

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCB CRJS 13-04 Postconviction Capital Case Procedures

**SPONSOR(S):** Criminal Justice Subcommittee; Gaetz

**TIED BILLS:** PCB CRJS 13-05 **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Criminal Justice Subcommittee	8 Y, 5 N	Cunningham	Cunningham

### SUMMARY ANALYSIS

This joint resolution proposes to amend Article V, Section 2 of the Florida Constitution, relating to the Florida Supreme Court's authority to adopt rules of practice and procedure. The joint resolution amends the Florida Constitution to require the procedures for postconviction or collateral review of capital cases resulting in a sentence of death to be governed exclusively by, and to the extent provided by, general law.

The resolution does not alter the Florida Supreme Court's authority to adopt rules of practice and procedure in other areas of the law.

The resolution also adds a new section to Article XII of the Florida Constitution specifying that the amendment to Section 2 of Article V (described above) will take effect July 1, 2015, and only applies to capital cases in which the conviction and sentence of death have been affirmed on direct appeal on or after July 1, 2015.

This joint resolution requires publication prior to the election. The Florida Department of State estimates that required publication of a proposed constitutional amendment costs \$106.14 per word. At 773 words, the estimated cost to publish the amendment is \$82,047. This must be paid regardless of whether the amendment passes, and would be payable in FY 2014-2015 from General Revenue.

If the joint resolution is passed by a 3/5 vote of both houses of the legislature, it will be submitted to the voters in the general election in November of 2014.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Florida Constitution - Rulemaking Authority**

Article V, Section 2 of the Florida Constitution, authorizes the Florida Supreme Court to “adopt rules of practice and procedure in all courts . . .” The Florida Supreme Court has adopted rules of practice and procedure governing various subjects. For example, there are rules of civil procedure, rules of judicial administration, rules of criminal procedure, probate rules, and rules of juvenile procedure. The same section of the constitution authorizes the Legislature to repeal court rules of procedure with a 2/3 vote of the membership of both houses.

#### **Separation of Powers**

Unlike the federal constitution, the Florida Constitution includes a specific provision pertaining to the separation of powers among the three branches of government. Article II, Section 3 of the Florida Constitution provides, “The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.” The Florida Supreme Court has held that it has exclusive authority to enact rules of practice and procedure in all courts. The Legislature’s authority to enact substantive law is also exclusive.<sup>1</sup>

The Florida Supreme Court can protect itself against legislative encroachment on its procedural rulemaking authority by declaring legislative rulemaking enactments an unconstitutional violation of the separation of powers provision. The Legislature’s means of shielding the substantive law it passes from alteration by court rule of procedure is by repealing the rule of procedure.<sup>2</sup> The constitution does not preclude the Florida Supreme Court from reenacting a rule that is similar or identical to one that the Legislature has repealed.<sup>3</sup>

#### **Distinguishing Substance from Procedure**

Generally speaking, “substantive law” involves matters of public policy affecting the authority of government and rights of citizens relating to life, liberty and property. Court “rules of practice and procedure” govern the administration of courts, and the behavior of litigants within a court proceeding.<sup>4</sup>

#### **Comparison with the Federal System**

Federal courts have acknowledged for some time that Congress has the authority to regulate matters of practice and procedure in the federal courts.<sup>5</sup> Congress delegated some of its rulemaking power to the Supreme Court of the United States in 1934 by passing the Rules Enabling Act,<sup>6</sup> which gave the Supreme Court the authority to promulgate rules of practice and procedure for federal courts. Notwithstanding this delegation of authority, however, Congress plays a critical role in implementing any rule proposals offered by the Court. All rule proposals are subject to review by Congress and take

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<sup>1</sup> See Art. III, Sec. 1, FLA. CONST.; *Allen v. Butterworth*, 756 So.2d 52 (Fla. 2000); *Johnson v. State*, 336 So.2d 93 (Fla. 1976).

<sup>2</sup> *Allen v. Butterworth*, 756 So.2d 52 (Fla. 2000).

<sup>3</sup> *Id.*

<sup>4</sup> In *Allen v. Butterworth*, the Florida Supreme Court referred to a discussion explaining the distinction between substance and procedure from Justice Adkins’ concurring opinion in *In Re Rules of Criminal Procedure*, 272 So.2d 65, 66 (Fla. 1972):

Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof. Examination of many authorities leads me to conclude that substantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property. As to the term "procedure," I conceive it to include the administration of the remedies available in cases of invasion of primary rights of individuals. The term "rules of practice and procedure" includes all rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution.

<sup>5</sup> See, e.g., *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941); *Wayman v. Southard*, 23 U.S. 1 (1825).

<sup>6</sup> Pub. L. No. 73-415, (June 19, 1934). The current version of the Rules Enabling Act, as subsequently amended, is codified as 28 U.S.C. ss. 2071-2077.

effect only after the Supreme Court has presented them to Congress, and after Congress has had seven months to review proposed rules or changes.<sup>7</sup> Congress uses the review period to "make sure that the action under the delegation squares with the Congressional purpose."<sup>8</sup> In fact, the federal statute currently provides that "[s]uch rules shall not abridge, enlarge or modify any substantive right."<sup>9</sup>

Rules are proposed by the Judicial Conference of the United States and reviewed by the Supreme Court who, if they approve, forward them to Congress by May 1<sup>st</sup>.<sup>10</sup> If Congress does not reject, modify, or defer the rules, they take effect as a matter of law on December 1<sup>st</sup> of the year proposed.<sup>11</sup>

### **Comparison to Larger States**

The rulemaking provisions of the two states with populations larger than Florida—California and Texas—were examined to compare Florida's system with theirs. In both states, their legislatures play an active role in, and have the final word on, the shape of court rules.

In California, the state constitution specifically requires that "[t]he rules adopted shall not be inconsistent with statute."<sup>12</sup> As a result, rules of procedure that are inconsistent with statute are null and void.<sup>13</sup> They also have a committee responsible for promulgating rules called the "Judicial Council." However, the Judicial Council itself promulgates rules, and the state supreme court does not approve such rules.

In Texas, the state Supreme Court is responsible under the constitution to promulgate rules of civil procedure and rules for judicial administration that are not inconsistent with state law.<sup>14</sup> Although the Supreme Court has authority to promulgate such rules, they are subject to legislative control if the legislature chooses to exercise it.<sup>15</sup> Criminal rules of procedure are provided by statute.<sup>16</sup>

### **Effects of the Court's Rulemaking Authority on the Legislature**

The exclusive authority of the Florida Supreme Court over court practice and procedure has impacted the ability of the Legislature to address the time delays in the administration of the death penalty.<sup>17</sup> The Legislature currently has no authority to limit how many postconviction motions can be filed in a capital case and cannot limit the amount of time that a defendant has to file a motion.<sup>18</sup> In a special session held in 2000, the Legislature passed the Death Penalty Reform Act of 2000 (DPRA), which imposed a statute of limitations on postconviction death penalty appeals and provided that the postconviction process would begin while the case was on direct appeal – thereby moving up the start of that part of the appeals process.<sup>19</sup> The statute of limitations in the DPRA provided that appeals filed after the

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<sup>7</sup> See 28 U.S.C. s. 2074.

<sup>8</sup> *Sibbach*, 312 U.S. at 15.

<sup>9</sup> See 28 U.S.C. s. 2072(b).

<sup>10</sup> See 28 U.S.C. ss. 2073, 2074 and 2075. The Judicial Conference is chaired by the Chief Justice of the United States Supreme Court and consists of the chief judges of the 13 appellate circuits, the chief judge of the Court of International Trade, and other selected federal judges.

<sup>11</sup> See 28 U.S.C. s. 2074.

<sup>12</sup> Article VI, Sec. 6(d), CAL. CONST.

<sup>13</sup> California courts have stated that rules of procedure promulgated by their state Judicial Council are subordinate to statutes enacted by the Legislature; if the two conflict, either in letter or merely intent, the court rule is invalid. See *Cooper v. Westbrook Torrey Hills, LP*, 97 Cal.Rptr.2d 742 (Cal. App. 4 Dist. 2000); *In re Jermaine B.*, 26 Cal.Rptr.2d 612 (Cal. App. 3 Dist. 1994). This applies not only to statutes in effect when a rule was adopted, but also to statutes enacted subsequently. See *Trans-Action Commercial Investors, Ltd. v. Jelinek*, 70 Cal.Rptr.2d 449 (Cal. App. 1 Dist. 1997). Therefore, corrective legislation would effectively repeal an inconsistent court rule, and require the promulgation of a new rule of procedure consistent with the new statute.

<sup>14</sup> See Art. V, Sec. 31, TEX. CONST.

<sup>15</sup> See *Armadillo Bail Bonds v. State*, 802 S.W.2d 237 (Tex. Cr. App. 1990).

<sup>16</sup> See Art. V, Sec. 31, TEX. CONST.

<sup>17</sup> "Postconviction" motions are brought after the conviction and sentence have been affirmed on direct appeal or the time for filing an appeal has expired.

<sup>18</sup> See *Allen v. Butterworth*, 756 So.2d 52 (Fla. 2000).

<sup>19</sup> Chapter 2000-3, L.O.F. One of the clauses in the bill's preamble reads: "WHEREAS, in order for capital punishment to be fair, just, and humane for both the family of victims and for offenders, there must be a prompt and efficient administration of justice following any sentence of death ordered by the courts of this state, . . ."

deadline would be time-barred.<sup>20</sup> Shortly thereafter, the Florida Supreme Court found the DPRA unconstitutional.<sup>21</sup> The Court held: “. . . we find that the DPRA is an unconstitutional encroachment on this Court's exclusive power to adopt rules for the practice and procedure in all courts.”<sup>22</sup> The Court rejected the state's argument that if Congress has the authority to set a statute of limitations in death penalty postconviction motions, the Florida Legislature should also have the same authority.<sup>23</sup> The court noted that:

In Florida, Article V, Section 2(a) of the Florida Constitution grants this Court the exclusive authority to adopt rules of procedure. Consequently, the separation of powers argument raised in the present case would never be an issue in the federal system. Unlike the Florida Constitution, the federal constitution does not expressly grant the United States Supreme Court the power to adopt rules of procedure.<sup>24</sup>

### **Joint Resolution**

This joint resolution proposes amending Article V, Section 2 of the Florida Constitution relating to the Supreme Court's rulemaking authority. The joint resolution amends the Florida Constitution to require the procedures for postconviction or collateral review of capital cases resulting in a sentence of death to be governed exclusively by, and to the extent provided by, general law.

The joint resolution does not alter the Supreme Court's authority to authority to adopt rules of practice and procedure in other areas of the law.

The joint resolution also adds a new section to Article XII of the Florida Constitution specifying that the amendment to Section 2 of Article V (described above) will take effect July 1, 2015, and only applies to capital cases in which the conviction and sentence of death have been affirmed on direct appeal on or after July 1, 2015.

If the joint resolution is passed by a 3/5 vote of both houses of the legislature, it will be submitted to the voters in the general election in November of 2014.

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

This is a joint resolution, which is not divided by sections.

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

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

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

The joint resolution does not appear to have an impact on state government revenues.

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

This amendment requires publication prior to the election. The Florida Department of State estimates that required publication of a proposed constitutional amendment costs \$106.14 per word. At 773 words, the estimated cost to publish the amendment is \$82,047. This must be paid regardless of whether the amendment passes, and would be payable in FY 2014-2015 from General Revenue.

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

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<sup>20</sup> *Id.*

<sup>21</sup> *See Allen v. Butterworth*, 756 So.2d 52 (Fla. 2000).

<sup>22</sup> *Id.* at 53.

<sup>23</sup> *See Id.* at 63. The federal statute discussed was the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132.

<sup>24</sup> *Id.* at 63.

1. Revenues:

The joint resolution does not appear to have an impact on local government revenue.

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this resolution does not appear to: require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

This is a legislative joint resolution, which is one of the methods for proposing, approving or rejecting amendments to the Florida Constitution. The joint resolution requires passage by a three-fifths vote of the membership of each house of the Legislature. The proposed constitutional amendment must be submitted to the electors at the next general election held more than 90 days after the joint resolution is filed with the custodian of state records. If approved by a majority of the electors voting on the question, the proposed amendment will take effect July 1, 2015.

B. RULE-MAKING AUTHORITY:

The resolution does to appear to create an need to rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES