

## Criminal Justice

### Capital support

March 01, 2007

By: Jordana Mishory

**T**he Republican chairman of a key legislative committee is proposing to reopen a state legal office in Tallahassee that former Gov. Jeb Bush and conservative lawmakers shuttered as part of their push to privatize representation of death row inmates.

State Sen. Victor Crist, Tampa, who heads the Senate Justice Appropriations Committee, said he intends to "fully fund" the Capital Collateral Regional Counsel offices, including reopening the northern regional office in Tallahassee. CCRC offices are in Fort Lauderdale and Tampa.

The CCRC offices represent death row inmates on post-conviction habeas corpus claims of ineffective representation, prosecutorial misconduct and fresh evidence of innocence.

Sen. Crist said he received a letter from Supreme Court Chief Justice R. Fred Lewis advocating the re-establishment of the northern CCRC office. Crist also chairs the state Commission on Capital Cases, which oversees the CCRCs and the state registry of private lawyers who handle post-conviction habeas petitions.

"The Court is unanimously and very firmly of the view that the CCRC structure with the three regional offices with only supplemental support from registry counsel is far superior to the private attorney registry approach," wrote Lewis in the Feb. 11 letter to Sen. Crist.

Over the last several years, the nationally emulated CCRC offices had to fight to survive the efforts of Bush and his allies to replace them with private lawyers.

Florida Supreme Court Justice Raoul G. Cantero III and other experts have said that state-employed CCRC lawyers generally do a better job than private lawyers in handling the time-consuming, complex post-conviction habeas cases.

Crist's move comes as the state auditor general has issued a report on a three-year study comparing the performance of the CCRC lawyers in Fort Lauderdale and Tampa with that of private lawyers on a state registry who have handled cases in the state's northern region. The Legislature mandated the study in 2003 to determine which model was more cost-effective.

Based on statistics from the 2005 and 2006 fiscal years, the auditor general found that CCRC representation was "significantly more costly" than representation through private lawyers, who are paid \$100 an hour. The report attributed this difference at least partly to the fact the CCRC budgets include administrative costs, while the registry program doesn't pay private lawyers for such costs.

But the report also found that the CCRC attorneys spent nearly twice as many hours as private registry lawyers working on each case. The CCRC attorneys interviewed more witnesses and experts and filed more public record requests.

"While this comparison does not provide any information as to the efficiency or effectiveness of the efforts by the respective attorneys, it does demonstrate that the CCRC attorneys have been applying considerably more time on these activities than the registry attorneys," the auditor general's report said.

Death penalty appellate experts previously cautioned that the auditor general would not be able to measure the qualitative difference in representation between the state-run and private model.

Roger Maas, the executive director for the Commission on Capital Cases, said the report provided no conclusive determination as to which way of providing legal services was more effective. "The auditor general's report hasn't changed anyone's opinion because there is something in there for everyone," Maas said. "Those that want privatization will find justification, and those that want the CCRCs will find the justification."

Maas said in a written comment to the auditor general's report that "the registry attorneys have significantly more experience than CCRC attorneys and are less likely to spend 'effort' on issues that are procedurally barred or superfluous."

But Neal Dupree, the head of the CCRC office in Fort Lauderdale, argued that the inspector general's report was favorable to his office. "I don't see anything in the auditor general's report that would indicate to the House or the Senate that the way to go would be to privatize this whole thing," Dupree said.

Dupree said the amount of trial court experience does not affect the quality of post-conviction work. Dupree estimated that it would cost about \$8.5 million to fund all three offices.

#### CCRCs won more cases

The Legislature established the CCRC offices in Fort Lauderdale, Tampa and Tallahassee in 1997 to handle post-conviction appeals for death row inmates. Experts say such cases require experienced, skilled attorneys and hundreds of hours of work.

But then-Gov. Bush and supporters in the Legislature sought to speed up the death penalty appeals process. They claimed that appeals handled by CCRC lawyers were taking too long and costing too much.

The auditor general's report found that neither CCRC lawyers nor private registry lawyers were fully responsible for the amount of time it takes for each case to work its way through the system. Other factors, such as the backlog of appellate court dockets or delays in obtaining transcripts, also come into play.



Neal Dupree

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The report also noted that the CCRCs had 14 successes in gaining relief for their clients. This relief could include gaining a new trial, a new sentencing phase, or a new evidentiary hearing. During the same period, the registry was credited with only five successes. The report noted, however, that this statistic could vary year to year.

The CCRC offices handled 166 active cases in 2004-05 and 169 cases in 2005-06. The registry handled 149 active cases in the first year and 153 in the second.

Sen. Crist said he also plans to sponsor legislation to clarify that the CCRCs are within the legislative branch of government, not the executive branch. Crist said the CCRCs originally were "meant to be a legislative entity under the oversight of the Legislature, not the executive branch." It's a conflict for the CCRCs if they are within the executive branch, because the governor signs death warrants.

Which branch oversees the CCRC became an issue of contention after the Department of Financial Services released a scathing report last August alleging that Dupree and Bill Jennings, the CCRC chief in Tampa, wrongly spent \$219,000 on lobbyists to fight for saving the CCRC offices. The report claims the CCRCs are part of the executive branch and therefore cannot hire lobbyists to lobby the Legislature.

State law says that when an executive department misuses state dollars for lobbying purposes, the Department of Financial Services shall deduct that amount of money from the responsible state employee's paycheck.

Jennings appealed the report's finding to the Division of Administrative Hearings. An administrative judge recently found that the Department of Financial Services violated a rule-making procedure and vacated the critical findings regarding Dupree and Jennings. The Department of Financial Services has appealed this ruling to the 1st District Court of Appeal.

The Department of Financial Service's report also alleged that Dupree mismanaged his office when he gave an attorney full-time pay before she started working, used an office computer in his home for non-work-related purposes, and illegally sent two attorneys to Cuba to do research on their death row client's case. Dupree denied the allegations. These issues weren't appealed.

### **Waiting on appointments**

Dupree's and Jenning's terms as head of their respective CCRCs expired last fall. Their names were sent to Gov. Charlie Crist by the Florida Supreme Court Judicial Nominating Commission for possible reappointment. Each man is competing against two other candidates for the CCRC positions.

Gov. Crist's office did not return calls for comment on the status of those appointments or on the auditor general's report.

Sen. Crist said he is confident that the Senate will approve his plan to reopen the CCRC northern region office, and that he hopes the House will go along "to ensure the integrity of the capital punishment process remains in tact."

State Rep. Dan Gelber, D-Miami Beach, a former federal prosecutor, said the auditor general's report dispelled any possible argument for the privatization of the appellate work. "At one point there was the issue of weighing efficiency versus quality, but that doesn't seem to be an argument either," he said.

Larry Spalding, the legislative staff counsel for the ACLU in Tallahassee, who headed the state's single CCRC office from 1985 to 1993, said the discussion of restoring the Tallahassee office of the CCRC and continuing the CCRC program statewide is only possible because Jeb Bush has left office and his successor seems open to the idea.

"If you tried to restore it with Jeb Bush still in office, that's not going to happen," Spalding said. "He basically believed the private sector could always do better than public sector. In this particular arena, it's just not true. Not that there aren't capable criminal defense lawyers who can do it. But it's very complicated, takes a lot of time, and unless you do it on a regular basis, it's just very difficult."

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Law editor Harris Meyer provided additional reporting for this article.

**Neal Dupree photo by Melanie Bell**

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