

Commission for the Review of Post-Conviction Representation

McDonald Commission, Care of Committee on Criminal Justice, 41st Senate
Office Building, Tallahassee, FL 32399-1111

February 13, 1997

The Honorable Lawton Chiles
Governor
The Capitol
Tallahassee, FL.

The Honorable Toni Jennings
Office of the Senate President
The Capitol
Tallahassee, FL..

The Honorable Daniel Webster
Office of the Speaker of the House of Representatives
The Capitol
Tallahassee, FL.

Re: Study of Postconviction Representation of Death Row Inmates

Dear Governor Chiles, President Jennings, and Speaker Webster:

We are pleased to submit the following report based on our study of postconviction representation of death row inmates in Florida, and possible solutions to the problems of the lack of timely collateral representation of eligible death-row inmates and unwarranted delay in the administration of justice in capital cases.

On December 16, 1996, your offices entered a joint agreement to form The Commission to Study Postconviction Representation of Indigent Death Row Inmates. The Commission held four public meetings where it received testimony from many interested parties concerning Capital Collateral Representative, [CCR.] The Commission heard testimony .from representatives of the Attorney General's office, the State Attorneys, a representative from the Department of Corrections, private defense attorneys, Judge Philip Padovano, and former Attorney General Robert L. Shevin. The Commission also

heard testimony from a murder victim's family member and former CCR investigator.

The Commission heard a presentation from Mr. Michael Minerva, the current Capital Collateral Representative. The Commission received letters from the State Attorneys from the Third, Fourth, Sixth, Ninth, Tenth, Eleventh, and Twentieth Judicial Circuits, and law enforcement officials concerning the office of the Capital Collateral Representative.

FACTUAL FINDINGS.

Based on the presentations, written materials and other information, the Commission finds the following facts:

1) The Office of Capital Collateral Representative has refused or failed to represent at least 14 eligible, indigent death row inmates, despite a substantial increase in the budget allocated by the Legislature in the last fiscal year.

According to the presentation by the Attorney General's Office, there are currently fourteen inmates on death row who qualify for legal services from CCR, but CCR is refusing to provide such representation. [Transcript, p. 19, McDonald Commission Meeting, Jan. 10, 1997.] Mr. Moore stated that the refusal of CCR to provide such counsel is a violation of s. 27.702, F.S., and the rules of the Florida Supreme Court.

The Attorney General's office also stated that as CCR's staffing has increased, productivity has *decreased*. In fact, as of Jan. 10, 1997, the CCR had failed to file a single, initial postconviction pleading since April 15, 1996. [Transcript, Jan. 10, 1997, p. 20]. This failure of CCR has occurred despite a significant increase of funding from the Legislature for fiscal year 1996-97, \$4.9 million, up from \$3.1 million in FY 95-96, and a staff of one lawyer per six clients, with support investigators and staff.

Mr. Minerva, of Capital Collateral Representative, testified that his office is following a filing schedule set up by the Florida Supreme Court in assigning counsel to the death cases, which is outside the time limits for assignment. Further, the Commission recognizes, based on Mr. Minerva's comments, that Capital Collateral Representative has been successful in 23 death cases. Finally, a number of private attorneys, who have worked with CCR, testified that CCR attorneys were a valuable resource in helping the private attorneys prepare for representing death row inmates.

3). Based on a survey prepared by the Attorney General, the Commission believes the State of Florida currently provides the most comprehensive system for providing legal services to already convicted death-row inmates.

3)Despite the best efforts to provide a fair and well-financed system of postconviction

legal services, the Office of the Capital Collateral Representative utilized state resources to file suit against the state, claiming that its own office failed to adequately meet new federal legal standards. In a recent ruling, the United States District Court for the Northern District of Florida agreed with the arguments of the Capital Collateral Representative. Robert Shevin, former Attorney General, however, described this action by the CCR as a bad-faith act of litigation, which the office should not have brought to court.

4). Based on substantial and extensive statements from numerous state attorneys, the Florida Department of Law Enforcement, the Department of Corrections and others, the Commission finds that the CCR has engaged in abusive public-records requests and dilatory litigation tactics, including the failure to reveal adverse legal precedent to the courts. In fact, Mr. Minerva has recognized that abuses have occurred.

Additional information has indicated that the CCR engages in improper litigation tactics which have frustrated the administration of justice in capital cases. The agency also files pleadings which contain improper, repetitive claims which are legally prohibited. Victims' family members have testified that CCR has slandered the character and reputation of deceased victims, while perpetuating fraud on state courts.

5) The Commission finds that the mission of CCR has been to both represent individual clients and to cause a dismantling of the death penalty. Clearly, the majority of the public accepts full zealous representation of individual inmates, provided that it is done in a diligent and ethical manner, but is unwilling to expend funds or to otherwise participate in the demise of the death penalty. In fact, although CCR has been successful in twenty three cases, it's reputation has been tarnished by the many unethical abuses and tactics. The Commission finds that the state's goal in providing postconviction representation is to give death row prisoners competent counsel after a direct appeal, and ensure the finality and integrity of the courts' judgments and sentences.

6) The Commission finds that based on CCR's lack of institutional integrity, should consider other models of postconviction representation.

DISCUSSION.

The Commission's dilemma in studying postconviction representation is to fairly balance the concern of making postconviction representation accountable for any improper or unethical practices with the concern of allowing defense attorneys to be zealous advocates and protect their client's rights. The Commission considered several options and possible consequences.

1. Abolishing the Office of Capital Collateral Representative.

Senate Bill 114 introduced by Senator Charles Williams seeks to abolish CCR, and end state postconviction representation. Although postconviction representation is not currently required under the federal constitution, this option would not end delay in capital postconviction proceedings. Currently, the federal courts give Florida courts' factual findings a presumption of correctness because the inmate had legal representation and a full and fair hearing in state. Without this presumption, each state conviction would be subject to a factual challenge in federal court.

2. Proposed Privatization Model.

Next, the draft legislation attached to the Joint Agreement seeks to abolish CCR, and begin a privatization model. Under this draft legislation, private attorneys would be paid for representing prisoners as the attorney completed different stages in the postconviction. On its face, this proposal offers a possible solution to moving cases forward by applying a "carrot instead of a stick." Such a privatized model has been recommended by the office of Mr. Bernie McCabe, State Attorney for the Sixth Judicial Circuit [letter of Mr. Douglas Crow, Executive Assistant, Jan.23, 1997]; and by the office of Mr. Jerry Hill [letter of Mr. John Aguero, Jan. 15, 1997]. The office of Ms. Katherine Rundle, State Attorney for the Eleventh Circuit, recommended against the privatization of such services [letter of Ms. Katherine Rundle, Jan. 15, 1997, recommending other reforms to increase accountability

If a private model is utilized, Commission members have stated that a privatized model should employ the rate of compensation used in federal court for reimbursement of such legal representation. That rate is \$100 per hour for legal representation, paid upon completion of services rendered.

Private attorneys, who testified, questioned whether a privatization model could provide qualified attorneys. Specifically, it was the consensus that private attorneys would not have the special training in the narrow field of death cases, the cost of representation would be too great, and that private attorneys would be unwilling to take these types of cases because of the type of commitment.

Moreover, the determination whether to consider a privatized model was hindered by the failure of the Office of the Capital Collateral Representative to provide adequate documentation regarding the needed resources required to provide competent postconviction capital representation.

3. Proposed Local Representation Model

Ms. Katherine Rundle presented the Commission with a proposal to decentralize CCR and make it accountable on the local level, like public defenders. She proposed that there should be a separate office in each judicial circuit, and that the circuit's capital collateral representative be appointed by the chief judge of that circuit for a term of years. Further, Ms. Rundle's office proposed that the chief judge would have the authority to remove the local capital collateral representative for good cause.

The Commission finds that Ms. Rundle's plan provides a good starting point for correcting CCR's lack of accountability. The localization of CCR would make the agency more accountable within each circuit, which should result in a decrease in the number of patently frivolous claims and motions. Further, localization would end delays caused by attorneys having two or more hearings in different parts of the state, and reduce the amount of money spent in traveling.

Ms. Rundle's plan, however, has two drawbacks. The first drawback is the creation of twenty local capital collateral offices will probably result in expensive "start-up" costs. Moreover, the requirement that the state fund a capital collateral representative in each circuit may not be efficient because it is doubtful that every circuit has a sufficient number of death cases to make this idea feasible. The second drawback is the appointment of the capital collateral representative and management by the chief judges of each circuit. The Commission finds under the Florida Constitution, the appointment of the local capital collateral representative should be by the Governor. Further, the Commission finds that if a local model is adopted, then the proper oversight should be from a joint legislative committee rather than a local court.

Based on the above factual findings and due consideration by the Commission, this Commission offers two postconviction models for consideration, and nine proposed reforms to postconviction representation in capital cases.

RECOMMENDED MODELS FOR CAPITAL COLLATERAL LEGAL SERVICES.

The Commission recommends the Legislature consider two alternative models for providing legal representation for indigent death-row inmates previously convicted of murder and sentenced to death. One model would employ regional offices to provide such representation, while the second model would transfer capital collateral legal representation to the offices of the Public Defenders.

A. Regional Capital Collateral Councils.

1. The Commission recommends the consideration of creating three separate and distinct regional capital collateral councils, which will be located in Northern, Central, and Southern Florida.

The creation of regional offices as opposed to the one central Capital Collateral Representation office, will serve the following purposes.

First, the separate and distinct offices will ensure a prisoner with a "conflict cases" receives representation quickly. For example under this recommendation, if two codefendants are sentenced to death in Orlando, then the Central Florida office would be able to represent one defendant and the Southern Florida office could represent the other defendant.

Second, the requirement that the offices be regional will help promote professionalism and end scheduling conflicts. A benefit of regional offices will hopefully be increased professionalism. One criticism of Capital Collateral Representation is the allegation of unethical tactics. The Commission thinks that if an attorney must practice before the same judges and with the same attorneys, then professionalism will be fostered.

A problem which results in delay is the problem with scheduling conflicts for a prisoner's attorney. Under the current model, delay may occur because a defense attorney has hearings in different parts of the state and spends a lot of time and money traveling. Regional offices should address the problems of scheduling conflicts by having the attorneys where the cases will be heard.

The Commission also recommends that the Regional Counsel should be authorized to employ full-time or part-time assistants, or to contract with private counsel or Public Defenders to provide prompt, cost-efficient representation to individuals on death row. The Regional Counsel would then have maximum flexibility to provide the necessary legal representation.

2. The Commission recommends the selection of the Regional Capital Collateral Counsel from a list of names provided by the Chief Judges of each circuit within each region. The Governor shall appoint the Regional Capital Collateral Counsel, who will be confirmed by the Senate for a one-year term.

The purpose of selecting a regional capital collateral counsel is to provide local input on who will be supervising the regional offices, and to permit oversight and accountability as to the office's management. Many of the criticisms made about CCR centered on the lack of accountability and abuses in the circuit courts. The Commission has determined that if local chief circuit judges nominate the Regional Capital Collateral Counsel, then

the Counsel will prevent abuses on the local level. Furthermore, the requirement that the Counsel be reappointed every-year will also ensure that there is constant oversight by the Legislature of the regional offices.

The Commission recommends that the Governor be granted the authority to appoint an attorney who may not have been recommended by the judges, if the Governor believes the appointment to be in the best interest of the fair administration of justice in capital cases.

3. The creation of a Joint Legislative Committee on the Administration of Justice in Capital Cases to review the Regional Counsel's budget expenditures, and the Regional Capital Collateral Representative's management.

The Joint Legislative Committee will provide accountability over the regional offices' budgets. Further, the Committee will provide a forum for complaints against abusive practices and a means for referring the complaints to the Florida Bar, the Florida Supreme Court, or the Ethics Commission, as appropriate.

B. The Public Defender Model.

Additionally, the Commission urges the Legislature to consider assigning the responsibility for capital postconviction legal representation to the offices of the Public Defenders. Public Defenders currently provide trial and appeal representation to indigent criminal defendants. The attorneys employed in these offices are experts in criminal law. The Public Defenders are experienced in every aspect of criminal-defense representation and would be qualified to represent death-sentenced inmates. Some have provided collateral representation to convicted inmates.

If the Legislature chooses this option, the Commission notes any bill should require that no Public Defender provide capital collateral representation to a former client, as the collateral representation usually requires that counsel challenge the former legal representation as "ineffective". Moreover, the Legislature would be required to authorize Public Defenders to provide collateral representation across circuit boundaries.

ADDITIONAL RECOMMENDATIONS TO IMPROVE THE ADMINISTRATION OF JUSTICE IN CAPITAL CASES.

The Commission makes the following additional recommendations:

1. The Commission Strongly Encourages the Florida Bar and the Florida Supreme Court to Strictly Enforce the Canons of Ethics and Professionalism in Death Penalty Cases.

The Commission is disturbed by the credible information demonstrating litigation abuses committed by the office of the Capital Collateral Representative. The Commission urges the Florida Supreme Court and all other state courts to require all attorneys to comply with the Canons of Ethics, regardless of the nature of the case. No justification exists to allow any attorneys to violate the rules binding on the legal profession.

2. The requirement that attorneys sign public records requests and provide notice to all agencies' legal counsel whose records are requested

One consistent criticism from the Attorney General, State Attorneys, and attorneys for state agencies is that CCR abuses the public records process leading to unwarranted delay. The Florida Supreme Court has recently enacted a public records rule to address these abuses. Another way to stop the abuses is to require attorneys to sign public records requests. An attorney, who signs a public record requests, will be vouching that the material is relevant to the death case. Further, this requirement will provide a contact person for other parties in the case to assist in the prompt compliance with public records laws. Counsel requesting public records should also be required to notify any agency's legal counsel whose records are requested.

3. The Florida Supreme Court incorporate the timelines contained in section 924.055, Florida Statutes.

The Legislature enacted time limitations for postconviction proceedings in capital cases, The time limits of s.924.055, F.S., require that:

- All postconviction motions be filed within one year after the Florida Supreme Court issues a mandate on a direct appeal, or the United States Supreme Court denies a petition for review, whichever occurs later;
- Within 90 days after the state files a response to the postconviction motion, the circuit court shall conduct all necessary hearings and *render a decision*.
- Within 200 days after the notice of appeal is filed from an order denying postconviction relief, the Florida Supreme Court shall render a decision;
- A death-sentenced inmate must file any petition for *habeas corpus* in the federal district court within 90 days after the Florida Supreme Court issues a mandate in a postconviction proceeding.

If the Florida Supreme Court adopted these provisions by rule, these time limits would be imposed regardless whether the provisions are considered procedural or substantive in nature. This rule would help reduce delays in the courts.

4. The Commission recommends the Legislature require basic competency standards for capital collateral counsel.

The Commission recommends that the following competency standards for lead counsel be enacted:

- 3 years experience in the practice of law, and a member of the Florida Bar; and
- 5 felony jury trials, felony appeals or capital postconviction evidentiary hearings. or any combination above.

These standards should comply with the federal Antiterrorism and Effective Death Penalty Act, which provides reforms in federal courts for states which follow the federal guidelines.

5. The Commission recommends the Legislature ure require publicly-funded capital collateral counsel to provide a quarterly report to the President of the Senate and the Speaker of the House of Representatives The report should specifically descrihe the number of hours and money expended in capital collateral investigation and litigation.

The McDonald Commission was not able to get an accurate picture of number of hours and money spent in representing death row inmates because CCR did not keep accurate records of time expended on legal services in state courts. The ability to make intelligent choices about work load and an agency's performance requires that the hours and money spent on a case be documented. Thus, these facts need to be gathered and sent to the Legislature.

6. Authorize the Attorney General to be made co-counsel of record in death cases before the circuit courts.

Most of the delay in death cases occurs in the initial 3.850 stage of a death case in the circuit courts. The Commission recommends authorizing the Attorney General to participate as co-counsel with the State Attorney. The Attorney General's office can provide invaluable expertise and assistance if requested by the state attorney.

7. The Legislature recognize that the handling of capital cases is a public service.

The handling of capital cases requires great effort by defense counsel. The Legislature should recognize that this representation is a public service and recommend that the Florida Supreme Court award pro bono credit to any attorney for time spent providing legal representation to convicted death-row inmates, regardless whether the attorney receives compensation.

8. Limit repetitive postconviction motions to newly discovered evidence and changes in the law.

One cause of delay in death-penalty cases has been the filing of successive postconviction motions. By enacting these limitations, the Legislature will be informing the Florida Supreme Court that it considers successive postconviction motions to be disfavored and to be narrowly construed.

9. The Commission recommends the Legislature establish statutory authority for payment of private counsel in existing and future conflict-of-interest cases, and that the Legislature require prior judicial approval for the use of expert witnesses in capital collateral litigation.

The 1996 Legislature appropriated moneys for the payment of conflict attorneys. The Commission recommends the Legislature specifically delineate guidelines for the payment of counsel and other costs associated with such cases. The guidelines should include the appropriate limitations on such payments, the appropriate hourly rate, and any fee limits the Legislature may wish to impose.

The Commission further believes that expert witnesses should be approved by a circuit judge in capital collateral litigation, just as such witnesses are approved in criminal litigation by circuit judges.

10. The Commission urges the Legislature to exercise caution when considering amendments to Florida's existing statutory scheme regarding the imposition of the death penalty.

The Commission heard credible commentary from former Assistant Attorney General Robert Shevin, and former assistant Attorney General Raymond Marky, that Florida's statutory framework for imposing the death penalty has withstood constitutional challenge for a twenty years.

Respectfully submitted,

Justice Parker Lee McDonald (Retired)
Chair

Senator Locke Burt
Member

Representative Victor D. Crist
Member

J. Hardin Peterson,
Member