an affidavit asserting indigency
12 for representation; providing for specified
13 court determinations with respect to indigency;
14 amending s. 27.56, F.S., relating to lien for
15 payment of attorney's fees or costs; providing
16 conforming language; amending s. 39.052, F.S.,
17 relating to transfer of a child for prosecution
18 as an adult, to conform; reenacting ss.
19 27.51(1), 27.562, 39.041, 947.18, and
20 948.03(1)(1), F.S., relating to duties of
21 public defender, disposition of certain funds
22 into the county fine and forfeiture fund, a
23 child's right to counsel, conditions of parole,
24 and terms and conditions of probation or
25 community control, to incorporate said
26 amendments in references; providing an
27 appropriation; providing an effective date.
28
29 Be It Enacted by the Legislature of the State of Florida;
30
31

1316

CODING: Words stricken are deletions; words underlined are additions.

SB 1316

First Engrossed

1 Section 1. Section 27.52, Florida Statutes, is amended
2 to read:
3 27.52 Determination of indigency.--
4 (1)(a) The determination of indigency of any accused
5 person shall be made by the court, and may be made at any
6 stage of the proceedings. ~~Any accused person claiming~~
7 ~~indigency shall file with the court an affidavit which shall~~
8 ~~contain the factual information required in subsection (2).~~
9 (b) An accused person, or if applicable a parent or
10 legal guardian of an accused minor or an accused adult
11 tax-dependent person, asserting indigency and requesting
12 representation by the public defender, shall file with the
13 court a completed affidavit containing the factual information
14 required under subsection (2) and stating that the affidavit
15 is signed under oath and under penalty of perjury.
16 (c) A fee of \$40 shall be paid into the county
17 depository at the time the affidavit is filed. However, the
18 affidavit shall be accepted without the fee if the court
19 finds, after reviewing the financial information contained in
20 the affidavit, that the fee should be reduced, waived, or
21 assessed at the disposition.
22 (d) If the court finds that the accused person
23 applying for representation appears to be indigent based on
24 the factual information provided, the court shall appoint the
25 public defender to provide representation. If the fee is not
26 paid prior to the disposition of the case, the sentencing
27 judge shall be advised of this fact and may:
28 1. Assess the fee as part of the sentence or as a
29 condition of probation; or
30 2. Assess the fee pursuant to s. 27.56.
31

1316

2
CODING: Words stricken are deletions; words underlined are additions.

1 Notwithstanding any provision of law or local order to the
 2 contrary, the collecting entity shall assign the first \$40 to
 3 the Indigent Criminal Defense Trust Fund, if created by law;
 4 otherwise it shall be deposited in the General Revenue Fund.
 5 In no event should a person who is found to be indigent be
 6 refused counsel for failure to pay the fee.

7 (e) The fee shall be remitted into the county
 8 depository and transferred to the Indigent Criminal Defense
 9 Trust Fund, if created by law; otherwise it shall be deposited
 10 in the General Revenue Fund, for the purpose of supplementing
 11 the general revenue funds appropriated to public defenders.

12 (f) The affidavit must contain the following financial
 13 information and calculations as to the accused person's
 14 income:

15 1. Net income.--Total salary and wages, minus
 16 deductions required by law, including court-ordered support
 17 payments.

18 2. Other income.--Including, but not limited to,
 19 social security benefits, union funds, veterans' benefits,
 20 workers' compensation, other regular support from absent
 21 family members, public or private employee pensions,
 22 unemployment compensation, dividends, interest, rent, trusts,
 23 and gifts.

24 3. Assets.--Including, but not limited to, cash,
 25 savings accounts, bank accounts, stocks, bonds, certificates
 26 of deposit, equity in real estate, and equity in a boat or a
 27 motor vehicle or in other tangible property.

28 (g) The income of an accused minor or an accused adult
 29 tax-dependent person who is substantially supported by a
 30 parent or parents or by a guardian, or who continues to be
 31 claimed as a dependent for tax purposes, shall include the

1316

3

CODING: Words stricken are deletions; words underlined are additions.

1 income of that dependent person's parent or parents or
 2 guardian, except a parent or guardian who has an adverse
 3 interest in the proceeding.

4 (2)(a) After reviewing the affidavit and questioning
 5 the accused person, the court shall make one of the following
 6 three determinations:

7 1. The accused person is indigent.

8 2. The accused person is indigent, but able to
 9 contribute.

10 3. The accused person is not indigent. A person is
 11 indigent for the purposes of this part if he or she is unable
 12 to pay for the services of an attorney, including costs of
 13 investigation, without substantial hardship to the person or
 14 his or her family.

15 (b) An accused person, or an accused minor's or
 16 accused adult tax-dependent person's parent or guardian, is
 17 indigent if:

18 1. The income of the person is equal to or below 125
 19 percent of the then-current federal poverty guidelines
 20 prescribed for the size of the household of the accused by the
 21 United States Department of Health and Human Services or if
 22 the person is receiving Aid to Families with Dependent
 23 Children (AFDC), poverty-related veterans' benefits, or
 24 Supplemental Security Income (SSI); or

25 2. The person is unable to pay for the services of an
 26 attorney without substantial hardship to his or her family.

27 (c) An accused person, or an accused minor's or
 28 accused adult tax-dependent person's parent or guardian, is
 29 indigent but able to contribute if the person has income of
 30 more than 125 percent and less than 250 percent of the
 31 then-current federal poverty income guidelines prescribed for

1316

4

CODING: Words stricken are deletions; words underlined are additions.

1 the size of the household of the person by the United States
2 Department of Health and Human Services.

3 (d)(b) In determining whether a defendant is indigent,
4 the court shall determine whether any of the following facts
5 exist, and the existence of any such fact shall create a
6 presumption that the defendant is not indigent:

7 1. The defendant has been released on bail in the
8 amount of \$5,000 or more.

9 ~~2--The defendant has no dependents and his or her~~
10 ~~gross income exceeds \$100 per week, or, if the defendant has~~
11 ~~dependents, his or her gross income exceeds \$100 per week plus~~
12 ~~\$20 per week for each of the first two dependents of the~~
13 ~~defendant and \$10 per week for each additional dependent.~~

14 ~~3--The defendant owns cash in excess of \$500.~~

15 (c) The court shall also consider the following
16 additional circumstances in determining whether a defendant is
17 indigent:

18 ~~1--The probable expense and burden of defending the~~
19 ~~case;~~

20 2. The defendant owns ownership of, or has equity in,
21 any intangible or tangible personal property or real property
22 or the expectancy of an interest in any such property, by the
23 defendant; and

24 3. The defendant retained private counsel immediately
25 before or after filing the affidavit asserting indigency
26 pursuant to subsection (1). ~~The amount of debts owed by~~
27 ~~defendant or debts that might be incurred by the defendant~~
28 ~~because of illness or other misfortunes within the family.~~

29 (e)(d) A nonindigent parent or legal guardian of an
30 accused minor or an accused adult tax-dependent a-dependent
31 person under the age of 18 years shall furnish the minor or

1316

5

CODING: Words stricken are deletions; words underlined are additions.

1 dependent such person with the necessary legal services and
2 costs incident to a delinquency proceeding or, upon transfer
3 of such person for criminal prosecution as an adult pursuant
4 to s. 39.052, a criminal prosecution, in which the person has
5 a right to legal counsel under the Constitution of the United
6 States or the Constitution of the State of Florida. The
7 failure of a parent or legal guardian to furnish legal
8 services and costs under this section shall not bar the
9 appointment of legal counsel pursuant to s. 27.53. When the
10 public defender, a special assistant public defender appointed
11 pursuant to s. 27.53(2), or appointed private legal counsel is
12 appointed to represent an accused minor or an accused adult
13 tax-dependent person a-minor in any proceeding in circuit
14 court or in a criminal proceeding in any other court, the
15 parents or the legal guardian ~~of the minor~~ shall be liable for
16 the fees and costs of such representation even if the person
17 is a minor being tried as an adult in an amount not to exceed
18 \$1,250. Liability for the costs of such representation may be
19 imposed in the form of a lien against the property of the
20 nonindigent or indigent but able to contribute parents or the
21 legal guardian of the accused minor or accused adult
22 tax-dependent person, which lien shall be enforceable as
23 provided in s. 27.56 or s. 27.561. The court shall determine
24 the amount of the obligation; and, in determining the amount
25 of the obligation, the court shall follow the procedure
26 outlined by this section.

27 (3) If the trial court determines shall determine and
28 adjudge, within 2 years 1-year after the determination of
29 indigency, that any accused was erroneously or improperly
30 determined to be indigent, the state attorney shall may, in
31 the name of the state, proceed against such accused for the

1316

6

CODING: Words stricken are deletions; words underlined are additions.

1 reasonable value of the services rendered to the accused and
 2 including all costs paid by the state or county in his or her
 3 behalf. Any amount recovered shall be remitted to the board
 4 of county commissioners of the county wherein the accused was
 5 tried. The funds shall be deposited in the fine and forfeiture
 6 fund of that county and be used to defray the expenses
 7 incurred by the county with respect to the defense of
 8 defendants in criminal prosecutions.

9 Section 2. Subsections (1), (2), (3), and (4) of
 10 section 27.56, Florida Statutes, are amended to read:

11 27.56 Assistance; lien for payment of attorney's fees
 12 or costs.--

13 (1)(a) The court having jurisdiction over any
 14 defendant who has been determined to be guilty of a criminal
 15 act by a court or jury or through a plea of guilty or nolo
 16 contendere and who has received the assistance of the public
 17 defender's office or a special assistant public defender, or
 18 the services of a private attorney appointed pursuant to the
 19 Florida Statutes or the Florida Rules of Criminal Procedure,
 20 but is not indigent under s. 27.52(2), or has been determined
 21 indigent but able to contribute, may assess attorney's fees
 22 and costs against the defendant. At the sentencing hearing,
 23 ~~or-at-such-stage-in-the-proceedings-as~~ the court may deem
 24 ~~appropriate-the-public-defender-the-special-assistant-public~~
 25 ~~defender-or-the-private-attorney-representing-such-defendant~~
 26 shall ~~move-the-court-to~~ assess attorney's fees and costs
 27 against the defendant and shall determine the appropriate
 28 amount and method of payment. Such costs may include the cost
 29 of depositions; cost of transcripts of depositions, including
 30 the cost of defendant's copy, which transcripts are certified
 31 by the defendant's attorney as having served a useful purpose

1316

CODING: Words stricken are deletions; words underlined are additions.

1 in the disposition of the case; investigative costs; witness
 2 fees; the cost of psychiatric examinations; or other
 3 reasonable costs specially incurred by the county for the
 4 defense of the defendant in criminal prosecutions within the
 5 county. Costs shall not include expenses inherent in providing
 6 a constitutionally guaranteed jury trial or expenditures in
 7 connection with the maintenance and operation of government
 8 agencies that must be made by the public irrespective of
 9 specific violations of law. Any cost assessed pursuant to
 10 this paragraph shall be reduced by any amount assessed against
 11 a defendant pursuant to s. 27.3455.

12 (b) Upon entering a judgment of conviction, the trial
 13 court may order the defendant to pay the costs assessed by the
 14 court in full, or within a time certain as set by the court,
 15 after the judgment of conviction becomes final.

16 (c) After assessment of the attorney's fees and costs,
 17 the court may order the defendant to pay the attorney's fees
 18 in full or in installments, at the time or times specified.
 19 The court may order payment of the assessed attorney's fees as
 20 a condition of probation, of suspension of sentence, or of
 21 withholding the imposition of sentence.

22 (2)(a) When payment of attorney's fees or costs has
 23 been ordered by the court, there is hereby created in the name
 24 of the county in which such assistance was rendered a lien,
 25 enforceable as hereinafter provided, upon all the property,
 26 both real and personal, of any person who:

- 27 1. Has received any assistance from any public
 28 defender of the state, from any special assistant public
 29 defender, or from any appointed private legal counsel; or
- 30 2. Is a parent of an accused a minor or an accused
 31 adult tax-dependent person who is being, or has been,

1316

CODING: Words stricken are deletions; words underlined are additions.

1 represented by any public defender of the state, by any
2 special assistant public defender, or by any appointed private
3 legal counsel.

4
5 Such lien shall constitute a claim against the
6 defendant-recipient or parent and his or her estate,
7 enforceable according to law, in an amount to be determined by
8 the court in which such assistance was rendered.

9 (b) Immediately after the issuance of an order for the
10 payment of attorney's fees or costs, a judgment showing the
11 name and residence of the defendant-recipient or parent shall
12 be filed for record in the office of the clerk of the circuit
13 court in the county where the defendant-recipient or parent
14 resides and in each county in which such defendant-recipient
15 or parent then owns or later acquires any property. Such
16 judgments shall be enforced on behalf of the county by the
17 board of county commissioners of the county in which
18 assistance was rendered.

19 (3) In lieu of the procedure above described, the
20 court is authorized to require that the defendant-recipient of
21 the services of the public defender, special assistant public
22 defender, or appointed private legal counsel, or that the
23 parent of an accused a minor or an accused adult tax-dependent
24 person who has received such services, execute a lien upon his
25 or her real or personal property, presently owned or
26 after-acquired, as security for the debt created hereby. Such
27 lien shall be recorded in the public records of the county at
28 no charge by the clerk of the circuit court and shall be
29 enforceable in the same manner as a mortgage.

30 (4) The board of county commissioners of the county
31 wherein the defendant-recipient was tried or received the

1316

9

CODING: Words stricken are deletions; words underlined are additions.

1 services of a public defender, special assistant public
2 defender, or appointed private legal counsel shall is
3 authorized to enforce, satisfy, compromise, settle,
4 subordinate, release, or otherwise dispose of any debt or lien
5 hereby imposed under this section. A defendant-recipient or
6 parent, who has been ordered to pay attorney's fees or costs
7 and who is not in willful default in the payment thereof, may,
8 at any time, petition the court which entered the order for
9 remission of the payment of attorney's fees or costs or of any
10 unpaid portion thereof. If it appears to the satisfaction of
11 the court that payment of the amount due will impose manifest
12 hardship on such person or his or her immediate family, the
13 court may remit all or part of the amount due in attorney's
14 fees or costs or may modify the method of payment.

15 Section 3. Paragraph (d) is added to subsection (3) of
16 section 39.052, Florida Statutes, to read:

17 39.052 Hearings.--

18 (3) TRANSFER OF A CHILD FOR PROSECUTION AS AN ADULT.--

19 (d) Notwithstanding any provision of this section or
20 any other law to the contrary, if a child is transferred for
21 criminal prosecution pursuant to this section, a nonindigent
22 or indigent but able to contribute parent or legal guardian of
23 the child pursuant to s. 27.52 is liable for necessary legal
24 fees and costs incident to the criminal prosecution of the
25 child as an adult.

26 Section 4. For the purpose of incorporating the
27 amendments to sections 27.52 and 27.56, Florida Statutes, in
28 references thereto, the sections or subdivisions of Florida
29 Statutes set forth below are reenacted to read:

30 27.51 Duties of public defender.--

31

10

1316

CODING: Words stricken are deletions; words underlined are additions.

1 (1) The public defender shall represent, without
 2 additional compensation, any person who is determined by the
 3 court to be indigent as provided in s. 27.52 and who is:
 4 (a) Under arrest for, or is charged with, a felony;
 5 (b) Under arrest for, or is charged with, a
 6 misdemeanor, a violation of chapter 316 which is punishable by
 7 imprisonment, criminal contempt, or a violation of a municipal
 8 or county ordinance in the county court, unless the court,
 9 prior to trial, files in the cause a statement in writing that
 10 the defendant will not be imprisoned if he or she is
 11 convicted;
 12 (c) Alleged to be a delinquent child pursuant to a
 13 petition filed before a circuit court; or
 14 (d) Sought by petition filed in such court to be
 15 involuntarily placed as a mentally ill person or involuntarily
 16 admitted to residential services as a person with
 17 developmental disabilities.

18 27.562 Disposition of funds.--All funds collected
 19 pursuant to s. 27.56 shall be remitted to the board of county
 20 commissioners of the county wherein the defendant-recipient
 21 was tried. Such funds shall be placed in the fine and
 22 forfeiture fund of that county to be used to defray the
 23 expenses incurred by the county in defense of criminal
 24 prosecutions. All judgments entered pursuant to the
 25 provisions of this act shall be in the name of the county in
 26 which the judgment was rendered.

27 39.041 Right to counsel.--
 28 (1) A child is entitled to representation by legal
 29 counsel at all stages of any proceedings under this part. If
 30 the child and the parents or other legal guardian are indigent
 31 and unable to employ counsel for the child, the court shall

1 appoint counsel pursuant to s. 27.52. Determination of
 2 indigency and costs of representation shall be as provided by
 3 ss. 27.52 and 27.56. Legal counsel representing a child who
 4 exercises the right to counsel shall be allowed to provide
 5 advice and counsel to the child at any time subsequent to the
 6 child's arrest, including prior to a detention hearing while
 7 in secure detention care. A child shall be represented by
 8 legal counsel at all stages of all court proceedings unless
 9 the right to counsel is freely, knowingly, and intelligently
 10 waived by the child. If the child appears without counsel,
 11 the court shall advise the child of his or her rights with
 12 respect to representation of court-appointed counsel.

13 (2) If the parents or legal guardian of an indigent
 14 child are not indigent but refuse to employ counsel, the court
 15 shall appoint counsel pursuant to s. 27.52(2)(d) to represent
 16 the child at the detention hearing and until counsel is
 17 provided. Costs of representation shall be assessed as
 18 provided by ss. 27.52(2)(d) and 27.56. Thereafter, the court
 19 shall not appoint counsel for an indigent child with
 20 nonindigent parents or legal guardian but shall order the
 21 parents or legal guardian to obtain private counsel. A parent
 22 or legal guardian of an indigent child who has been ordered to
 23 obtain private counsel for the child and who willfully fails
 24 to follow the court order shall be punished by the court in
 25 civil contempt proceedings.

26 (3) An indigent child with nonindigent parents or
 27 legal guardian may have counsel appointed pursuant to s.
 28 27.52(2)(d) if the parents or legal guardian have willfully
 29 refused to obey the court order to obtain counsel for the
 30 child and have been punished by civil contempt and then still
 31 have willfully refused to obey the court order. Costs of

1 representation shall be assessed as provided by ss.
 2 27.52(2)(d) and 27.56.
 3 947.18 Conditions of parole.--No person shall be
 4 placed on parole merely as a reward for good conduct or
 5 efficient performance of duties assigned in prison. No person
 6 shall be placed on parole until and unless the commission
 7 finds that there is reasonable probability that, if he is
 8 placed on parole, he will live and conduct himself as a
 9 respectable and law-abiding person and that his release will
 10 be compatible with his own welfare and the welfare of society.
 11 No person shall be placed on parole unless and until the
 12 commission is satisfied that he will be suitably employed in
 13 self-sustaining employment or that he will not become a public
 14 charge. The commission shall determine the terms upon which
 15 such person shall be granted parole. If the person's
 16 conviction was for a controlled substance violation, one of
 17 the conditions must be that the person submit to random
 18 substance abuse testing intermittently throughout the term of
 19 supervision, upon the direction of the correctional probation
 20 officer as defined in s. 943.10(3). In addition to any other
 21 lawful condition of parole, the commission may make the
 22 payment of the debt due and owing to the state under s. 960.17
 23 or the payment of the attorney's fees and costs due and owing
 24 to a county under s. 27.56 a condition of parole subject to
 25 modification based on change of circumstances.
 26 948.03 Terms and conditions of probation or community
 27 control.--
 28 (1) The court shall determine the terms and conditions
 29 of probation or community control. Conditions specified in
 30 paragraphs (a) through and including (m) do not require oral
 31 pronouncement at the time of sentencing and may be considered

1316

1 standard conditions of probation. Conditions specified in
 2 paragraphs (a) through and including (m) and (2)(a) do not
 3 require oral pronouncement at sentencing and may be considered
 4 standard conditions of community control. These conditions
 5 may include among them the following, that the probationer or
 6 offender in community control shall:
 7 (1) Pay any attorney's fees and costs assessed under
 8 s. 27.56, subject to modification based on change of
 9 circumstances.
 10 Section 5. There is hereby appropriated an amount
 11 sufficient to provide each judicial circuit with an indigency
 12 examiner to implement the provisions of this act.
 13 Section 6. This act shall take effect January 1, 1997.
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25
 26
 27
 28
 29
 30
 31

1316

+{ }+ represents underlined; words underlined are additions

-{ }- represents stricken; words stricken are deletions

House Bill hb0037er

Corresponding Bill Information and History

ENROLLED

1996 Legislature

CS/HB 37

An act relating to legal actions brought by prisoners; amending s. 57.081, F.S.; providing that prisoners are not entitled to receive without charge certain services of courts, sheriffs, and clerks; creating s. 57.085, F.S.; providing circumstances for prepayment or waiver of court costs and fees of indigent prisoners; creating s. 92.351, F.S.; prohibiting prisoners from submitting nondocumentary physical evidence without court authorization; providing guidelines for inspection and forwarding by corrections or detention facilities of certain packages mailed to courts by prisoners; amending s. 95.11, F.S.; providing limits for filing of petitions and actions brought by or on behalf of prisoners; creating s. 944.279, F.S.; providing for loss of gain-time for filing frivolous or malicious actions; amending s. 944.28, F.S.; specifying

5/11/96

6:30:00 PM

that gain-time is subject to forfeiture for
bringing frivolous or malicious actions;
providing an effective date.

WHEREAS, frivolous inmate lawsuits congest civil court
dockets and delay the administration of justice for all
litigants, and

WHEREAS, each year self-represented indigent inmates in
Florida's jails and prisons file an ever-increasing number of
frivolous lawsuits at public expense against public officers
and employees, and

1

ENROLLED

1996 Legislature

CS/HB 37

WHEREAS, state and local governments spend millions of
dollars each year processing, serving, and defending frivolous
lawsuits filed by self-represented indigent inmates, and

WHEREAS, the overwhelming majority of civil lawsuits
filed by self-represented indigent inmates are frivolous and
malicious actions intended to embarrass or harass public
officers and employees, and

WHEREAS, under current law frivolous inmate lawsuits
are dismissible by the courts only after considerable
expenditure of precious taxpayer and judicial resources, NOW,
THEREFORE,

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (1) of section 57.081, Florida Statutes, is amended to read:

57.081 Costs; right to proceed where prepayment of costs waived.--

(1) Any indigent person+{(, except a prisoner as defined in s. 57.085,)+ who is a party or intervenor in any judicial or administrative agency proceeding or who initiates such proceeding shall receive the services of the courts, sheriffs, and clerks, with respect to such proceedings, without charge. Such services are limited to filing fees, service of process, certified copies of orders or final judgments, a single photocopy of any court pleading, record, or instrument filed with the clerk, examining fees, mediation services and fees, court-appointed counsel fees, subpoena fees and services, service charges for collecting and disbursing funds, and any other cost or service arising out of pending litigation. In any appeal from an administrative agency

2

ENROLLED

1996 Legislature

CS/HB 37

decision, for which the clerk is responsible for preparing the transcript, the clerk shall waive the cost of preparing the transcripts and the cost for copies of any exhibits in the record. No prepayment of costs to any judge, clerk, or sheriff is required in any action when the party has obtained from the clerk in each proceeding a certification of indigency, based on an affidavit of the applicant claiming that the applicant is indigent and unable to pay the charges otherwise payable by

law to any of such officers and providing the details of the applicant's financial condition. However, when the person is represented by an attorney, the person need not file an affidavit in order to be exempt from payment of charges under this subsection. A represented person is exempt from charges under this subsection-({,})- if the attorney of such person files a written certificate, signed by the attorney, certifying that the attorney has made an investigation to ascertain the financial condition of the client and has found the client to be indigent; that the attorney has investigated the nature of the applicant's position and in the attorney's opinion it is meritorious as a matter of law; and that the attorney has not been paid or promised payment of any remuneration for services and intends to act as attorney for +{the)+ applicant without compensation. On the failure or refusal of the clerk to issue a certificate of indigency, the applicant is entitled to a review of the application for the certificate by the court having jurisdiction of the cause of action.

Section 2. ~~Section 57.085~~, Florida Statutes, is created to read:

+{57.085 Waiver of prepayment of court costs and fees for indigent prisoners.--}+

3

ENROLLED

1996 Legislature

CS/HB 37

+{(1) For the purposes of this section, the term "prisoner" means a person who has been convicted of a crime

5/11/96

6:30:10 PM

and is incarcerated for that crime or who is being held in custody pending extradition or sentencing.)+

+(2) When a prisoner who is intervening in or initiating a judicial proceeding seeks waiver of prepayment of court costs and fees because of indigency, the prisoner must file an affidavit of indigency with the appropriate clerk of the court. The affidavit must contain complete information about the prisoner's identity; the nature and amount of the prisoner's income; all real property owned by the prisoner; all tangible and intangible property worth more than \$100 which is owned by the prisoner; the amount of cash held by the prisoner; the balance of any checking, savings, or money-market account held by the prisoner; the prisoner's dependents, including their names and ages; the prisoner's debts, including the name of each debtor and the amount owed to each debtor; and the prisoner's monthly expenses. The prisoner must certify in the affidavit whether the prisoner has been adjudicated indigent under this section, certified indigent under s. 57.081, or authorized to proceed as an indigent under 28 U.S.C. s. 1915 by a federal court. The prisoner must attach to the affidavit a photocopy of the prisoner's trust account records for the preceding 6 months or for the length of the prisoner's incarceration, whichever period is shorter. The affidavit must contain the following statements: "I am unable to pay court costs and fees. Under penalty of perjury, I swear or affirm that all statements in this affidavit are true and complete.")+

+(3) Before a prisoner may receive a waiver of prepayment of any court costs and fees for an action brought

ENROLLED

1996 Legislature

CS/HB 37

under this section, the court must review the affidavit of indigency and adjudicate the prisoner indigent.)+

+{(4) When a court adjudicates a prisoner indigent but concludes, from the affidavit of indigency or other information, that the prisoner is able to pay part of the court costs and fees required by law, the court shall order the prisoner to make, prior to service of process, an initial partial payment of those court costs and fees. The initial partial payment must total at least 20 percent of the average monthly balance of the prisoner's trust account for the preceding 6 months or for the length of the prisoner's incarceration, whichever period is shorter.)+

+{(5) When a court adjudicates a prisoner indigent under this section, the court shall order the prisoner to make monthly payments of no less than 20 percent of the balance of the prisoner's trust account as payment of court costs and fees. When a court orders such payment, the Department of Corrections or the local detention facility shall place a lien on the inmate's trust account for the full amount of the court costs and fees, and shall withdraw money maintained in that trust account and forward the money, when the balance exceeds \$10, to the appropriate clerk of the court until the prisoner's court costs and fees are paid in full.)+

+{(6) Before an indigent prisoner may intervene in or initiate any judicial proceeding, the court must review the prisoner's claim to determine whether it is legally sufficient to state a cause of action for which the court has

jurisdiction and may grant relief. The court shall dismiss all or part of an indigent prisoner's claim which:)+

+{(a) Fails to state a claim for which relief may be granted;)+

5

ENROLLED

1996 Legislature

CS/HB 37

+{(b) Seeks monetary relief from a defendant who is immune from such relief;)+

+{(c) Seeks relief for mental or emotional injury where there has been no related allegation of a physical injury; or)+

+{(d) Is frivolous, malicious, or reasonably appears to be intended to harass one or more named defendants.)+

+{(7) A prisoner who has twice in the preceding 3 years been adjudicated indigent under this section, certified indigent under s. 57.081, or authorized to proceed as an indigent under 28 U.S.C. s. 1915 by a federal court may not be adjudicated indigent to pursue a new suit, action, claim, proceeding, or appeal without first obtaining leave of court. In a request for leave of court, the prisoner must provide a complete listing of each suit, action, claim, proceeding, or appeal brought by the prisoner or intervened in by the prisoner in any court or other adjudicatory forum in the preceding 5 years. The prisoner must attach to a request for leave of court a copy of each complaint, petition, or other document purporting to commence a lawsuit and a record of disposition of the proceeding.)+

+{(8) In any judicial proceeding in which a prisoner has been adjudicated indigent and has been granted a full or partial waiver of court costs and fees, the court may at any time dismiss the prisoner's action, in whole or in part, upon a finding that:)+

+{(a) The prisoner's claim of indigency is false or misleading;)+

+{(b) The prisoner provided false or misleading information regarding another judicial or administrative proceeding in which the prisoner was a party;)+

6

ENROLLED

1996 Legislature

CS/HB 37

+{(c) The prisoner failed to pay court costs and fees assessed under this section despite having the ability to pay; or)+

+{(d) The prisoner's action or a portion of the action is frivolous or malicious.)+

+{(9) In determining whether an action is frivolous or malicious, the court may consider whether:)+

+{(a) The prisoner's claim has no arguable basis in law or fact;)+

+{(b) The prisoner's claim reasonably appears intended solely to harass a party filed against;)+

+{(c) The prisoner's claim is substantially similar to a previous claim in that it involves the same parties or arises from the same operative facts as a previous claim;)+

+{(d) The prisoner's claim has little likelihood of

success on its merits; or

(e) The allegations of fact in the prisoner's claim are fanciful or not credible.)+

+{(10) This section does not apply to a criminal proceeding or a collateral criminal proceeding.)+

Section 3. Section 92.351, Florida Statutes, is created to read:

+{92.351 Prohibition against prisoners submitting nondocumentary physical evidence without authorization of court.--)+

+{(1) No prisoner as defined by s. 57.085 who is a party to a judicial proceeding may submit evidence or any other item that is not in paper document form to a court or clerk of court without first obtaining authorization from the court. This prohibition includes, but is not limited to, all nondocumentary evidence or items offered in support of a

7

ENROLLED

1996 Legislature

CS/HB 37

motion, pleading, or other document filed with the court.

This prohibition does not preclude a prisoner who is appearing in person or through counsel before a court at a trial or hearing from submitting physical evidence to the court at the appropriate time.)+

+{(2) A corrections or detention facility for prisoners may conduct a cursory examination of the outside of any package or other mailing from a prisoner to a court or clerk of court of this state to determine whether the package

or mailing contains materials other than paper documents. If such package or mailing appears to contain materials other than paper documents, the facility shall refuse to forward it until the sender presents a court order authorizing the mailing of such nondocumentary items or demonstrates that the contents are not prohibited by this section.)+

Section 4. Paragraphs (f) and (g) are added to subsection (5) of section 95.11, Florida Statutes, to read:

95.11 Limitations other than for the recovery of real property.--Actions other than for recovery of real property shall be commenced as follows:

(5) WITHIN ONE YEAR.--

+{(f) Except for actions described in subsection (8), a petition for extraordinary writ, other than a petition challenging a criminal conviction, filed by or on behalf of a prisoner as defined in s. 57.085.)+ +{

(g) Except for actions described in subsection (8), an action brought by or on behalf of a prisoner, as defined in s. 57.085, relating to the conditions of the prisoner's confinement.)+

Section 5. Section 944.279, Florida Statutes, is created to read:

ENROLLED

1996 Legislature

CS/HB 37

+{944.279 Loss of gain-time for filing frivolous or malicious actions.--}+

+{(1) At any time, and upon its own motion or on

motion of a party, a court may conduct an inquiry into whether any action or appeal brought by a prisoner was brought in good faith. A prisoner who is found by a court to have brought a frivolous or malicious suit, action, claim, proceeding, or appeal in any court of this state or in any federal court, which is filed after June 30, 1996, or who knowingly or with reckless disregard for the truth brought false information or evidence before the court, is subject to forfeiture of gain-time and the right to earn gain-time. The court shall issue a written finding and direct that a certified copy be forwarded to the appropriate institution or facility for disciplinary action as provided in s. 944.28(2).)+

+(2) This section does not apply to a criminal proceeding or a collateral criminal proceeding.)+

Section 6. Paragraph (a) of subsection (2) of section 944.28, Florida Statutes, is amended to read:

944.28 Forfeiture of gain-time and the right to earn gain-time in the future.--

(2)(a) All or any part of the gain-time earned by a prisoner according to the provisions of law +(is)+ -(shall be)- subject to forfeiture if such prisoner -(shall)- unsuccessfully +(attempts)+ -(attempt)- to escape; +(assaults)+ -(assault)- another person; +(threatens)+ -(threaten)- or knowingly +(endangers)+ -(endanger)- the life or person of another person; +(refuses)+ by action or word -(refuse)- to carry out any instruction duly given to him +(or her)+; +(neglects)+ -(neglect)- to perform -(the work, duties, and tasks assigned to him)- in a faithful, diligent,

ENROLLED

1996 Legislature

CS/HB 37

industrious, orderly, and peaceful manner +(the work, duties,
and tasks assigned to him or her)+; +(is found by a court to
have brought a frivolous suit, action, claim, proceeding, or
appeal in any court; is found by a court to have knowingly or
with reckless disregard for the truth brought false
information or evidence before the court;)+ or +(violates)+
-(violate)- any law of the state or any rule or regulation of
the department or institution.

Section 7. This act shall take effect July 1, 1996.

1 An act relating to criminal appeals and
 2 collateral review of criminal proceedings;
 3 creating the "Criminal Appeal Reform Act of
 4 1996"; directing the retitling of chapter 924,
 5 relating to appeals, as "Criminal Appeals and
 6 Collateral Review"; amending s. 924.05, F.S.;
 7 making only direct appeals under chapter 924 a
 8 matter of right; creating s. 924.051, F.S.;
 9 providing legislative intent and definitions;
 10 providing guidelines and terms and conditions
 11 of appeals and collateral review in criminal
 12 cases; limiting direct appeals to allegations
 13 of prejudicial error; limiting appeals after a
 14 defendant pleads guilty or nolo contendere;
 15 prohibiting collateral relief on grounds that
 16 were or could have been raised at trial and, if
 17 properly preserved, on direct appeal; placing a
 18 time limitation on filing for collateral
 19 relief, with exceptions; placing the burden of
 20 demonstrating prejudicial error on the party
 21 challenging a ruling of a trial court;
 22 prohibiting the use of public funds, resources,
 23 or employees in appellate or collateral
 24 proceedings unless it is constitutionally or
 25 statutorily mandated; amending s. 924.06, F.S.;
 26 revising criteria for appeal by defendant;
 27 limiting the right to appeal of defendants who
 28 plead guilty or nolo contendere; creating s.
 29 924.066, F.S.; limiting applications for
 30 collateral relief and providing that there is
 31

1 no right to a court-appointed lawyer in
 2 noncapital collateral proceedings; amending s.
 3 924.07, F.S., relating to the state's right of
 4 appeal, to clarify language; amending s.
 5 924.37, F.S.; providing that a cross-appeal by
 6 the state is not jurisdictional; providing for
 7 appellate court decision or an issue
 8 cross-appealed by the state, under specified
 9 circumstances; removing a requirement that an
 10 appellate court decide issues appealed by the
 11 state; providing an effective date.
 12

13 Be It Enacted by the Legislature of the State of Florida:

14
 15 Section 1. This act may be cited as the "Criminal
 16 Appeal Reform Act of 1996."

17 Section 2. The Division of Statutory Revision of the
 18 Joint Legislative Management Committee shall change the title
 19 of chapter 924, Florida Statutes, from "APPEALS" to "CRIMINAL
 20 APPEALS AND COLLATERAL REVIEW."

21 Section 3. Section 924.05, Florida Statutes, is
 22 amended to read:

23 924.05 Appeal as matter of right.--Direct appeals
 24 provided for in this chapter are a matter of right.

25 Section 4. Section 924.051, Florida Statutes, is
 26 created to read:

27 924.051 Terms and conditions of appeals and collateral
 28 review in criminal cases.--

29 (1) As used in this section:

30 (a) "Prejudicial error" means an error in the trial
 31 court that harmfully affected the judgment or sentence.

1 (b) "Preserved" means that an issue, legal argument,
 2 or objection to evidence was timely raised before, and ruled
 3 on by, the trial court, and that the issue, legal argument, or
 4 objection to evidence was sufficiently precise that it fairly
 5 apprised the trial court of the relief sought and the grounds
 6 therefor.

7 (2) The right to direct appeal and the provisions for
 8 collateral review created in this chapter may only be
 9 implemented in strict accordance with the terms and conditions
 10 of this section.

11 (3) An appeal may not be taken from a judgment or
 12 order of a trial court unless a prejudicial error is alleged
 13 and is properly preserved or, if not properly preserved, would
 14 constitute fundamental error. A judgment or sentence may be
 15 reversed on appeal only when an appellate court determines
 16 after a review of the complete record that prejudicial error
 17 occurred and was properly preserved in the trial court or, if
 18 not properly preserved, would constitute fundamental error.

19 (4) If a defendant pleads nolo contendere without
 20 expressly reserving the right to appeal a legally dispositive
 21 issue, or if a defendant pleads guilty without expressly
 22 reserving the right to appeal a legally dispositive issue, the
 23 defendant may not appeal the judgment or sentence.

24 (5) Collateral relief is not available on grounds that
 25 were or could have been raised at trial and, if properly
 26 preserved, on direct appeal of the conviction and sentence.

27 (6) A petition or motion for collateral or other
 28 postconviction relief may not be considered if it is filed
 29 more than 2 years after the judgment and sentence became final
 30 in a noncapital case or more than 1 year after the judgment
 31

1 and sentence became final in a capital case in which a death
 2 sentence was imposed unless it alleges that:

3 (a) The facts upon which the claim is predicated were
 4 unknown to the petitioner or his attorney and could not have
 5 been ascertained by the exercise of due diligence;

6 (b) The fundamental constitutional right asserted was
 7 not established within the period provided for in this
 8 subsection and has been held to apply retroactively; or

9 (c) The sentence imposed was illegal because it either
 10 exceeded the maximum or fell below the minimum authorized by
 11 statute for the criminal offense at issue. Either the state
 12 or the defendant may petition the trial court to vacate an
 13 illegal sentence at any time.

14 (8) In a direct appeal or a collateral proceeding, the
 15 party challenging the judgment or order of the trial court has
 16 the burden of demonstrating that a prejudicial error occurred
 17 in the trial court. A conviction or sentence may not be
 18 reversed absent an express finding that a prejudicial error
 19 occurred in the trial court.

20 (9) It is the intent of the Legislature that all terms
 21 and conditions of direct appeal and collateral review be
 22 strictly enforced, including the application of procedural
 23 bars, to ensure that all claims of error are raised and
 24 resolved at the first opportunity. It is also the
 25 Legislature's intent that all procedural bars to direct appeal
 26 and collateral review be fully enforced by the courts of this
 27 state.

28 (10) Funds, resources, or employees of this state or
 29 its political subdivisions may not be used, directly or
 30 indirectly, in appellate or collateral proceedings unless the
 31 use is constitutionally or statutorily mandated.

1 Section 5. Section 924.06, Florida Statutes, is
 2 amended to read:
 3 924.06 Appeal by defendant.--
 4 (1) A defendant may appeal from:
 5 (a) A final judgment of conviction when probation has
 6 not been granted under chapter 948, except as provided in
 7 subsection (3);
 8 (b) An order granting probation under chapter 948;
 9 (c) An order revoking probation under chapter 948;
 10 (d) A sentence, on the ground that it is illegal; or
 11 (e) A sentence imposed outside the range permitted
 12 recommended by the guidelines authorized by chapter 921.
 13 (2) An appeal of an order granting probation shall
 14 proceed in the same manner and have the same effect as an
 15 appeal of a judgment of conviction. An appeal of an order
 16 revoking probation may review only proceedings after the order
 17 of probation. If a judgment of conviction preceded an order
 18 of probation, the defendant may appeal from the order or the
 19 judgment or both.
 20 (3) A defendant who pleads guilty with no express
 21 reservation of the right to appeal a legally dispositive
 22 issue, or a defendant who pleads nolo contendere with no
 23 express reservation of the right to appeal a legally
 24 dispositive issue, shall have no right to a direct appeal.
 25 ~~Such-a-defendant-shall-obtain-review-by-means-of-collateral~~
 26 ~~attack:~~
 27 Section 6. Section 924.066, Florida Statutes, is
 28 created to read:
 29 924.066 Collateral relief.--
 30 (1) Subject to the terms and conditions set forth in
 31 this chapter, a prisoner in custody may seek relief based upon

1 ~~claim that the judgment of conviction or sentence was imposed~~
 2 ~~in violation of the Constitution or law of the United States~~
 3 ~~or the State of Florida.~~
 4 (2) Either the state or a prisoner in custody may
 5 obtain review in the next higher state court of a trial
 6 court's adverse ruling granting or denying collateral relief.
 7 The state may obtain review of any trial court ruling that
 8 fails to enforce a procedural bar.
 9 (3) A person in a noncapital case who is seeking
 10 collateral review under this chapter has no right to a
 11 court-appointed lawyer.
 12 Section 7. Section 924.07, Florida Statutes, is
 13 amended to read:
 14 924.07 Appeal by state.--
 15 (1) The state may appeal from:
 16 (a) An order dismissing an indictment or information
 17 or any count thereof or dismissing an affidavit charging the
 18 commission of a criminal offense, the violation of probation,
 19 the violation of community control, or the violation of any
 20 supervised correctional release.
 21 (b) An order granting a new trial.
 22 (c) An order arresting judgment.
 23 (d) A ruling on a question of law when the defendant
 24 is convicted and appeals from the judgment. Once the state's
 25 cross-appeal is instituted, the appellate court shall review
 26 and rule upon the question raised by the state regardless of
 27 the disposition of the defendant's appeal.
 28 (e) The sentence, on the ground that it is illegal.
 29 (f) A judgment discharging a prisoner on habeas
 30 corpus.
 31

1 (g) An order adjudicating a defendant insane under the
2 Florida Rules of Criminal Procedure.

3 (h) All other pretrial orders, except that it may not
4 take more than one appeal under this subsection in any case.

5 (i) A sentence imposed outside the range permitted
6 recommended by the guidelines authorized by chapter 921.

7 (j) A ruling granting a motion for judgment of
8 acquittal after a jury verdict.

9 (k) An order denying restitution under s. 775.089.

10 (1) An order or ruling suppressing evidence or
11 evidence in limine at trial.

12 (2) An appeal under this section must shall embody all
13 assignments of error in each pretrial order that the state
14 seeks to have reviewed. The state shall pay all costs of the
15 such appeal except for the defendant's attorney's fee.

16 Section 8. Section 924.37, Florida Statutes, is
17 amended to read:

18 924.37 Order or decision when state appeals.--

19 (1) When the state appeals from an order dismissing an
20 indictment, information, or affidavit, or a count of it, or an
21 order granting a new trial and the order is affirmed, the
22 appellate court shall direct the trial court to implement the
23 order. If an order dismissing an indictment, information, or
24 affidavit, or a count of it, is reversed, the appellate court
25 shall direct the trial court to permit the defendant to be
26 tried on the reinstated indictment, information, or affidavit.
27 If an order granting a new trial is reversed, the appellate
28 court shall direct that judgment of conviction be entered
29 against the defendant.

30 (2) A cross-appeal by the state is not jurisdictional.
31 When the state cross-appeals appeals from a ruling on a

1 question of law adverse to the state, the appellate court
2 shall decide the question if it is reasonably capable of
3 repetition in any proceeding.

4 Section 9. This act shall take effect July 1, 1996.
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31