

Death Penalty

Comparing defenses

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By: Jordana Mishory

A Santa Rosa County jury convicted Gary Lawrence of first-degree murder for beating his ex-wife's lover to death.

After Lawrence's 1995 conviction and death sentence were affirmed by the Florida Supreme Court, his state-appointed private lawyer tried to file a federal habeas corpus petition seeking to vacate the sentence. But the lawyer missed a crucial filing deadline, preventing Lawrence's habeas petition from being heard.

This morning, the U.S. Supreme Court will hear oral arguments in Lawrence's appeal seeking to allow his habeas petition to go forward despite the error. The Office of Florida Attorney General Charlie Crist is representing the state.

An amicus brief filed by the American Civil Liberties Union argues that this problem is dangerously common with Florida's private registry lawyers. It cites 15 other Florida cases, including 13 involving private registry lawyers, in which death row inmates were barred or may be barred from bringing their federal habeas cases because of missed deadlines by their lawyers. In two of the cases, the lawyers who missed the deadline work for Florida's state-run Capital Collateral Regional Counsel offices.

In eight of the late cases, including Lawrence's, the inmates were barred from bringing their petitions. In the other eight cases, the state of Florida is attempting to block the petitions.

Gov. Jeb Bush and his Republican legislative allies have tried to eliminate the CCRC program, whose state-employed lawyers handle state and federal habeas petitions on behalf of Florida death row inmates. They wanted to replace them with private lawyers.

In 2003, the Legislature eliminated the CCRC's northern regional office in Tallahassee and established a study comparing the cost-effectiveness of private attorneys with the lawyers in two remaining CCRC offices in Fort Lauderdale and Tampa.

The Auditor General's office is scheduled to submit the results of that study to the Legislature early next year, and lawmakers may decide the fate of the CCRC program during the 2007 legislative session.

But CCRC supporters say the U.S. Supreme Court case is the latest indication that private lawyers on the state registry list are not doing as good a job as CCRC lawyers in representing death row inmates on post-conviction petitions.

John Holdridge, director of the ACLU's Capital Punishment Project in Durham, N.C., said having one case in a state where the attorney blew the habeas deadline is too many. Having 16 such cases, he said, is "intolerable."

In another indication of problems with the registry program, a Tallahassee attorney, Mark Olive, who is representing death row inmate Jacob John Dougan Jr., is arguing before the Florida Supreme Court that the statutory cap of 840 hours for which a registry attorney can bill the state makes it difficult to effectively represent an inmate.

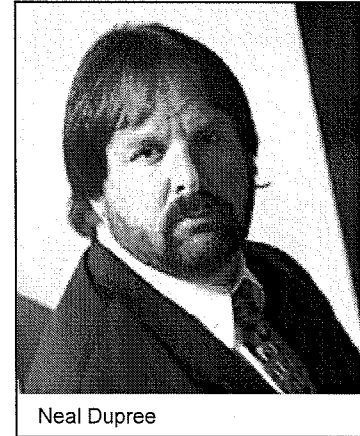
The state auditor general's office is compiling financial data submitted by the two CCRC offices and the registry program to conduct the legislatively required study comparing the public and private models of representation.

According to partial data obtained by the Daily Business Review, the registry program overall handles cases for significantly less money. But experts say such a comparison is meaningless without considering the quality of the work. Based on the figures submitted, it's not clear that the auditor general's office will be able to evaluate quality.

That office did not return repeated calls for comment for this story.

"Financially, it's clear that the registry is cheaper," said Roger Maas, executive director of the Commission on Capital Cases, which oversees both the CCRC and registry programs. "But effectiveness can't be quantitatively analyzed. Maybe they can do it and I don't know. They might be able to show efficiency but not effectiveness."

Neither Gov. Bush's office nor Attorney General Crist's office returned calls for comment by deadline.



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Stephen Hanlon, a partner at Holland & Knight in Washington, D.C., who is representing Mark Olive in the Florida Supreme Court case, called the private registry program a "failed system."

CCRC lawyers more expert

The Legislature established three regional CCRC offices in 1997 to handle post-conviction petitions. These petitions involve arguments of fresh evidence of innocence, prosecutorial misconduct, ineffective counsel or other habeas claims. Experts say such cases require experienced, skilled attorneys and thousands of hours of work.

Since 2003, lawyers on the private registry have handled more than half of Florida's post-conviction cases. The rest of the cases are handled by CCRC lawyers. There are 29 state-employed attorneys between the two CCRC agencies, and 149 attorneys on the private registry list.

Gov. Bush and some legislators, who seek to speed up the death penalty appeals process, have tried to eliminate the CCRC and turn the work over to private lawyers. CCRC lawyers were involved in some cases where Florida death row inmates were exonerated.

Florida leads the nation in the number of death row inmates released from death row, with 22 cleared since 1973. A recent American Bar Association report criticized Florida's death penalty system, stating that it's riddled with errors and legal deficiencies.

CCRC supporters argue that because the CCRC lawyers handle only post-conviction habeas cases, they generally are more expert in the process than private attorneys who don't have as much experience and also handle other types of cases.

Early last year, Supreme Court Justice Raoul G. Cantero III, a Bush appointee, publicly criticized the work of private registry attorneys in representing death row inmates, while generally praising CCRC lawyers.

Too few hours?

In the case before Florida Supreme Court, *Olive v. Maas*, Mark Olive claims he is unable to fully represent his client because of the statutory restrictions on the number of hours he can bill.

Olive is asking the high court to declare unconstitutional a 2002 statute that prevents payment for hours beyond the cap. In the meantime, he said he's representing his client on a pro bono basis.

His suit names Roger Maas, executive director of the Commission on Capital Cases. The statute allows the commission director to remove attorneys from the registry who seek fees in excess of the caps.

The trial court dismissed Olive's complaint, holding that he lacked standing. Olive appealed to the 1st District Court of Appeal, which remanded the case. On second review, the trial court did not find the statutory cap unconstitutional. But it did hold that the commission could not remove attorneys asking for more money.

The registry program pays attorneys a maximum of \$84,000. At \$100 an hour, that comes to 840 hours of work. For federal cases, the state pays private registry lawyers \$150 an hour, with no cap.

But Olive's attorney, Stephen Hanlon, cited a report done by the Spangenberg Group and commissioned by Holland stating that it takes an average of 3,100 hours of work by a lawyer to do an effective job on a habeas petition in a death penalty case. "The problem with the statute is that it doesn't provide for that kind of lawyer," Hanlon said. "It provides for the illusion of a lawyer."

Neal Dupree, the head of the Fort Lauderdale CCRC office, said it takes his lawyers an average of 2,500-3,000 hours to handle a case.

Maas declined to comment on Olive's Supreme Court case. But he said, "There's a tremendous amount of money available to these [private registry] lawyers. By and large, most lawyers are able to provide appropriate legal services within the guidelines of the statute."

Comparison 'meaningless'

Meanwhile, the two CCRC offices and the registry program recently submitted financial data to the state Auditor General for the comparative study required by the Legislature. The data include the amount of money and time it took for lawyers to handle state habeas petitions, covering the fiscal years 2004-05 and 2005-06.

During the study period, registry lawyers handled 150 cases, while the two CCRC offices combined handled 166. Yet the two CCRC offices received more than three times as much money as the registry during the 2004-2005 fiscal year — \$7.3 million versus \$2.3 million.

According to Maas and Dupree, the difference is explained by the fact that the allocation for the CCRC offices includes all expenses of running the offices. In contrast, the allocation for the registry only covers fees for the private lawyers and their investigators.

According to the data, fees for CCRC attorneys, who are paid on a salary basis, work out to an average of \$37 an hour, while registry attorneys are paid \$100 an hour by statute.

"My lawyers can put two times as much time into the case for the same price than the registry attorneys can," Dupree said.

But Martin McClain, a prominent capital appellate attorney in Wilton Manors who does registry work, said such quantitative numbers are "meaningless." Instead of looking at the cost and time involved in handling habeas petitions, McClain argued, the Auditor General's office and the Legislature should look at the quality of the representation.

One example would be the number of cases in which federal judges threw out habeas petitions because the attorney missed the deadline, as in the Lawrence case. "That in itself should tell you that [the private registry program] isn't working," McClain said.

Holland & Knight's Hanlon agreed that the study seems to be lacking the necessary qualitative analysis.

State Sen. Stephen Wise, R-Jacksonville, chairman of the Senate criminal justice committee, said he is waiting to see the outcome of the auditor general's report.

He said his decision on which program is better will be based on effectiveness, cost, and speed in taking cases through the habeas process. But he said he would err on the side of "being able to ensure that inmates got appropriate counsel."

Wise started out opposed to the CCRC because he felt CCRC lawyers were unnecessarily prolonging the appellate process. But he changed his mind, he said, when he realized that post-conviction petitions were essential to ensure that inmates were receiving full and fair justice before execution.

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Neal Dupree photo by Melanie Bell

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