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### STATEMENT OF THE CASE AND FACTS

This case is before this Court following transfer from the Fifth District Court of Appeals. The case was transferred following the filing of all briefs in the lower court. On April 23, 1997, this Court ordered the Office of the Attorney General and the Capital Collateral Representative to file simultaneous briefs on or before May 13, 1997.

On April 11, 1996, Williams' *pro bono* collateral attorney filed a "Motion for Costs" in which he sought "an order authorizing reasonable funds to obtain and compensate expert witnesses and for other litigation expenses necessary for the effective and competent presentation of [Williams'] post-conviction claims for relief." (R3-10). After hearing the arguments of the parties, and after Orange County and Williams filed pleadings setting out their respective positions, the trial court entered an order directing Orange County to pay Williams' litigation expenses. (R78-9), Orange County gave notice of appeal to the Fifth District Court of Appeals on July 3, 1996. (R80). The record was certified as complete on August 12, 1996. (R89).

### SUMMARY OF THE ARGUMENT

Williams is a prisoner under sentence of death who is

represented by pro bono counsel in his Rule 3.850 proceeding. The litigation expenses incurred by pro bono counsel (if they are reimbursed at all) should be paid out of Justice Administrative Commission funds rather than being borne by Orange County because the result reached by the Circuit Court is contrary to the statutory provisions involved. Alternatively, the Capital Collateral Representative should be directed to assume representation of Williams, either exclusively or along with pro bono counsel.

#### ARGUMENT

##### I. THE LITIGATION EXPENSES OF WILLIAMS' **PRO BONO** COUNSEL SHOULD BE PAID IN THE SAME FASHION AS SUCH EXPENSES ARE PAID IN THE CASE OF CONFLICT COUNSEL

Williams was convicted of murder and sentenced to death for the November 7, 1980, murder of Mary Elizabeth Robinson. This Court affirmed that conviction and sentence on June 23, 1983. *Williams v. State*, 437 So.2d 133 (Fla. 1983). In 1986, Williams' present attorney became involved in this case on a **pro bono** basis, and filed a motion to vacate the conviction and sentence.<sup>1</sup> (R4) That motion remains pending and is the subject of the litigation expense

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Pro **bono** counsel also represented Williams in a state habeas corpus proceeding. *Williams v. Wainwright*, 503 So.2d 890 (Fla. 1987).

**issue before this Court.** This case is one of a limited number of cases in which volunteer (or pro bono) counsel represent death-sentenced inmates and, before its dissolution, received assistance from the now-defunct Volunteer Lawyer's Resource Center (hereinafter VLRC) . Few cases fall within the category of **what can** be labeled "VLRC cases", and this Court has not spoken to the issue of litigation expenses in this context. For the reasons set out below, either the Capital Collateral Representative (CCR) should assume Williams' collateral proceedings or the litigation expenses incurred by Williams' volunteer attorney should **be paid in the same** way such expenses are paid when conflict counsel is appointed under §27.703, *Fla. Stat.*

Williams' volunteer counsel was assisted by the Volunteer Lawyers' Resource Center (hereinafter VLRC) until that entity ceased to exist on March 31, 1996.<sup>2</sup> (R4) How counsel came to be involved in the case is not apparent from the record, but there is apparently no dispute that Williams would be eligible for representation by CCR were he not already represented by pro bono

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<sup>2</sup>

Williams' motion for costs was filed shortly after V.L.R.C. ceased operations. (R10)

counsel.<sup>3</sup>

Under common law, there is no mechanism through which one party is chargeable with the other's litigation costs. Instead, provisions allowing the payment of another's costs are statutory creations. See, e.g., *Wolf v. County of Volusia*, No. 88,146 (Fla. April 17, 1997); *Board of County Commissioners, Pinellas County v. Sawyer*, 627 So.2d 757 (Fla. 1993). Under settled law, a county can only be compelled to pay costs which are mandated by statute. *County of Dade v. Sansom*, 226 So.2d 278 (Fla. 3d DCA 1969). No provision contained within the *Florida Statutes* **mandates that the** county pay the costs at issue in this proceeding.

Florida law is well-settled that cost provisions against the state must be expressly authorized by statute:

It may be premised that at common law neither party could be charged **with the costs of the other, and** it was only by statute that such a charge came to be allowed, but even after that in England and in this country the sovereign or the state was not chargeable with costs, either in civil or criminal cases, unless there was express provision of law to authorize it.

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Williams' attorney opened his own practice in September of 1992, roughly three-and-one-half years before filing the motion at issue in this appeal. The record does not reveal why the 3.850 motion has remained pending since 1986.



*Buckman v. Alexander*, 24 Fla. 46, 49, 3 So. 817, 818 (1888).<sup>4</sup> None of the expenses ordered by the trial court are provided for by statute, and that court was without authority to require Orange County to pay those costs. The order of the lower court should be set aside.

Under the statute creating CCR, a conflict of interest triggers the appointment of substitute counsel to represent the inmate affected by the conflict. §27.703, *Fla. Stat.* Such appointed counsel is compensated out of funds 'appropriated to the Justice Administrative Commission." *Id.* There is no reason that Williams' volunteer counsel should be treated differently.

Because CCR is not representing Williams, that organization presumably has incurred no expenses related to this case, and has a vested interest in not gaining Williams as a "CCR client." However, because funds appropriated to CCR are not exposed **as a** result of Williams' volunteer lawyer's motion for funds, CCR has no interest at all in the outcome of this litigation. Under the facts of this case, CCR has received a windfall unless this Court orders them to begin representing Williams. Because Williams' volunteer lawyer is acting as the functional equivalent of 'conflict counsel"

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As used in *Wolf*, the "state" includes the county.

(and is fulfilling the responsibility placed upon CCR), his litigation expenses should be paid in the same manner as those of any other conflict counsel.<sup>5</sup> The expenses incurred by Williams' volunteer attorney should be paid out of Justice Administrative Commission funds rather than Orange County, Florida funds.<sup>6</sup>

In his brief, Williams' counsel argues that "statutory and decisional authority" dictates that the county is responsible for Williams' post-conviction litigation expenses. However, the authorities upon which Williams relies are all premised upon there being a **constitutional** right to counsel. No such right attaches at the post-conviction stage, when the proceeding is civil in nature and is an attack on a presumptively valid conviction and sentence. *Larnbrix v. Singletary*, 21 Fla. L. Weekly S365 (Fla., Sept. 12, 1996) ; *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *Murray v. Giarratano*, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). Because there is no right to

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Presumably volunteer counsel does not care about the source of funds from which his expenses are paid.

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Because these funds do not impact CCR's budget, CCR should not oppose payment out of Justice Administrative Commission funds, either.

counsel at the collateral attack stage, the cases and statutory provisions relied upon by Williams do not control the result in this case.

The trial court reached the conclusion that Orange County should bear Williams' litigation expenses based upon its interpretation that those expenses were for necessary personnel required to operate the circuit court. §43.28, *Fla. Stat.* That interpretation is possible only through a strained reading of that statutory provision, which has not been extended beyond attorney fees in cases in which there is a right to **counsel**.<sup>7</sup>

"It is axiomatic that **all** parts of a statute must be read together in order to achieve a consistent whole." *T.R. v. State*, 677 So.2d 270 (Fla. 1996). The stated intent of the Legislature is that death-sentenced individuals **will** be represented by CCR unless there is a conflict of interest that necessitates appointment of other counsel. §27.702, *Fla. Stat.* In this case, as set out above, Williams is eligible for representation by CCR--however, in holding Orange County responsible for his litigation expenses, the trial court extended §43.28, *Fla. Stat.*, beyond its plain and ordinary

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7

Attorney fees are not at issue because Williams' pro bono counsel has not sought to recover such. The only expenses at issue are associated with expert witnesses.

meaning to reach the result that an unspecified number of mental state experts and investigators are "necessary personnel" to the operation of the Circuit Court, with the result that the County was ordered to pay their fees. The plain language of the statute does not support that statutory construction, and the trial court's contrary interpretation fails. See, e.g., *Perkins v. State*, 682 So.2d 1083, 1085 (Fla. 1996). The lower court extended the statutory provision to include expert witnesses, when there is no authority for holding that such witnesses are "necessary" at the collateral attack stage, and when there is no constitutional right to such witnesses in the first place. Such witnesses do not fall within the "necessary personnel" provision, and the statute should not be extended in such a manner.<sup>8</sup> See also, *County of Seminole v. Padilla*, 470 So.2d 28 (Fla. 5DCA 1985) (County not responsible for travel costs Public Defender incurred in connection with witness interviews.) This Court should set aside the order of the trial court and either direct that CCR take over the representation (exclusively or in cooperation with present counsel), or direct that Williams' litigation expenses be paid from Justice

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Williams' motion for costs sets forth the anticipated investigative and expert testimony in considerable detail, while at the same time indicating that such witnesses have not yet been retained.

Administrative Commission funds.

There is no statutory limitation on the Judicial Administrative Commission that prohibits them from paying the expenses at issue in this case, and, in fact, that is the most appropriate source of funds for use in this case (if CCR does not take the **case** over) . §43.16, *Fla. Stat.* In view of the expressed intent of the legislature that conflict counsel be paid from Commission funds, and in view of the statutory duty of the Commission to provide assistance to CCR, it is in accord with the plain meaning of the statutory provisions at issue to pay Williams' litigation expenses from that source. In contrast, the result reached by the trial court (that the experts are "necessary personnel") is a strained result (at best) that is wholly inconsistent with the plain language of the provision involved. Williams' expenses should be paid from Justice Administrative Commission funds.

Alternatively, rather than holding Orange County responsible for an amount that, at this time, is effectively unlimited, this Court should order the Capital Collateral Representative to assume Williams' representation, either exclusively or with pro se counsel assisting. This result is particularly appropriate in light of the complaints raised by volunteer counsel regarding his lack of

available time and resources. (R4-5) If there is no conflict between Williams and CCR, and the record is silent on this issue, then CCR and volunteer counsel can jointly represent Williams, with the expenses being borne by CCR.<sup>9</sup>

Newly-enacted §27.704(3)<sup>10</sup> specifically provides for such an arrangement. Specifically, that statute authorizes the regional capital collateral representative to:

Appoint *pro bono* assistant counsel, who must be members in good standing of the Florida Bar, and who shall serve without compensation at the discretion of the Capital Collateral Regional Counsel Representative.

§27.704(3), *Fla. Stat.* Further, §27.704(2), authorizes the Capital Collateral Regional Counsel to contract with private counsel who are members in good standing of the Florida Bar for purposes of providing representation to death-sentenced inmates. §27.704(2), *Fla. Stat.* Both of those statutory provisions provide a means through which present volunteer counsel can continue to represent Williams without incurring litigation expenses. Newly-enacted §27.704 is a complete solution to the issue before this court.

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Of course, if there is a conflict between Williams and CCR, there is no question that conflict counsel must be paid out of Justice Administrative Commission funds pursuant to §27.703, *Fla. Stat.*

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A copy of the newly-enacted statute is attached hereto.

If this Court determines that CCR should not become involved in this case, then Williams' litigation expenses, regardless of the source from which they are paid, should be calculated based upon the guidelines applied in the case of conflict counsel. Specifically, those guidelines limit mental state experts to no more than \$150 per hour, with the caveat that local experts should be used when possible. Further, those guidelines indicate that more than one expert will only be approved in the 'rarest of circumstances."<sup>11</sup> Williams should not receive more funds for expenses than do inmates who are represented by conflict counsel, and this Court should hold that the terms and conditions set out in Judge Schaeffer's memorandum apply to Williams.<sup>12</sup>

#### CONCLUSION

Based upon the foregoing arguments and authorities, this Court should set aside the order of the Circuit Court and order that the litigation expenses incurred by Williams' volunteer **attorney** should

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<sup>11</sup>

**See,** February 10, 1997 Memorandum Regarding Administration of Funds, from Judge Susan **Schaeffer** to attorneys handling capital collateral proceedings as conflict counsel.

<sup>12</sup>

There are apparently no costs that were incurred by Williams' attorney before the Justice Administrative Commission appropriation took effect. Hence, there is no impediment to payment of costs from that fund.

be paid from Justice Administrative Commission funds. Alternatively, this Court should direct CCR to take over Williams' representation, either as sole counsel, or with Williams' volunteer attorney remaining involved in the case.

Respectfully submitted,

ROBERT A. BUTTERWORTH  
ATTORNEY GENERAL

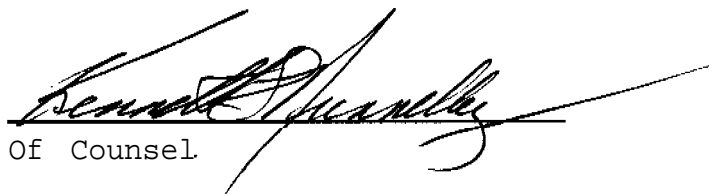
A handwritten signature in black ink, appearing to read "Kenneth S. Nunnelly", written over a horizontal line.

KENNETH S. NUNNELLEY  
ASSISTANT ATTORNEY GENERAL  
FL. BAR # 0998818  
444 Seabreeze Blvd., 5th FL  
Daytona Beach, FL 32118  
(904) 238-4990  
Counsel for Appelant



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to Chandler R. Muller, Law Offices of Chandler R. Muller, P.A., 1150 Louisiana Avenue #2, Post Office Box 2128, Winter Park, Florida 32790, to George Dorsett, Assistant County Attorney, Office of the County Attorney, 201 South Rosalind, Orlando, Florida 32801, **and** to the Office of the Capital Collateral Representative, Post Office Drawer 5498, Tallahassee, Florida 32314-5498, on this 13<sup>th</sup> day of May, 1997.

  
Of Counsel

3) Experts.a) Psychiatrists and Psychologists

I will pay psychiatrists and psychologists up to \$150.00 per hour, although I will expect you to negotiate a lower rate if you can. Of course, the work must be reasonable and necessary. I will strenuously question your need to have more than one doctor, except in the rarest of circumstances.

b) Other experts

I will pay a reasonable hourly rate depending on the type of expert used. It is impossible to be more specific than this since I can't possibly speculate on the various experts you might need.

I expect you to use local or nearby experts when possible. This will keep travel costs down.

4) Investigators.

Many of you will be working at a reduced hourly rate, and I expect your investigators to do likewise. I will pay \$35.00 per hour for typical investigative work. If your investigator is doing work which would otherwise be done by you -- preparing witnesses for hearings, talking to experts, preparing mitigation presentations, etc., I will pay \$50.00 per hour.

5) Travel.

Travel costs, including mileage and per diem, will be paid pursuant to F.S. § 112.061. You should ask for government rates at hotels. Rental cars will not generally be approved.

6) Other.

It is impossible at this time to address all costs and expenses. As petitions are filed, and I get a feel for common costs and expenses, I will do another memorandum.

Motions to Incur Costs.

These motions are to be heard before the judge who is hearing the collateral proceeding. However, you and the trial judge must understand that I am

charged with finally determining that the costs were reasonable and necessary

Time for Billing for Fees and Costs

You can bill quarterly for your fees earned and costs paid or billed during the quarter. The quarters will end as follows:

March 15th  
June 15th  
September 15th  
December 15th

Your petitions for payment for each quarter must be in my hands by the 31st of March, the 30th of June, the 30th of September, and the 31st of December. This is absolutely essential for June, as I must have your bills to the JAC by July 15th to get you paid from the current year's appropriation.

For the budget year July 1, 1996 - June 30, 1997, since this is the first year of this appropriation, and some of the quarters are over, send me all your fee hours and costs from July 1, 1996 through March 15, 1997 by March 31, 1997. Then send the last quarter fee hours and costs through June 15, 1997 by June 30, 1997. Do not ask to be paid for your time or costs prior to the beginning of the appropriation -- July 1, 1996. These attorney fees and costs will have to be paid by some other fund, perhaps by the county where the case is being heard.

Your petition should set out your hours spent and for what they were spent. For example,

2/13/97	Research	4 hours
2/16/97	Prepared Memorandum for Hearing	2.5 hours
2/24/97	Attended Huff Hearing	3.5 hours

I also expect your experts to send you a bill that breaks their service into hours and function.

Pending Litigation and Legislation

There is litigation pending to determine if the counties are responsible for collateral conflict attorneys fees and costs connected with the case. The outcome of that litigation may well determine if the state will continue to appropriate money to pay your fees and costs. Additionally, if CCR is abolished, or if regional CCR offices are established as independent offices, presumably there will be no more conflicts as another office can take over a conflict case. I will continue to monitor legislation

connected to CCR, and keep you informed.

If CCR is not abolished, or if independent regional CCR offices are not established, I am lead to believe that annual appropriations will be made for capital conflict counsel fees, costs, and expenses. Obviously, I cannot and do not guarantee this will happen. I will try to ensure the appropriation is sufficient to pay you for your services and all reasonable costs and expenses. If the appropriation dries up and I am unable to replenish it, I will notify you as soon as possible. In that event, I will try to figure out an equitable solution, although that may be impossible.

Feel free to wrice and ask questions, or to call with your questions. I will try my best to answer. I am sure you understand this is a new experience for all of us, and there will be some questions that only time and experience can answer.

SJS/sr

cc : **The Honorable Gerald Kogan, Chief Justice**  
All Chief fudges,  
All State Attorneys,  
**The Honorable Robert A. Butterworth, Attorney General**  
**Tracey Reeves, Executive Director,**  
Justice Administrative Commission  
Don McCall, Director of Accounting,  
Justice Administrative Commission

# Supreme Court of Florida

IN RE: SPECIAL CAPITAL COLLATERAL  
REPRESENTATIVE IN CONFLICT CASES

## ADMINISTRATIVE ORDER

I have been advised that: (1) twenty-five death-penalty defendants are unable to be represented by the Capital Collateral Representative because of an ethical conflict and at least seven presently have no counsel; (2) while section 27.703, Florida Statutes (1995), provides for the appointment of counsel, until this fiscal year no funds were allocated for this type of representation; (3) the Capital Collateral Representative, for ethical reasons, has advised me that he is unable to provide a separate conflict capital office or provide resources for conflict counsel appointed under section 27.703; (4) the present 1996-97 appropriations act provides for \$236,084 for conflict representation, with those funds being separately identified in the budget of the Judicial Administration Commission; and (5) while section 27,703 provides for the sentencing court to appoint counsel, there is no present mechanism established for a fair allocation of those funds for each counsel in all conflict cases.

It is clear that the sentencing court, in those cases in which no counsel is representing a death-penalty defendant, needs to appoint counsel as soon as possible. To fairly allocate these appropriated funds to each of these appointed counsel for conflict collateral representation, an immediate needs exists to appoint a single judicial officer to determine, en appropriate petition, the amount of funds immediately necessary for each case, to be utilized for reasonable attorney fees, costs, and expenses in representing those persons whom the Capital Collateral Representative is unable to represent because of a conflict of interests.

Accordingly, it is ordered:

(1) The sentencing court, for all death-penalty defendants who are not presently represented by counsel, pursuant to section 27.703, shall appoint competent counsel for each such death-penalty defendant who is unrepresented because of the Capital Collateral Representative's conflict.

(2) A single judicial officer, assigned by this office, is authorized to exclusively determine the reasonable attorney fees, costs, and expenses for conflict capital representative counsel in postconviction relief proceedings upon receipt of an appropriate petition filed in the sentencing court, with a copy served upon the appropriate state attorney, the Attorney General of Florida, and the assigned judicial officer.

(3) The Judicial Administration Commission is hereby authorized to pay, from appropriated funds, the amount of fees,

costs, and expenses authorized by the judicial officer assigned by this office.

(4) Any order entered by the assigned judicial officer determining the amount of fees, costs, and expenses may be reviewed by this Court the same as any order of a circuit judge in a capital collateral proceeding.

DONE AND ORDERED at Tallahassee, Florida, this 23rd day of October, 1996.

*Gerald Kogan*  
GERALD KOGAN  
Chief Justice

ATTEST:

*Sid J. White*  
SID J. WHITE  
Clerk



# Supreme Court of Florida

97A-U40

WHEREAS, it officially has been determined that it is necessary for the administrative operation of the courts that a single judge be assigned to allocate appropriated funds for conflict counsel in postconviction relief proceedings;

NOW, THEREFORE, the undersigned, under the authority vested by article v, section 2 of the Florida Constitution, the rules of this Court promulgated thereunder, and specifically the administrative order of the Supreme court of Florida in In Re Special Capital Collateral Representative in Conflict cases dated October 23, 1996, does hereby assign and designate the Honorable Susan F. Schaeffer, Judge of the Circuit Court of the Sixth Judicial Circuit of Florida, to be assigned to each and every circuit in this state to determine the reasonable attorney's fees, costs, and expenses for conflict capital representative counsel in postconviction proceedings pursuant to the above administrative order. Judge Susan F. Schaeffer is hereby vested with all and singular the powers and prerogatives conferred by the constitution and laws of the state of Florida upon a judge of the court to which the judge is hereby assigned.

DONE AND ORDERED at Tallahassee, Florida on OCTOBER 25, 1996.

*[Signature]*  
ACTING CHIEF JUSTICE  
SUPREME COURT OF FLORIDA

ATTEST:

*[Signature]*  
DEPUTY CLERK  
SUPREME COURT OF FLORIDA



686-111-97

W

CS/HB 1091

A bill to be entitled

An act relating to the representation of persons sentenced to death; amending **s. 27.701, F.S.**; transferring the capital collateral regional counsels to the executive branch; providing for the office of capital collateral representative to be replaced by three capital collateral regional counsels appointed within the northern, middle, and southern regions of the state: providing for nominations of the regional counsels by the Supreme Court Judicial Nominating Commission; requiring the Governor to appoint the regional counsels; providing for ~~terms~~ of office: prohibiting a regional counsel from running for or accepting appointment to a state office for a specified period after leaving office; amending **s. 27.702, F.S.**; specifying the duties of the capital collateral regional counsel; establishing the independence of the regional offices but consolidating the administrative functions of three **offices** within the Justice Administrative Commission; authorizing the court to assess attorney's fees and costs against a nonindigent or indigent-but-able-to-contribute defendant; providing for a determination of **indigency**; ~~providing~~ for lien imposition and enforcement against such defendant's property; requiring the regional counsel to provide certain reports to the President of the Senate, the **Speaker** of the House of Representatives, and the

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

686-111-97

CS/HB 1091

1 Commission on the Administration of Justice in  
2 **Capital** Cases; amending s. 27.703, **F.S.**;  
3 providing for the appointment ~~of~~ substitute  
4 counsel in instances of conflict of interest;  
5 establishing qualifications for appointed  
6 counsel; establishing a rate of compensation.  
7 for attorney's fees in such cases; amending s.  
8 27.704, **F.S.**; authorizing the capital  
9 collateral regional counsel to appoint  
10 assistant **counsel**, investigators, and support  
11 personnel: providing employment qualifications  
12 for certain positions; amending s. 27.705,  
13 F.S. ; providing for the capital collateral  
14 counsel to be paid under the General  
15 Appropriations Act; providing for the payment  
16 of office and travel expenses; requiring the  
17 regional counsel to submit a pay plan each year  
18 to the Justice Administrative Commission **and**  
19 Legislature; amending s. 27,706, **F.S.**;  
20 prohibiting the capital collateral regional  
21 counsel and full-time assistants from engaging  
22 in the private practice of law; amending s.  
23 27.707, **F.S.**; authorizing investigators  
24 employed by the capital collateral **regional**  
25 **counsel** to serve subpoenas and court orders;  
26 amending s. 27.708, F.S.; providing for access  
27 to ~~persons~~ sentenced to death who are  
28 incarcerated: requiring the regional counsel  
29 and contracted private counsel to comply with  
30 the Rules of Criminal Procedure; requiring the  
31 assigned attorney or the regional counsel to

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CS/HB 1091

1 approve requests for public records made by  
2 assistant counsel or appointed counsel;  
3 creating the Commission on the Administration  
4 of Justice in Capital Cases; providing for  
5 membership; setting terms of membership;  
6 providing for the selection of a chair;  
7 providing for per diem and travel expenses;  
8 requiring quarterly meetings of the commission;  
9 providing for the Executive Office of the  
10 Governor to staff the commission; requiring the  
11 commission to review the administration of  
12 justice in capital collateral cases, **receive**  
13 relevant public input, review the operation of  
14 the regional offices of capital collateral  
15 counsel, and advise and make recommendations to  
16 the Governor, Legislature, and Supreme Court;  
17 requiring that the commission hear complaints  
18 regarding the practice of any such office;  
19 amending s. 16.01, F.S.; requiring that the  
20 Attorney General act as co-counsel in capital  
21 collateral proceedings: amending s. 924.051,  
22 F.S.; limiting collateral and postconviction  
23 relief in any capital case to motions that  
24 allege newly discovered evidence or a change in  
25 the law; prohibiting the testimony of an expert  
26 witness in any such Case unless approved by the  
27 court; providing recommendations for the  
28 Supreme Court: providing for appointment of  
29 regional counsels and interim counsels by  
30 specified dates: providing for continuity of  
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CS/HB 1091

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legal representation under certain  
circumstances; providing an effective date.

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

Section 1, section 27,701, Florida Statutes, is  
amended to read:

27.701 Capital collateral regional counsels  
~~representative.~~--There are is-hereby created in the executive  
~~judicial~~ branch of state government three regional offices the  
~~office~~ of capital collateral counsel, which shall be located  
in a northern region, middle region, and southern region of  
the state. The northern region shall consist of the First,  
Second, Third, Fourth, Eighth, and Fourteenth Judicial  
Circuits; the middle region shall consist of the Fifth, Sixth,  
Seventh, Ninth, Tenth, Twelfth, Thirteenth, and Eighteenth  
Judicial Circuits; and the southern region shall consist of  
the Eleventh, Fifteenth, Sixteenth, Seventeenth, Nineteenth,  
and Twentieth Judicial Circuits. Each regional office shall  
be administered by a regional counsel. A regional counsel must  
~~representative, the head of which shall be the capital~~  
~~collateral representative for the state.~~--The capital  
~~collateral representative shall~~ be, and must shall have been  
for the preceding 5 years, a member in good standing of The  
Florida Bar, Each The capital collateral regional counsel  
~~representative~~ shall be appointed by the Governor, and is  
subject to confirmation by the Senate: The Supreme court  
Judicial Nominating Commission shall recommend to the Governor  
three qualified candidates for each appointment as regional  
counsel. The Governor shall appoint a regional counsel for  
each region from among the recommendations, or, if it is in

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CS/HB 1091

1 the best interest of the fair administration of justice in  
 2 capital cases, the Governor may reject the nominations and  
 3 request submission of three new nominees by the Supreme Court  
 4 Judicial Nominating Commission. Each capital collateral  
 5 regional counsel shall be appointed to a term of 3 years.  
 6 ~~from three or more nominations submitted by any or all elected~~  
 7 ~~public defenders and shall serve a term of 4 years. Six~~  
 8 ~~months prior to the end of any such term, the Governor shall~~  
 9 ~~accept nominations from any or all elected public defenders~~  
 10 ~~for the office of capital collateral representative for the~~  
 11 ~~next succeeding term and may appoint the incumbent or any~~  
 12 ~~other nominated person for the next succeeding term.~~  
 13 Vacancies in the office of capital collateral regional counsel  
 14 representative shall be filled in the same manner as  
 15 appointments. A person appointed as a regional counsel may  
 16 not run capital collateral representative is prohibited from  
 17 running for or accept accepting appointment to any state  
 18 office within for a period of 2 years following vacation of  
 19 office. ~~The principal office of the capital collateral~~  
 20 ~~representative shall be located in Tallahassee. The capital~~  
 21 ~~collateral representative may establish such branch offices as~~  
 22 ~~may, in his or her discretion, be warranted to fulfill~~  
 23 ~~statutory duties herein.~~

24 Section 2, Section 27.702, Florida Statutes, 1996  
 25 Supplement, is amended to read:

26 27.702 Duties of the capital collateral regional  
 27 counsel: reports representative.--

28 (1) The capital collateral regional counsel  
 29 representative shall represent, ~~without additional~~  
 30 ~~compensation,~~ each person convicted and sentenced to death in  
 31 this state for the sole purpose of instituting and prosecuting

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1 collateral actions challenging the legality of the judgment  
2 and sentence imposed against such person in the state courts,  
3 federal courts in **this** state, the United States Court of  
4 Appeals for the Eleventh Circuit, and the United States  
5 Supreme Court. Representation by the capital collateral  
6 regional counsel representative shall commence automatically  
7 upon termination of direct appellate proceedings in state or  
8 federal courts, Within 91 days after the date the Supreme  
9 Court issues a mandate on a direct appeal or the United States  
10 Supreme Court denies a petition for certiorari, whichever is  
11 later, the capital collateral regional counsel representative  
12 shall file a notice of appearance in the trial court in which  
13 the judgment and sentence were entered and shall secure all  
14 direct-appeal files for collateral representation. upon  
15 receipt of files from the public defender or other counsel,  
16 the capital collateral regional counsel representative shall  
17 assign each such case to personnel in his or her office for  
18 investigation, client contact, and any such further action as  
19 the circumstances may warrant. The three capital collateral  
20 regional counsels' offices shall function independently and be  
21 separate budget entities, and the regional counsels shall be  
22 the office heads for all purposes, The Justice Administrative  
23 Commission shall provide administrative support and service to  
24 the three offices to the extent requested by the regional  
25 counsels. The three regional offices shall not be subject to  
26 control: supervision, or direction by the Justice  
27 Administrative Commission in any manner, including, but not  
28 limited to, personnel, purchasing, transactions involving real  
29 or personal property, and budgetary matters.

30 (2) The capital collateral regional counsel  
31 representative shall represent each person convicted and

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1 sentenced to death within the district ~~in this state~~ in  
2 collateral postconviction proceedings, unless a court appoints  
3 or permits other counsel. to appear as counsel of record.

4 (3)(a) The capital collateral regional counsel  
5 ~~representative~~ shall file motions seeking compensation for  
6 representation and reimbursement for expenses pursuant to 18  
7 U.S.C. s. 3006A when providing representation to indigent  
8 persons in the federal courts, and shall deposit all such  
9 payments received into the Capital Collateral Trust Fund  
lb established for such purpose,

11 (b) The court having jurisdiction over any nonindigent  
12 or indigent-but-able-to-contribute defendant who has been  
13 receiving the services of the capital collateral regional  
14 counsel may assess attorney's fees and costs against the  
15 defendant at any stage in the proceedings as the court may  
16 deem appropriate. The determination of indigency or  
17 nonindigency of any defendant shall be made by the court  
18 pursuant to s. 27.52. Liability for the costs of such  
19 representation may be imposed in the form of a lien against  
20 the property of the nonindigent or  
21 indigent-but-able-to-contribute defendant, which lien shall be  
22 enforceable as provided in s. 27.56 or s. 27,561.

23 (4) Each capital collateral regional counsel shall  
24 provide a quarterly report to the President of the Senate, the  
25 Speaker of the House of Representatives, and the Commission on  
26 the Administration of Justice in Capital Cases which details  
27 the number of hours worked by investigators and legal counsel  
28 per case and the amounts per case expended during the  
29 preceding quarter in investigating and litigating capital  
30 collateral cases,

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1 Section 3. Section 27.703, Florida Statutes, 1996  
2 Supplement, is amended to read:

3 27.703 Conflict of interest and substitute counsel.--

4 (1) If, at any time during the representation of two  
5 or more persons, the capital collateral regional counsel  
6 ~~representative~~ determines that the interests of those persons  
7 are so adverse or hostile that they cannot all be counseled by  
8 the regional counsel ~~capital-collateral-representative~~ or his  
9 or her staff without conflict of interest, the sentencing  
10 court shall, upon application ~~therefor~~ by the regional  
11 counsel, designate another regional counsel and, only if a  
12 conflict exists with the other two counsels, ~~capital~~

13 ~~collateral-representative~~ appoint one or more members of The  
14 Florida Bar to represent one or more of such persons.

15 (2) Appointed counsel shall be paid from funds  
16 appropriated to the Justice Administrative Commission. The  
17 hourly rate may not exceed \$100,

18 (3) Prior to employment, counsel appointed pursuant to  
19 this section must have participated in at least five felony  
20 jury trials, five felony appeals, or five capital  
21 postconviction evidentiary hearings, or any combination of at  
22 least five of such proceedings.

23 Section 4. Section 27.704, Florida Statutes, is  
24 amended to read:

25 27.704 Appointment of assistants and other staff;  
26 method of payments.--Each capital collateral regional counsel  
27 may:

28 (1) ~~The capital-collateral-representative is~~  
29 ~~authorized to~~ Appoint, employ, and establish, in such numbers  
30 as he or she determines shall-determine, full-time or  
31 part-time assistant counsel ~~capital-collateral~~



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1 representatives, investigators, and other clerical and support  
2 persannel who shall be paid from funds appropriated for that  
3 purpose. A full-time assistant capital collateral counsel  
4 must ~~representatives-shall~~ be a member members in good  
5 standing of The Florida Bar, with not less than 3 2 years'  
6 experience in the practice of criminal law, and, prior to  
7 employment, must have participated in at least five felony  
8 jury trials, five felony appeals, or five capital  
9 postconviction evidentiary hearings or any combination of at  
10 least five of such proceedings.

11 (2) Contract with private counsel who are members in  
12 good standing of The Florida Bar or with public defenders for  
13 the purpose of providing prompt and cost-effective  
14 representation for individuals who are sentenced to death in  
15 this state. A private counsel or public defender under  
16 contract with the regional counsel must have at least 3 years'  
17 experience in the practice of criminal law, and, prior to the  
18 contract, must have participated in at least five felony jury  
19 trials, five felony appeals, or five capital postconviction  
20 evidentiary hearings or any combination of at least five of  
21 such proceedings..

22 (3)(2) ~~The-capital-collateral-representative-is~~  
23 authorized-to Appoint pro bono part-time assistant counsel  
24 capital-collateral-representatives, who must shall be members  
25 in good standing of The Florida Bar, and who shall serve  
26 without compensation at the discretion of the capital  
27 collateral regional counsel representative.

28 Section 5. Section 27.705, Florida Statutes, is  
29 amended to read:  
30  
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1           27.705 Salaries of ~~the~~ capital collateral regional  
2 counsel representative and assistant capital collateral  
3 counsel representatives.--

4           (1) Each ~~The~~ capital collateral regional counsel  
5 representative shall be paid a salary by the **state**, which  
6 shall be as provided in the General Appropriations Act and  
7 shall be paid in equal monthly installments,

8           (2) Full-time assistant capital collateral counsel  
9 representatives shall be compensated in an amount set by the  
10 capital collateral regional counsel, which may ~~representative~~  
11 not to exceed 100 percent of the salary of the capital  
12 collateral regional counsel representative and shall be paid  
13 from funds appropriated for that purpose.

14           (3) All payments of the salary of each of the capital  
15 collateral regional counsel representative and employees of  
16 his or her office, and payments for other necessary expenses  
17 of office from state funds appropriated therefor, ~~are shall-be~~  
18 ~~considered-as-being~~ for a valid public purpose. Travel  
19 expenses for official business within and outside the state  
20 shall be paid in accordance with ~~the-provisions-of~~ s. 112.061.  
21 For purposes of s. 112.061 only, part-time assistant capital  
22 collateral counsel representatives shall be considered  
23 employees of the regional office of capital collateral counsel  
24 representative.

25           (4) Each ~~The~~ capital collateral regional counsel  
26 representative shall develop a classification and pay plan to  
27 be submitted on or before January 1 of each year to the  
28 Justice Administrative Commission, the office of the President  
29 of the Senate, and the office of the Speaker of the House of  
30 Representatives. Such plan shall be developed in accordance  
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1 with policies and procedures of the Executive Office of the  
2 Governor established pursuant to s. 216.181.

3 Section 6. Section 27.706, Florida Statutes, is  
4 amended to read:

5 27.706 Private practice of law prohibited.--~~Each~~ The  
6 capital collateral regional counsel ~~representative~~ and all  
7 full-time assistants appointed by him or her shall ~~serve~~ on a  
8 full-time basis and may not engage ~~are prohibited from~~  
9 engaging in the private practice of law.

10 Section 7. Section 27.707, Florida Statutes, is  
11 amended to read:

12 27.707 Investigators: ~~service~~ of process.--Each  
13 investigator employed by the capital collateral regional  
14 counsel ~~has representative-shall-have~~ full authority to serve  
15 any subpoena ~~witness-subpoenaed~~ or court order issued by any  
16 court or judge in any case for which the office has  
17 responsibility for providing representation.

18 Section 8. Section 27,708, Florida Statutes, is  
19 amended to read:

20 27,708 Access to prisoners; compliance with the  
21 Florida Rules of Criminal Procedure in capital collateral  
22 litigation; records requests; approval of records requests.--

23 (1) Each ~~The~~ capital collateral regional counsel  
24 ~~representative~~ and his or her assistants may ~~shall-be~~  
25 ~~empowered-to~~ inquire of all persons sentenced to death who are  
26 ~~incarcerated~~ and tender them advice and counsel at any  
27 reasonable time, but ~~the-provisions-of~~ this section does ~~shall~~  
28 not apply with respect to persons who are represented by other  
29 counsel.

30 (2) The capital collateral regional counsel and  
31 contracted private counsel must timely comply with all

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1 provisions of the Florida Rules of Criminal Procedure  
2 governing collateral review of capital cases, including  
3 provisions pertaining to requests for records under Florida  
4 Rule of Criminal Procedure 3,852.

5 (3) All requests for records in capital postconviction  
6 proceedings must be made in accordance with Florida Rule of  
7 Criminal Procedure 3.852, and, if the 'person sentenced to  
8 death is represented by an assistant capital collateral  
9 regional counsel or other attorney appointed to assist the  
10 regional counsel, the regional counsel or the attorney  
11 assigned to the case must approve the request,

12 Section 9. (1)(a) There is created the Commission on  
13 the Administration of Justice in Capital Cases, which shall  
14 consist of the six following members:

15 1. Two members appointed by the Governor.

16 2. Two members appointed by the President of the  
17 Senate from the membership of the Senate. One member shall be  
18 a member of the majority party and one member shall be a  
19 member of the minority party,

20 3. Two members appointed by the Speaker of the House  
21 of Representatives from the membership of the House of  
22 Representatives, One member shall be a member of the majority  
23 party and one member shall be a member of the minority party.

24 (b) The chair of the commission shall be selected by  
25 the members for a term of 1 year.

26 (c) The commission shall meet quarterly, and other  
27 meetings may be called by the chair upon giving at least 7  
28 days' notice to all members and the public.

29 (d) Members of the commission are entitled to per diem  
30 and travel expenses to be paid by the appointing entity.

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1           (e) The initial members of the commission must be  
2 appointed on or before October 1, 1997. Members of the  
3 commission shall be appointed to serve terms of 4 years each,  
4 except that a member's term shall expire upon leaving office  
5 as a member of the Senate or the Rouse of Representatives. Two  
6 of the initial members, one from the Senate and one from the  
7 House of Representatives, shall be appointed for terms of 2  
8 years each. Two of the initial members, one from the Senate  
9 and one from the House of Representatives, shall be appointed  
10 for terms of 3 years each.

11           (f) The Executive Office of the Governor shall staff  
12 the commission,

13           (2) The commission shall review the administration of  
14 justice in capital collateral cases, receive relevant public  
15 input, review the operation of the capital collateral regional  
16 counsel, and advise and make recommendations, to the Governor,  
17 Legislature, and Supreme Court. In addition, the commission  
18 shall receive complaints regarding the practice of any office  
19 of regional counsel and shall refer any complaint to The  
20 Florida Bar, the Supreme Court, or the Commission on Ethics,  
21 as appropriate.

22           Section 10. Present subsections (5), (7), and (8) of  
23 section 16.01, Florida Statutes, are renumbered as subsections  
24 (7), (8), and (9), respectively, and a new subsection (6) is  
25 added to that section, to read:

26           16.01 Residence, office, and duties of Attorney  
27 General, -The Attorney General:

28           (6) Shall act as co-counsel of record in capital  
29 collateral proceedings.

30           Section 11. Subsection (6) of section 924,051, Florida  
31 Statutes, 1996 Supplement, is amended to read:

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1 924.051 Terms and conditions of appeals and collateral  
2 review in criminal cases.--

3 (6)(a) In a noncapital case, a petition or motion for "  
4 collateral or other postconviction relief may not be  
5 considered if it is filed more than 2 years after the judgment  
6 and sentence became final, ~~in a noncapital case or more than 1~~  
7 ~~year after the judgment and sentence became final in a capital~~  
8 ~~case in which a death sentence was imposed~~ unless the petition  
9 or motion ~~it~~ alleges that:

10 1.(a) The facts upon which the claim is predicated  
11 were unknown to the petitioner or his attorney and could not  
12 have been ascertained by the exercise of due diligence;

13 2.(b) The fundamental constitutional right asserted  
14 was not established within the period provided for in this  
15 subsection and has been held to apply retroactively; or

16 3.(c) The sentence imposed was illegal because it  
17 either exceeded the maximum or fell below the minimum  
18 authorized by statute for the criminal offense at issue.  
19 Either the state or the defendant may petition the trial court  
20 to vacate an illegal sentence at any time.

21 (b) In a capital case in which the sentence of death  
22 has been imposed:

23 1. A motion for collateral or other postconviction  
24 relief may not be considered if the motion is filed more than  
25 1 year after the judgment and sentence became final, unless  
26 the motion alleges that the facts upon which the claim is  
27 predicated are based on newly discovered evidence or a change  
28 in the law.

29 2. An expert witness may not be called to testify  
30 unless approved by the court.

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1           Section 12. In the interest of promoting justice and  
2 integrity with respect to capital collateral representation,  
3 the Legislature recommends that the Supreme Court:

4           (1) Adopt by rule the provisions of section 924.055,  
5 Florida Statutes, which limit the time for postconviction  
6 proceedings in capital cases.

7           (2) Award pro bono service credit for time spent by an  
8 attorney in providing legal representation to an individual  
9 sentenced to death in this state, regardless of whether the  
10 attorney receives compensation for such representation,

11           Section 13. The Governor shall appoint each capital  
12 collateral regional counsel no later than August 1, 1997.  
13 Each capital collateral regional counsel shall assume office  
14 on October 1, 1997. The Governor is authorized to appoint  
15 three interim capital collateral regional counsels who are  
16 authorized to carry out the duties provided herein until  
17 September 30, 1997. In order to maintain continuity, all  
18 attorneys assigned to represent clients, as of June 30, 1997,  
19 shall continue to provide such representation unless or until  
20 substitute counsel is ordered by the court or until the  
21 capital collateral regional counsel or the interim capital  
22 collateral regional counsel removes the attorney from the  
23 case.

24           Section 14. This act shall take effect July 1, 1997,  
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