



**Defending Liberty  
Pursuing Justice**

**EVALUATING FAIRNESS AND ACCURACY IN  
STATE DEATH PENALTY SYSTEMS:  
The Florida Death Penalty Assessment Report**

An Analysis of Florida's Death Penalty Laws, Procedures, and Practices

"A system that takes life must first give justice."

John J. Curtin, Jr., Former ABA President

September 2006

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Lastly, in this publication, the Project and the Assessment Team have attempted to note as accurately as possible information relevant to the Florida death penalty. The Project would appreciate notification of any errors or omissions in this report so that they may be corrected in any future reprints.



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## EXECUTIVE SUMMARY

### INTRODUCTION: GENESIS OF THE ABA'S DEATH PENALTY ASSESSMENTS PROJECT

Fairness and accuracy together form the foundation of the American criminal justice system. As the United States Supreme Court has recognized, these goals are particularly important in cases in which the death penalty is sought. Our system cannot claim to provide due process or protect the innocent unless it provides a fair and accurate system for every person who faces the death penalty.

Over the course of the past thirty years, the American Bar Association (ABA) has become increasingly concerned that capital jurisdictions too often provide neither fairness nor accuracy in the administration of the death penalty. In response to this concern, on February 3, 1997, the ABA called for a nationwide moratorium on executions until serious flaws in the system are identified and eliminated. The ABA urges capital jurisdictions to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed.

In the autumn of 2001, the ABA, through the Section of Individual Rights and Responsibilities, created the Death Penalty Moratorium Implementation Project (the Project). The Project collects and monitors data on domestic and international death penalty developments; conducts analyses of governmental and judicial responses to death penalty administration issues; publishes periodic reports; encourages lawyers and bar associations to press for moratoriums and reforms in their jurisdictions; convenes conferences to discuss issues relevant to the death penalty; and encourages state government leaders to establish moratoriums, undertake detailed examinations of capital punishment laws and processes, and implement reforms.

To assist the majority of capital jurisdictions that have not yet conducted comprehensive examinations of their death penalty systems, the Project decided in February 2003 to examine several U.S. jurisdictions' death penalty systems and preliminarily determine the extent to which they achieve fairness and provide due process. In addition to the Florida assessment, the Project has released state assessments of Alabama, Arizona, and Georgia. In the future, it plans to release reports in, at a minimum, Indiana, Ohio, Pennsylvania, Tennessee, and Virginia. The assessments are not designed to replace the comprehensive state-funded studies necessary in capital jurisdictions, but instead are intended to highlight individual state systems' successes and inadequacies.

All of these assessments of state law and practice use as a benchmark the protocols set out in the ABA Section of Individual Rights and Responsibilities' 2001 publication, *Death without Justice: A Guide for Examining the Administration of the Death Penalty in the United States* (the Protocols). While the Protocols are not intended to cover exhaustively all aspects of the death penalty, they do cover seven key aspects of death penalty administration: defense services, procedural restrictions and limitations on state post-conviction and federal habeas corpus proceedings, clemency proceedings, jury

instructions, an independent judiciary, racial and ethnic minorities, and mental retardation and mental illness. Additionally, the Project added five new areas to be reviewed as part of the assessments: preservation and testing of DNA evidence, identification and interrogation procedures, crime laboratories and medical examiners, prosecutors, and the direct appeal process.

Each assessment has been or is being conducted by a state-based assessment team. The teams are comprised of or have access to current or former judges, state legislators, current or former prosecutors, current or former defense attorneys, active state bar association leaders, law school professors, and anyone else whom the Project felt was necessary. Team members are not required to support or oppose the death penalty or a moratorium on executions.

The state assessment teams are responsible for collecting and analyzing various laws, rules, procedures, standards, and guidelines relating to the administration of the death penalty. In an effort to guide the teams' research, the Project created an Assessment Guide that detailed the data to be collected. The Assessment Guide includes sections on the following: (1) death-row demographics, DNA testing, and the location, testing, and preservation of biological evidence; (2) law enforcement tools and techniques; (3) crime laboratories and medical examiners; (4) prosecutors; (5) defense services during trial, appeal, and state post-conviction and clemency proceedings; (6) direct appeal and the unitary appeal process; (7) state post-conviction relief proceedings; (8) clemency; (9) jury instructions; (10) judicial independence; (11) racial and ethnic minorities; and (12) mental retardation and mental illness.

The assessment findings of each team provide information on how state death penalty systems are functioning in design and practice and are intended to serve as the bases from which states can launch comprehensive self-examinations. Because capital punishment is the law in each of the assessment states and because the ABA takes no position on the death penalty *per se*, the assessment teams focused exclusively on capital punishment laws and processes and did not consider whether states, as a matter of morality, philosophy, or penological theory, should have the death penalty.

This executive summary consists of a summary of the findings and proposals of the Florida Death Penalty Assessment Team. The body of this report sets out these findings and proposals in more detail. The Project and the Florida Death Penalty Assessment Team have attempted to describe as accurately as possible information relevant to the Florida death penalty. The Project would appreciate notification of any errors or omissions in this report so that they may be corrected in any future reprints.

## II. HIGHLIGHTS OF THE REPORT

### A. *Overview of the Florida Death Penalty Assessment Team's Work and Views*

To assess fairness and accuracy in Florida's death penalty system, the Florida Death Penalty Assessment Team<sup>1</sup> researched the twelve issues that the American Bar Association identified as central to the analysis of the fairness and accuracy of a state's capital punishment system: (1) collection, preservation, and testing of DNA and other types of evidence; (2) law enforcement identifications and interrogations; (3) crime laboratories and medical examiner offices; (4) prosecutorial professionalism; (5) defense services; (6) the direct appeal process; (7) state post-conviction proceedings; (8) clemency; (9) jury instructions; (10) judicial independence; (11) racial and ethnic minorities; and (12) mental retardation and mental illness.<sup>2</sup> The Florida Death Penalty Assessment Report devotes a chapter to each of these issues, which follow a preliminary chapter on Florida death penalty law (for a total of 13 chapters). Each of the issue chapters begins with a discussion of the relevant law and then reaches conclusions about the extent to which the State of Florida complies with the ABA Recommendations.

Members of the Florida Death Penalty Assessment Team have varying perspectives about the death penalty and the necessity for a moratorium in the State of Florida. Thus, the Team does not take a position on these issues. Nor does it take a position on the individual ABA recommendations contained in this report. On the issue of the death penalty, however, Harry Shorstein provides the following comment: "I am a proponent of the Death Penalty. It is my hope that this report will facilitate efforts to effect positive changes in the policies and administration of the Death Penalty."

The Team has concluded, however, that the State of Florida fails to comply or is only in partial compliance with many of these recommendations and that many of these shortcomings are substantial. More specifically, the Team is convinced that there is a need to improve the fairness and accuracy in the death penalty system. Therefore, the Team has unanimously agreed to endorse certain key proposals that are meant to address this situation. The next section highlights the most pertinent findings of the Team and is followed by a summary of its recommendations and observations.

### B. *Areas for Reform*

The Florida Death Penalty Assessment Team has identified a number of areas in which Florida's death penalty system falls short in the effort to afford every capital defendant fair and accurate procedures. While we have identified a series of individual problems within Florida's death penalty system, we caution that their harms are cumulative. The capital system has many interconnected moving parts; problems in one area can

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<sup>1</sup> The membership of the Florida Death Penalty Assessment Team is included *infra* on pp. 3-6 of the Florida Death Penalty Assessment Report.

<sup>2</sup> This report is not intended to cover all aspects of a state's capital punishment system and, as a result, it does not address a number of important issues, such as the treatment of death-row inmates while incarcerated.

undermine sound procedures in others. With that in mind, the Florida Death Penalty Assessment Team views the following problem areas as most in need of reform:

- ***Florida Leads the Nation in Death-Row Exonerations*** (see Chapter 2)<sup>3</sup> – Since 1973, the State of Florida has exonerated twenty-two death-row inmates, which is more than any other state in the nation.<sup>4</sup> Combined, these death-row exonerees served approximately 150 years in prison before being released.<sup>5</sup> During that same time, Florida executed sixty death-row inmates.<sup>6</sup> Therefore, the proportion exonerated exceeds thirty percent of the number executed.
- ***Inadequate Compensation for Conflict Trial Counsel in Death Penalty Cases*** (see Chapter 6) – The State of Florida has in place a statutory fee cap of \$3,500 for conflict trial counsel in death penalty cases. Moreover, conflict trial counsel are usually ineligible for compensation until the final disposition of the case unless they have been providing legal services on the case for more than one year. Florida’s Justice Administrative Commission (JAC) has been statutorily mandated to develop a schedule of partial payment of fees for cases that are not resolved in six months,<sup>7</sup> but it does not appear that the JAC has promulgated such schedule. The statutory fee cap, even if it may be exceeded in “extraordinary and unusual cases,” and the failure to regularly provide for partial payments have the potential to dissuade the most experienced and qualified attorneys from taking capital cases and may preclude those attorneys who do take these cases from having the funds necessary to present a vigorous defense.
- ***Lack of Qualified and Properly Monitored Capital Collateral Registry Counsel***<sup>8</sup> (see Chapters 6 and 8) – Florida’s statutory qualification requirements for capital collateral registry attorneys fall short of the requirements of the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (ABA Guidelines)<sup>9</sup> and are insufficient to ensure qualified counsel for every death-sentenced inmate. Registry attorneys, who are being appointed with greater frequency to capital

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<sup>3</sup> The definition of innocence used by the Death Penalty Information Center in placing defendants on the list of exonerated individuals is that they had “been convicted and sentenced to death, and subsequently either a) their conviction was overturned and they were acquitted at a re-trial, or all charges were dropped, or b) they were given an absolute pardon by the governor based on new evidence of innocence.” See Death Penalty Information Center, *Cases of Innocence 1973 – Present*, available at <http://www.deathpenaltyinfo.org/article.php?scid=6&did=110> (last visited on August 14, 2006).

<sup>4</sup> *Id.*

<sup>5</sup> One inmate, Frank Lee Smith, was exonerated after he died of cancer while on death-row.

<sup>6</sup> Death Penalty Information Center, *Execution Database*, at <http://www.deathpenaltyinfo.org/getexecdata.php> (last visited Aug. 14, 2006).

<sup>7</sup> FLA. STAT. § 27.5304(10) (2006).

<sup>8</sup> “Capital collateral registry attorneys” are private lawyers who are appointed from the statewide registry to represent death-sentenced inmates during post-conviction proceedings in cases of a conflict of interest or when the defendant was convicted and sentenced to death in the Northern Region of Florida, which no longer has a Capital Collateral Regional Counsel Office.

<sup>9</sup> American Bar Association, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913 (2003).

collateral cases since the closure of the Capital Collateral Regional Counsel Office in the Northern Region of Florida, need only minimal trial and appellate experience to qualify for appointment and are not adequately monitored. As a result, the performance of these attorneys has been criticized on a number of occasions. In his testimony to the Commission on Capital Cases, Justice Raoul Cantero of the Florida Supreme Court stated that the representation provided by registry attorneys is “[s]ome of the worst lawyering” he has ever seen.<sup>10</sup> Specifically, “some of the registry counsel have little or no experience in death penalty cases. They have not raised the right issues . . . [and] [s]ometimes they raise too many issues and still haven’t raised the right ones.”<sup>11</sup> Former Florida Supreme Court Chief Justice Barbara Pariente has echoed Justice Cantero’s concerns, stating in a letter to the Commission that “[a]s for [post-conviction] registry counsel, we have observed deficiencies and we would definitely endorse the need for increased standards for registry counsel, as well as a continuing system of screening and monitoring to ensure minimum levels of competence.”<sup>12</sup> Testimony to the Commission from a registry attorney also indicates that there is little or no oversight of registry attorneys, so that the State of Florida is “handing out funding with no accountability.”<sup>13</sup> The lack of qualified and properly monitored capital collateral registry counsel is particularly troublesome given that death-sentenced inmates do not have a state or federal constitutional right to assert a claim of ineffective assistance of state post-conviction counsel.

- ***Inadequate Compensation for Capital Collateral Registry Attorneys*** (see Chapters 6 and 8) – In at least some instances, registry attorneys handling capital collateral cases are not fully compensated at a rate that is commensurate with the provision of high quality legal representation. The Spangenberg Group<sup>14</sup> estimates that on average 3,300 “attorney hours” are required to take a case from denial of *certiorari* by the United States Supreme Court after direct appeal to the Florida Supreme Court to denial of *certiorari* from state post-conviction proceedings.<sup>15</sup> The compensation of registry attorneys during capital collateral proceedings in Florida, however, is subject to a statutory fee cap of \$84,000 (or 840 hours at \$100/hour), which must cover fees of lead counsel as well as any attorney designated by lead counsel to assist him/her. While the Florida Supreme Court has held that this statutory cap may be exceeded in “extraordinary or unusual cases,”<sup>16</sup> the Florida

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<sup>10</sup> Jan Pudlow, *Justice Rips Shoddy Work of Private Capital Case Lawyers*, FLA. B. NEWS, March 1, 2005.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> The Spangenberg Group is a nationally recognized research and consulting firm specializing in improving justice programs. See Spangenberg Group, Introduction, at <http://www.spangenberggroup.com/> (last visited on August 14, 2006). Members of The Spangenberg Group have achieved recognition as the country’s leading experts on the delivery of indigent defense services. See Spangenberg Group, Overview, at <http://www.spangenberggroup.com/over.html> (last visited on August 14, 2006).

<sup>15</sup> SPANGENBERG GROUP, AMENDED TIME & EXPENSE ANALYSIS OF POST-CONVICTION CAPITAL CASES IN FLORIDA 16 (1998).

<sup>16</sup> *Olive v. Maas*, 811 So. 2d 644, 653 (Fla. 1986).

Legislature, in apparent rejection of this position, has: (1) prohibited the use of state funds for payments in excess of the statutory cap; and (2) authorized the imposition of sanctions against any attorney who seeks compensation in excess of the caps.<sup>17</sup> The Circuit Court for the Second Judicial Circuit recently found that in order for such prohibition and sanction to be constitutional, it must be construed to allow the use of state funds to compensate those attorneys in excess of the statutory maximums and to prohibit the imposition of any sanction, but the Circuit Court's order has been appealed, making it unclear, at least temporarily, whether these attorneys will receive compensation in excess of the statutory cap, even in "extraordinary or unusual cases."<sup>18</sup>

- ***Significant Capital Juror Confusion*** (see Chapter 10) – Death sentences resulting from juror confusion or mistake are not tolerable, but research establishes that many Florida capital jurors do not understand their role and responsibilities when deciding whether to impose a death sentence. In one study, over 35 percent of interviewed Florida capital jurors did not understand that they could consider any evidence in mitigation and 48.7 percent believed that the defense had to prove mitigating factors beyond a reasonable doubt.<sup>19</sup> The same study also found that over 36 percent of interviewed Florida capital jurors incorrectly believed that they were *required* to sentence the defendant to death if they found the defendant's conduct to be "heinous, vile, or depraved"<sup>20</sup> beyond a reasonable doubt, and 25.2 percent believed that if they found the defendant to be a future danger to society, they were required by law to sentence him/her to death, despite the fact that future dangerousness is not a legitimate aggravating circumstance under Florida law.<sup>21</sup>
- ***Lack of Unanimity in Jury's Sentencing Decision in Capital Cases*** (see Chapter 10) – The Florida Supreme Court recently noted that "Florida is now the only state in the country that allows a jury to find that aggravators exist *and* to recommend a sentence of death by a mere majority vote."<sup>22</sup> Based on this information, the Florida Supreme Court called upon the Florida Legislature "to revisit Florida's death penalty statute to require some unanimity in the jury's recommendations."<sup>23</sup> Additionally, a recent study found that Florida's practice of permitting capital sentencing

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<sup>17</sup> FLA. STAT. § 27.7002(5), (6) (2006).

<sup>18</sup> *Olive v. Maas*, 03-CA-291 (Fla. Cir. Ct. 2d Jud. Cir. Mar. 23, 2006).

<sup>19</sup> William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51, 68 (2003). The interviews conducted in this study took place after Florida reformed its jury instructions. See William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L. J. 1043, 1077-1078 (1995). Although many of these interviews took place a year after the relevant trial, most jurors claimed to remember their deliberations "very well" or "fairly well," and studies in other states have consistently replicated these types of results. *Id.* at 1086 tbl. 2.

<sup>20</sup> We note that the Bowers and Foglia study uses the term "heinous, vile and depraved" instead of the proper term "heinous, atrocious or cruel," which is an aggravating circumstance in Florida, without accounting for this difference. See Bowers & Foglia, *supra* note 19.

<sup>21</sup> *Id.* at 72.

<sup>22</sup> *State v. Steele*, 921 So. 2d 538, 548-49 (Fla. 2005).

<sup>23</sup> *Id.*

recommendations by a majority vote reduces the jury's deliberation time and thus may diminish the thoroughness of the deliberations.<sup>24</sup>

- ***The Practice of Judicial Override*** – (see Chapters 1, 10, 11 and 12) Between 1972 and 1999, 166 of the 857 first-time death sentences imposed (or 19.4 percent) involved a judicial override of a jury's recommendation of life imprisonment or life imprisonment without the possibility of parole. Although the Team is not aware of any trial judge decision since that time to override a jury's recommendation of life imprisonment without the possibility of parole, Florida law still authorizes the practice. Not only does judicial override open up an additional window of opportunity for bias—as stated in 1991 by the Florida Supreme Court's Racial and Ethnic Bias Commission<sup>25</sup>—but it also affects jurors' sentencing deliberations and decisions. A recent study of death penalty cases in Florida and nationwide found: (1) that when deciding whether to override a jury's recommendation for a life sentence without the possibility of parole, trial judges take into account the potential “repercussions of an unpopular decision in a capital case,” which encourages judges in judicial override states to override jury recommendations of life, “especially so in the run up to judicial elections;” and (2) that the practice of judicial override makes jurors feel less personally responsible for the sentencing decision, resulting in shorter sentencing deliberations and less disagreement among jurors.<sup>26</sup> Additionally, in the wake of the United States Supreme Court's decision in *Ring v. Arizona*,<sup>27</sup> the constitutionality of judicial override remains in doubt.
- ***Lack of Transparency in the Clemency Process*** (see Chapter 9) – Full and proper use of the clemency process is essential to guaranteeing fairness in the administration of the death penalty. Given the ambiguities and confidentiality surrounding Florida's clemency decision-making process and the fact that clemency has not been granted to a death-sentenced inmate since 1983,<sup>28</sup> it is difficult to conclude that Florida's clemency process is adequate. For example, the factors considered by the Board of Executive Clemency (Board) are largely undefined and the Board is not required to provide its reasons for denying clemency. In fact, the Governor can deny clemency at any time, for any reason, even without holding a public hearing on the death-sentenced inmate's eligibility for clemency.
- ***Racial Disparities in Florida's Capital Sentencing*** (see Chapter 12) – The Florida Supreme Court's Racial and Ethnic Bias Commission found in 1991

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<sup>24</sup> William J. Bowers et al., *The Decision Makers: An Empirical Examination of the Way the Role of the Judge and Jury Influence Death Penalty Decision-Making*, 63 WASH. & LEE L. REV. (forthcoming Dec. 2006).

<sup>25</sup> EXECUTIVE SUMMARY: REPORTS & RECOMMENDATION OF THE FLORIDA SUPREME COURT RACIAL & ETHNIC BIAS COMMISSION, “WHERE THE INJURED FLY FOR JUSTICE”: REFORMING PRACTICES WHICH IMPEDE THE DISPENSATION OF JUSTICE TO MINORITIES IN FLORIDA 4 (Deborah Hardin Wagner ed. 1991) [hereinafter EXECUTIVE SUMMARY].

<sup>26</sup> Bowers et al., *supra* note 24.

<sup>27</sup> 536 U.S. 584 (2002).

<sup>28</sup> See <http://www.deathpenaltyinfo.org/article.php?did=126&scid=13> (last visited on Aug. 7, 2006).

that the application of the death penalty in Florida “is not colorblind,” citing a study that found that a criminal defendant in a capital case is, other things being equal, 3.4 times more likely to receive the death penalty if the victim is white than if the victim is African-American.<sup>29</sup> Similarly, as of December 10, 1999, of the 386 inmates on Florida’s death row, “only five were whites condemned for killing blacks. Six were condemned for the serial killings of whites and blacks. And three other whites were sentenced to death for killing Hispanics.”<sup>30</sup> Additionally, since Florida reinstated the death penalty, there have been no executions of white defendants for killing African-American victims.<sup>31</sup> Thus, it appears that those convicted of killing white victims are far more likely to receive a death sentence and be executed than those convicted of killing non-white victims.

- ***Geographic Disparities in Florida’s Capital Sentencing*** (see Chapters 1 and 5). The death sentences of the sixty individuals who have been executed in Florida since 1972 were imposed in thirty of Florida’s sixty-seven counties.<sup>32</sup> Similarly, of the fifteen new death sentences in 2001, three (or 20 percent)

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<sup>29</sup> EXECUTIVE SUMMARY, *supra* note 25. Of course, the data reported in this study could be explained by nonracial factors, but it should also be noted that the study used regression analysis to take into account factors such as the number of victims, the number of offenders, the weapon used, and the victim-offender relationship. See Michael L. Radelet & Glen L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 Fla. L. Rev. 1 (1991).

<sup>30</sup> Sydney P. Freedberg & William Yardley, *Lethal Injection Approved*, ST. PETERSBURG TIMES, Jan. 7, 2000.

<sup>31</sup> Michael Radelet, *Recent Developments in the Death Penalty in Florida*, at tbl. 3, available at <http://www.cuadp.org/florida/fldpinfo.html> (last visited on Aug. 18, 2006). For data on executions after 2001, see Clark County Prosecuting Attorneys Office, Rigoberto Sanchez-Velasco, at <http://www.clarkprosecutor.org/html/death/US/sanchez804.htm> (last visited on July 24, 2006) (Hispanic man executed for killing a Hispanic victim); Clark County Prosecuting Attorneys Office, Aileen Carol Wuornos, at <http://www.clarkprosecutor.org/html/death/US/wuornos805.htm> (last visited on July 24, 2006) (white woman executed for killing multiple white victims); Clark County Prosecuting Attorneys Office, Linroy Bottoson, at <http://www.clarkprosecutor.org/html/death/US/bottoson813.htm> (last visited on July 24, 2006) (African American man executed for killing an African American victim); Clark County Prosecuting Attorneys Office, Newton Carlton Slawson, at <http://www.clarkprosecutor.org/html/death/US/slawson854.htm> (last visited on July 24, 2006) (white man executed for killing multiple white victims); Clark County Prosecuting Attorneys Office, Glen James Ocha, at <http://www.clarkprosecutor.org/html/death/US/ocha957.htm> (last visited on July 24, 2006) (white man executed for killing a white victim); Clark County Prosecuting Attorneys Office, Paul Jennings Hill, at <http://www.clarkprosecutor.org/html/death/US/hill873.htm> (last visited on July 24, 2006) (white man executed for killing multiple white victims); Clark County Prosecuting Attorneys Office, John Richard Blackwelder, at <http://www.clarkprosecutor.org/html/death/US/blackwelder911.htm> (last visited on July 24, 2006) (white man executed for killing a white victim); Clark County Prosecuting Attorneys Office, Amos Lee King, at <http://www.clarkprosecutor.org/html/death/US/king834.htm> (last visited on July 24, 2006) (African American man executed for killing a white victim); Clark County Prosecuting Attorneys Office, Johnny L. Robinson, at <http://www.clarkprosecutor.org/html/death/US/robinson895.htm> (last visited on July 24, 2006) (African American man executed for killing a white victim). *But see* Clark County Prosecuting Attorneys Office, Edward Castro, at <http://www.clarkprosecutor.org/html/death/US/castro681.htm> (last visited on July 24, 2006) (listing Edward Castro as Hispanic with a white victim).

<sup>32</sup> Florida Department of Corrections Bureau of Research & Data Analysis, Table 15.1 (2005) (on file with author).

came from the First, Second, and Third Judicial Circuits.<sup>33</sup> The cause of these geographic disparities is unclear, but one possible variable is the charging decision. Research in other states indicate that charging practices vary from prosecutor to prosecutor<sup>34</sup> and few of the prosecutor offices in Florida that we contacted have written policies governing the charging decision. Research also suggests that some capital charging decisions in Florida are influenced by racial factors.<sup>35</sup>

- ***Death Sentences Imposed on People with Severe Mental Disability*** (see Chapter 13) – The State of Florida has a significant number of people with severe mental disabilities on death row, some of whom were disabled at the time of the offense and others of whom became seriously ill after conviction and sentence.<sup>36</sup>

### C. Florida Death Penalty Assessment Team Recommendations

As noted above, each chapter of this report includes several ABA recommendations, which the Florida Death Penalty Assessment Team used as a springboard to analyze Florida’s death penalty laws and procedures. While Team members expressed divergent views about the weight to be placed on the various ABA recommendations, the entire Florida Death Penalty Assessment Team endorses several independent, state-specific proposals, which correspond to the observations made in the previous section:

- (1) The State of Florida should create two independent commissions to: (a) establish the cause of wrongful convictions in capital cases and recommend changes to prevent future wrongful convictions in these cases;

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<sup>33</sup> Radelet, *supra* note 31, at 4.

<sup>34</sup> See, e.g., *Minimizing Risk: A Blueprint for Death Penalty Reform in Texas*, Texas Defender Service, available at <http://www.texasdefender.org/risk/risk.pdf> (2006) (listing as a problem in Texas the excessive prosecutorial discretion in charging decisions resulting in racial and geographic disparity); Raymond Paternoster and Robert Brame, *An Empirical Analysis of Maryland's Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction*, tbl. 8 (2003), available at <http://www.urhome.umd.edu/newsdesk/pdf/finalrep.pdf> (Final Report) (documenting significant unadjusted geographic disparities in prosecutorial charging decisions in Maryland); OFFICE OF THE ARIZ. ATTORNEY GENERAL, CAPITAL CASE COMMISSION FINAL REPORT 17 (2002) (recommending that all prosecutors involved in trying capital cases adopt written policies for identifying cases in which to seek the death penalty, including policies on “soliciting or accepting defense input before deciding to seek the death penalty”); OFFICE OF THE ARIZ. ATTORNEY GENERAL, CAPITAL CASE COMMISSION INTERIM REPORT, at A-3 (2001).

<sup>35</sup> See, e.g., Bob Levenson & Debbie Salamone, *Prosecutors See Death Penalty in Black and White*, ORLANDO SENTINEL, May 24, 1992, at A1; Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC’Y REV. 587, 618-19 (1985) (stating that “[i]t appears that not only are prosecutors sometimes motivated to seek a death sentence for reasons that reflect the racial configuration of the crime, but that they do so in a way that greatly reduces the possibilities for discovering evidence of discrimination and arbitrariness when only later stages of the judicial process are examined.”)

<sup>36</sup> See, e.g., Chris Adams, *Executing the Mentally Retarded Cruel and Unusual?*, CHAMPION, May 2001, at 10 (stating that as of 2001, “of the 3700 inmates currently on death row it is estimated ‘between 200-300 inmates are mentally retarded’”); Barbara A. Ward, *Competency for Execution: Problems in Law and Psychiatry*, 14 FLA. ST. U. L. REV. 35, 42 (1986) (estimating that “as many as fifty percent of Florida’s death-row inmates become intermittently insane”).

and (b) review claims of factual innocence in capital cases that, if sustained, would then be reviewed by a panel of judges. Given the number of exonerations in Florida, the creation of the first type of commission is extremely important—even if it is discovered, as one previous investigation suggested,<sup>37</sup> that many of the exonerated individuals were not clearly factually innocent—because understanding the reasons for the exoneration can help improve the system. The second type of commission, which would supplement the current post-conviction process, was recently established in North Carolina and is being considered in at least twelve other states, in large part because of the perception that procedural defaults and inadequate lawyering sometimes prevent claims of factual innocence from receiving full consideration.<sup>38</sup>

- (2) The State of Florida should take steps to ensure that all conflict trial counsel in death penalty cases are properly compensated. Specifically, the State of Florida should (a) eliminate the statutory fee cap, thus giving judges the discretion to determine on a case-by-case basis the appropriate amount of compensation, and (b) allow greater flexibility for obtaining interim payments for services.
- (3) The State of Florida should adopt qualification standards for capital collateral registry attorneys and attorney monitoring procedures that are consistent with the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (ABA Guidelines). In the alternative, it should reinstitute the Capital Collateral Regional Counsel Office in the Northern Region of Florida, thereby eliminating reliance on registry counsel in non-conflict cases.
- (4) The State of Florida should adopt compensation standards for capital collateral registry attorneys that are consistent with the ABA Guidelines.
- (5) The State of Florida should redraft its capital jury instructions with the objective of preventing common juror misconceptions that have been identified in the research literature referenced in the previous section.
- (6) The State of Florida should require that the jury's sentencing verdict in capital cases be unanimous and, when the sentencing verdict is a death sentence, that the jury reach unanimous agreement on at least one aggravating circumstance.
- (7) The State of Florida should give the jury final decision-making authority in capital sentencing proceedings, and thus should eliminate judicial override in cases where the jury recommends life imprisonment without the possibility of parole.

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<sup>37</sup> See FLA. COMM'N ON CAPITAL CASES, CASE HISTORIES: A REVIEW OF 24 INDIVIDUALS RELEASED FROM DEATH ROW 5 (2002), available at <http://www.floridacapitalcases.state.fl.us/Publications/innocentsproject.pdf> (last visited on August 14, 2006); see also DEATH PENALTY INFORMATION CENTER, INNOCENCE AND THE CRISIS IN THE AMERICAN DEATH PENALTY (2004), available at <http://www.deathpenaltyinfo.org/article.php?scid=45&did=1149#rn44> (last visited on August 14, 2006).

<sup>38</sup> Patrick Johnson, *North Carolina Creates a New Route to Exoneration*, CHRISTIAN SCIENCE MONITOR, Aug. 20, 2006.

- (8) The State of Florida's Board of Executive Clemency should: (a) adopt a rule that calls for the Board of Executive Clemency (Board) to issue a brief written statement in every instance wherein a death-sentenced inmate is denied clemency, making specific reference to the various factors/claims that the Board may have considered; (b) adopt a rule delineating the factors that the Board should consider, but not be limited to, when reviewing a death-sentenced inmate's grounds for clemency; (c) adopt a rule establishing that a death-sentenced inmate will receive a public hearing before the Board prior to the clemency determination; and (d) adopt a rule that calls for the Governor to, at a minimum, assign a clemency aide to routinely attend, in person or via video-conference, the Parole Commission interviews with the death-sentenced inmate since the Governor is, in effect, the principal clemency decision-maker and could therefore be well-served by an aide's first-hand observations. We also recommend that such a rule should attempt to facilitate participation by the clemency aides of the other members of the Board, at the discretion of their respective principals.
- (9) The State of Florida should sponsor a study to determine the existence or non-existence of unacceptable disparities, whether they be racial, socio-economic, geographic, or otherwise in its death penalty system, or, at least, implement the recommendations of its 2000 Governor's Task Force on Capital Cases.<sup>39</sup> Among other things, the Task Force recommended that a committee of experts be appointed to undertake a state-funded review of racial disparity in the capital punishment system and the establishment of an information clearinghouse on issues relevant to race and the death penalty.<sup>40</sup>
- (10) The State of Florida should develop statewide protocols for determining who may be charged with a capital crime, in an effort to standardize the charging decision.
- (11) Although the State of Florida excludes individuals with mental retardation from the death penalty, it does not explicitly exclude individuals with other types of serious mental disorders from being sentenced to death and/or executed, nor does it adequately protect against the accuracy-impairing impact of mental disability during the post-conviction process. Consistent with a resolution recently unanimously passed by the ABA House of Delegates,<sup>41</sup> the State of Florida should adopt a law or rule: (a) forbidding death sentences and executions with regard to everyone who, at the time of the offense, had significantly subaverage limitations in both their general intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury; (b) forbidding death

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<sup>39</sup> Becker, *supra* note 31.

<sup>40</sup> *Id.*

<sup>41</sup> American Bar Association, Recommendation #122A with Report, adopted Aug. 2006, *available at* <http://www.abanet.org/leadership/2006/annual/dailyjournal/hundredtwentytwoa.doc> (last visited Aug. 30, 2006).

sentences and executions with regard to everyone who, at the time of the offense, had a severe mental disorder or disability that significantly impaired their capacity (i) to appreciate the nature, consequences or wrongfulness of their conduct, (ii) to exercise rational judgment in relation to their conduct, or (iii) to conform their conduct to the requirements of the law; and (c) providing that a death-row inmate is not “competent” for execution where the inmate, due to a mental disorder or disability, has significantly impaired capacity to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the inmate’s own case. It should further provide that when a finding of incompetence is made after challenges to the validity of the conviction and death sentence have been exhausted and execution has been scheduled, the death sentence will be reduced to life without the possibility of parole (or to a life sentence for those sentenced prior to the adoption of life without the possibility of parole as the sole alternative punishment to the death penalty).

Lastly, the Florida Death Penalty Assessment Team notes that many of the problems discussed throughout this executive summary and in more detail in this report transcend the death penalty system. For instance, although capital cases comprise only 3 percent of all criminal felony filings, they occupy 50 percent of the Florida Supreme Court’s docket.<sup>42</sup> Additionally, the cost of a capital case resulting in a death sentence far exceeds the cost of a case resulting in a life sentence.<sup>43</sup> Many members of the Florida Death Penalty Assessment Team are concerned that the expenditure of resources on capital cases affects the system’s ability to render justice in non-capital cases.

### III. SUMMARY OF THE REPORT

#### Chapter One: An Overview of Florida’s Death Penalty System

In this chapter, we examined the demographics of Florida’s death row, the statutory evolution of Florida’s death penalty scheme, and the progression of an ordinary death penalty case through Florida’s death penalty system from arrest to execution.

#### Chapter Two: Collection, Preservation and Testing of DNA and Other Types of Evidence

DNA testing has proved to be a useful law enforcement tool to establish guilt as well as innocence. The availability and utility of DNA testing, however, depends on the state’s laws and on its law enforcement agencies’ policies and procedures concerning the collection, preservation, and testing of biological evidence. In this chapter, we examined Florida’s laws, procedures, and practices concerning not only DNA testing, but also the

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<sup>42</sup> Frank Davies, *Death Penalty System Called Highly Flawed: Two-Thirds of U.S. Cases Overturned*, MIAMI HERALD, June 12, 2000, at 1A.

<sup>43</sup> Glenn L. Pierce & Michael Radelet, *The Role and Consequences of the Death Penalty in American Politics*, 18 N.Y.U. J. L. & SOC. CHANGE 711, 719 (1990/91) (noting that in Florida a death sentence case costs approximately \$2.5 million more than a life sentence of 40 years); *see also* Amnesty International, *Death Penalty Facts: Cost*, at <http://www.amnestyusa.org> (last visited on Aug. 18, 2006).

collection and preservation of all forms of biological evidence, and we assessed whether Florida complies with the ABA’s policies on the collection, preservation, and testing of DNA and other types of evidence.

A summary of Florida’s overall compliance with the ABA’s policies on the collection, preservation, and testing of DNA and other types of evidence is illustrated in the following chart.<sup>44</sup>

<b>Collection, Preservation, and Testing of DNA and Other Types of Evidence</b>					
<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i> <sup>45</sup>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i> <sup>46</sup>	<i>Not Applicable</i>
<b>Recommendation</b>					
<b>Recommendation #1:</b> Preserve all biological evidence for as long as the defendant remains incarcerated.	X				
<b>Recommendation #2:</b> Defendants and inmates should have access to biological evidence, upon request, and be able to seek appropriate relief notwithstanding any other provision of the law.		X			
<b>Recommendation #3:</b> Law enforcement agencies should establish and enforce written procedures and policies governing the preservation of biological evidence.		X			
<b>Recommendation #4:</b> Law enforcement agencies should provide training and disciplinary procedures to ensure that investigative personnel are prepared and accountable for their performance.		X			
<b>Recommendation #5:</b> Ensure that adequate opportunity exists for citizens and investigative personnel to report misconduct in investigations.				X	
<b>Recommendation #6:</b> Provide adequate funding to ensure the proper preservation and testing of biological evidence.				X	

<sup>44</sup> Where necessary, the recommendations contained in this chart and all subsequent charts were condensed to accommodate spatial concerns. The condensed recommendations are not substantively different from the recommendations contained in the “Analysis” section of each chapter.

<sup>45</sup> Given that a majority of the ABA’s recommendations are composed of several parts, we used the term “partially in compliance” to refer to instances in which the State of Florida meets a portion, but not all, of the recommendation. This definition applies to all subsequent charts contained in this Executive Summary.

<sup>46</sup> In this publication, the Project and the Assessment Team have attempted to note as accurately as possible information relevant to the Florida death penalty. The Project would welcome notification of any omissions or errors in this report so that they may be corrected in any future reprints.

The State of Florida requires governmental entities to preserve all physical evidence from a death penalty case until sixty days after the defendant is executed. It also allows defendants to:

- (1) obtain physical evidence for DNA testing during pre-trial discovery,
- (2) gain DNA testing before entering a plea of guilty or nolo contendere, and
- (3) seek post-conviction DNA testing.

However, certain procedural requirements and restrictions have the potential to preclude inmates from successfully filing and obtaining a hearing on a post-conviction motion for DNA testing and from receiving post-conviction DNA testing. For example, judges are not required to hold evidentiary hearings on an inmate's motion requesting DNA testing. Rather, in order to obtain an evidentiary hearing on the merits of a motion, the motion must be sworn and the movant must sufficiently allege all of the six pleading requirements. If the movant fails to meet any of the procedural requirements, it will result in the summary dismissal of his/her motion without an evidentiary hearing. Additionally, even if the motion is legally sufficient, the judge may still deny the motion if its allegations are conclusively refuted by the record on appeal.

Even in cases in which DNA testing is granted, the forensic services offered by Florida Department of Law Enforcement (FDLE) crime laboratories are somewhat limited. For example, FDLE crime laboratories do not perform Mitochondrial or Y-STR testing, which is necessary for old, degraded evidence. Additionally, the reliability and validity of the tests performed by Florida crime laboratories have been called into question. For a discussion on the problems with Florida crime laboratories, see Chapter 4: Crime Laboratories and Medical Examiner Offices.

### Chapter Three: Law Enforcement Identifications and Interrogations

Eyewitness misidentification and false confessions are two of the leading causes of wrongful convictions. In order to reduce the number of convictions of innocent persons and to ensure the integrity of the criminal justice process, the rate of eyewitness misidentifications and of false confessions must be reduced. In this chapter, we reviewed Florida's laws, procedures, and practices on law enforcement identifications and interrogations and assessed whether they comply with the ABA's policies on law enforcement identifications and interrogations.

A summary of Florida's overall compliance with the ABA's policies on law enforcement identifications and interrogations is illustrated in the following chart.

<b>Law Enforcement Identifications and Interrogations</b>					
<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
<b>Recommendation</b>					
<b>Recommendation #1:</b> Law enforcement agencies should adopt guidelines for conducting lineups and photospreads in a manner that maximizes their likely accuracy. Every set of guidelines should address at least the subjects, and should incorporate at least the social scientific teachings and best practices, set forth in the ABA's Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures.				X	
<b>Recommendation #2:</b> Law enforcement officers and prosecutors should receive periodic training on how to implement the guidelines for conducting lineups and photospreads, and training on non-suggestive techniques for interviewing witnesses.		X			
<b>Recommendation #3:</b> Law enforcement agencies and prosecutors' offices should periodically update the guidelines for conducting lineups and photospreads to incorporate advances in social scientific research and in the continuing lessons of practical experience.				X	
<b>Recommendation #4:</b> Law enforcement agencies should videotape the entirety of custodial interrogations at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical, audiotape the entirety of such custodial		X			
<b>Recommendation #5:</b> Ensure adequate funding to ensure proper development, implementation, and updating of policies and procedures relating to identifications and interrogations.				X	
<b>Recommendation #6:</b> Courts should have the discretion to allow a properly qualified expert to testify both pre-trial and at trial on the factors affecting eyewitness accuracy.	X				
<b>Recommendation #7:</b> Whenever there has been an identification of the defendant prior to trial, and identity is a central issue in a case tried before a jury, courts should use a specific instruction, tailored to the needs of the individual case, explaining the factors to be considered in gauging lineup accuracy.		X			

We commend the State of Florida for taking certain measures that likely reduce the risk of inaccurate eyewitness identifications and false confessions. For example:

- Law enforcement officers in Florida are required to complete a basic training course that includes instruction on avoiding suggestive methods of interviewing witnesses such as leading, specific, or threatening questions; and
- Courts have the discretion to admit expert testimony regarding the accuracy of eyewitness identifications.

In addition to these statewide measures, at least twenty-three law enforcement agencies in Florida regularly record some or all custodial interrogations in an effort to protect against false or coerced confessions.

Despite these measures, however, the basic training course does not appear to include any instruction on conducting pre-trial identification procedures. Additionally, the State of Florida does not require law enforcement agencies to adopt procedures governing identifications and interrogations nor does it have a jury instruction that specifically provides the factors to be considered by the jury in gauging lineup accuracy.

In order to ensure that all law enforcement agencies conduct lineups and photospreads in a manner that maximizes their likely accuracy, the State of Florida should require all law enforcement agencies to adopt procedures on lineups and photospreads that are consistent with the ABA’s recommendations. In addition, the state should mandate that all law enforcement agencies record the entirety of custodial interrogations.

Chapter Four: Crime Laboratories and Medical Examiner Offices

With courts’ increased reliance on forensic evidence and the questionable validity and reliability of recent tests performed at a number of unaccredited and accredited crime laboratories across the nation, the importance of crime laboratory and medical examiner office accreditation, forensic and medical examiner certification, and adequate funding of these laboratories and offices cannot be overstated. In this chapter, we examined these issues as they pertain to Florida and assessed whether Florida’s laws, procedures, and practices comply with the ABA’s policies on crime laboratories and medical examiner offices.

A summary of Florida’s overall compliance with the ABA’s policies on crime laboratories and medical examiner offices is illustrated in the following chart.

<b>Crime Laboratories and Medical Examiner Offices</b>					
<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
<b>Recommendation</b>					
<b>Recommendation #1:</b> Crime laboratories and medical examiner offices should be accredited, examiners should be certified, and procedures should be standardized and published to ensure the validity, reliability, and timely analysis of forensic evidence.		X			
<b>Recommendation #2:</b> Crime laboratories and medical examiner offices should be adequately funded.				X	

Florida law does not require crime laboratories to be accredited, but all seven of the crime laboratories of the Florida Department of Law Enforcement (FDLE) and all five of the unaffiliated, local crime laboratories have voluntarily obtained accreditation. As a prerequisite for accreditation, the accreditation programs require laboratories to take certain measures to ensure the validity, reliability, and timely analysis of forensic evidence. Further, Florida law requires the FDLE to establish policies and procedures that are similar to the requirements of the accreditation programs. For example, the FDLE is required to: (1) establish policies and procedures to be employed by the laboratories; (2) establish standards of education and experience for professional and technical personnel employed by the laboratories; and (3) adopt internal procedures for the review and evaluation of laboratory services. It appears that all five accredited unaffiliated crime laboratories have adopted similar policies and procedures.

Despite these measures, however, the validity and reliability of the tests conducted by at least two of these laboratories have been called into question. For example, in 2003, a DNA analyst at the Broward County Sheriff's Office Crime Laboratory mixed DNA from a murder case with a separate rape case. Similarly, in 2002, a DNA lab worker at the FDLE Orlando Regional Crime Laboratory admitted to falsifying DNA data in a test designed to check the quality of work.

Like crime laboratories, the State of Florida does not require district medical examiner offices to be accredited, but four of the twenty-four medical examiner district offices have voluntarily obtained accreditation. Even though the State of Florida does not require such accreditation, it has established a commission to oversee the practices of all medical examiners and has adopted certain laws and procedures that govern the practices of all medical examiners—even those in the unaccredited districts. Additionally, according to the Florida Association of Medical Examiners, as of 2003, every district medical examiner had office policies that prescribed the duties of associate medical examiners and paraprofessional staff.

#### Chapter Five: Prosecutorial Professionalism

The prosecutor plays a critical role in the criminal justice system. The character, quality, and efficiency of the whole system is shaped in great measure by the manner in which the prosecutor exercises his/her broad discretionary powers, especially in capital cases, where prosecutors have enormous discretion deciding whether or not to seek the death penalty.

In this chapter, we examined Florida's laws, procedures, and practices relevant to prosecutorial professionalism and assessed whether they comply with the ABA's policies on prosecutorial professionalism.

A summary of Florida's overall compliance with the ABA's policies on prosecutorial professionalism is illustrated in the following chart.

<b>Prosecutorial Professionalism</b>					
<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
<b>Recommendation</b>					
<b>Recommendation #1:</b> Each prosecutor's office should have written policies governing the exercise of prosecutorial discretion to ensure the fair, efficient, and effective enforcement of criminal law.				X	
<b>Recommendation #2:</b> Each prosecutor's office should establish procedures and policies for evaluating cases that rely on eyewitness identification, confessions, or the testimony of jailhouse snitches, informants, and other witnesses who receive a benefit.				X	
<b>Recommendation #3:</b> Prosecutors should fully and timely comply with all legal, professional, and ethical obligations to disclose to the defense information, documents, and tangible objects and should permit reasonable inspection, copying, testing, and photographing of such disclosed documents and tangible objects.		X			
<b>Recommendation #4:</b> Each jurisdiction should establish policies and procedures to ensure that prosecutors and others under the control or direction of prosecutors who engage in misconduct of any kind are appropriately disciplined, that any such misconduct is disclosed to the criminal defendant in whose case it occurred, and that the prejudicial impact of any such misconduct is remedied.		X			
<b>Recommendation #5:</b> Prosecutors should ensure that law enforcement agencies, laboratories, and other experts under their direction or control are aware of and comply with their obligation to inform prosecutors about potentially exculpatory or mitigating evidence.				X	
<b>Recommendation #6:</b> The jurisdiction should provide funds for the effective training, professional development, and continuing education of all members of the prosecution team, including training relevant to capital prosecutions.	X				

The State of Florida does not require state attorneys' offices to establish policies on the exercise of prosecutorial discretion. Accordingly, the State of Florida should adopt the Florida Death Penalty Assessment Team's recommendation previously discussed on page xi of the Executive Summary.

We recognize, however, that the State of Florida has taken certain measures to promote the fair, efficient, and effective enforcement of criminal law, such as:

- The State of Florida has entrusted The Florida Bar with investigating grievances and disciplining practicing attorneys, including prosecutors;
- The Florida Bar has promulgated the Florida Rules of Professional Conduct, which require prosecutors to, among other things, disclose to the defense all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor;
- The Florida Supreme Court holds prosecutors responsible for disclosing not only evidence of which s/he is aware, but also “favorable evidence known to others acting on the government’s behalf;”
- The Florida Supreme Court has established guidelines for prosecutors, defense attorneys, and trial judges on conducting plea discussions and reaching plea agreements; and
- The State of Florida, through Florida’s twenty State Attorneys, has created the Florida Prosecuting Attorneys’ Association to serve the needs of prosecutors by offering educational programs and technical support.

Despite these measures, the Florida Supreme Court has on a number of occasions expressed its concern over the prevalence of prosecutorial misconduct. In *Gore v. State*,<sup>47</sup> for example, the Court reiterated an admonishment from an earlier case stating:

[W]e are deeply disturbed as a Court by continuing violations of prosecutorial duty, propriety and restraint. We have recently addressed incidents of prosecutorial misconduct in several death penalty cases . . . . It ill becomes those who represent the state in the application of its lawful penalties to themselves ignore the precepts of their profession and their office.<sup>48</sup>

Courts in Florida have not only expressed concern over prosecutorial misconduct, but also with the efficacy of The Florida Bar’s disciplinary abilities. In *Johnnides v. Amoco Oil Company*,<sup>49</sup> the Third District Court of Appeals stated:

[W]e have no illusions that [referring lawyers to The Florida Bar] will have any practical effect. Our skepticism is caused by the fact that, of the many occasions in which members of this court—reluctantly and usually only after agonizing over what we thought was the seriousness of doing so—have found it appropriate to make such a referral about a lawyer’s conduct in litigation, none has resulted in the public imposition of any discipline—not even a reprimand—whatsoever. In fact, the reported decisions do not reflect that the Bar has responded concretely at all to the tide of uncivil and unprofessional conduct which has been the subject of

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<sup>47</sup> 719 So. 2d 1197, 1202 (Fla. 1998).

<sup>48</sup> *Id.*

<sup>49</sup> 778 So. 2d 443 (2001).

so much article-writing, sermon-giving, seminar-holding and general hand-wringing for at least the past twenty years.<sup>50</sup>

Along these same lines, based on reports from prosecutors offices and The Florida Bar, it appears that prosecutors have rarely been sanctioned for misconduct in capital cases.

Chapter Six: Defense Services

Effective capital case representation requires substantial specialized training and experience in the complex laws and procedures that govern a capital case, as well as full and fair compensation to the lawyers who undertake capital cases and resources for investigators and experts. States must address counsel representation issues in a way that will ensure that all capital defendants receive effective representation at all stages of their cases as an integral part of a fair justice system. In this chapter, we examined Florida’s laws, procedures, and practices relevant to defense services and assessed whether they comply with the ABA’s policies on defense services.

A summary of Florida’s overall compliance with the ABA’s policies on defense services is illustrated in the following chart.

Defense Services						
Compliance		In Compliance	Partially in Compliance	Not in Compliance	Insufficient Information to Determine Statewide Compliance	Not Applicable
Recommendation						
Recommendation #1: Guideline 4.1 of the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases (ABA Guidelines)—The Defense Team and Supporting Services			X			
Recommendation #2: Guideline 5.1 of the ABA Guidelines—Qualifications of Defense Counsel			X			
Recommendation #3: Guideline 3.1 of the ABA Guidelines—Designation of a Responsible Agency				X		
Recommendation #4: Guideline 9.1 of the ABA Guidelines—Funding and Compensation			X			
Recommendation #5: Guideline 8.1 of the ABA Guidelines—Training			X			

Florida’s indigent legal representation system is composed of twenty public defenders’ offices, two Capital Collateral Regional Counsel Offices, and twenty-one attorney registries. Together, these entities provide at least one attorney as well as investigators and experts for indigent defendants charged with or convicted of a capital offense at every stage of the legal proceedings, except possibly during clemency proceedings. The system nonetheless falls far short of complying with the *ABA Guidelines for the*

<sup>50</sup> *Id.* at 445 n.2.

*Appointment and Performance of Defense Counsel in Death Penalty Cases* (ABA Guidelines) for a number of reasons:

- Florida law contains only minimal qualification requirements for capital collateral registry attorneys. Specifically, these attorneys are only required to: (1) be members in good standing of The Florida Bar with not less than three years of experience in the practice of criminal law, (2) have participated in at least five felony jury trials, five felony appeals, or five capital post-conviction evidentiary hearings or any combination of at least five of such proceedings, and (3) meet the continuing legal education requirements;
- The statutory fee caps for attorneys handling capital cases at trial, on appeal, during capital collateral proceedings, and during clemency proceedings and the failure to provide for interim payments to some of these attorneys have the potential to: (1) dissuade the most experienced and qualified lawyers from taking capital cases, and (2) preclude those attorneys who do take cases from having the funds necessary to present a vigorous defense; and
- The State of Florida has not removed the judiciary from the attorney appointment and monitoring process, thereby failing to protect against the appointment or retention of attorneys for reasons other than their qualifications.

Based on this information, the State of Florida should at a minimum adopt the Florida Death Penalty Team's recommendations previously discussed on page xiii of the Executive Summary.

#### Chapter Seven: Direct Appeal Process

The direct appeal process in capital cases is designed to correct any errors in the trial court's findings of fact and law and to determine whether the trial court's actions during the guilt/innocence and penalty phases of the trial were improper. One important function of appellate review is to ensure that death sentences are not imposed arbitrarily, or based on improper biases. Meaningful comparative proportionality review, the process through which a sentence of death is compared with sentences imposed on similarly situated defendants to ensure that the sentence is not disproportionate, is the prime method to prevent arbitrariness and bias at sentencing. In this chapter, we examined Florida's laws, procedures, and practices relevant to the direct appeal process and assessed whether they comply with the ABA's policies on the direct appeal process.

A summary of Florida's overall compliance with the ABA's policies on the direct appeal process is illustrated in the following chart.

Direct Appeal Process						
Compliance		In Compliance	Partially in Compliance	Not in Compliance	Insufficient Information to Determine Statewide Compliance	Not Applicable
Recommendation						
<b>Recommendation #1:</b> In order to (1) ensure that the death penalty is being administered in a rational, non-arbitrary manner, (2) provide a check on broad prosecutorial discretion, and (3) prevent discrimination from playing a role in the capital decision making process, direct appeals courts should engage in meaningful proportionality review that includes cases in which a death sentence was imposed, cases in which the death penalty was sought but not imposed, and cases in which the death penalty could have been sought but was not.			X			

The Florida Supreme Court has interpreted the Florida Constitution to impose “an absolute obligation” on the Court to determine whether death is a proportionate penalty. The Court’s proportionality review entails (1) performing a qualitative review of the underlying basis for each aggravator and mitigator; and (2) determining whether the crime falls within the category of *both* the “most aggravated” and the “least mitigated murders.” This review must consider the totality of the circumstances in the case under review and compare it to cases in which the death penalty was imposed. The Florida Supreme Court only expands its proportionality review to cases where the death penalty was not imposed in cases involving multiple co-defendants or co-participants.

Given that the State of Florida generally limits its proportionality review to cases in which the death penalty was actually imposed, the meaningfulness of the Court’s review is questionable. For example, a recent study of 272 death sentences reviewed for proportionality by the Florida Supreme Court between January 1, 1989 and December 31, 2003 raised a number of questions pertaining to the meaningfulness of the Court’s review and demonstrated that the Court’s proportionality review has been much less successful in identifying disproportional death sentences since 1999.<sup>51</sup> Specifically, the study found that the Florida Supreme Court’s average rate of vacating death sentences significantly decreased from 20 percent during 1989-1999 to 4 percent during 2000-2003.<sup>52</sup> It also found that the Court has affirmed death sentences in cases with low levels of aggravation and high levels of mitigation—cases with the lowest level of criminal culpability—at a much higher rate in 2000-2003 than it did in 1989-1999.<sup>53</sup> In order to increase the meaningfulness of its proportionality review, the Florida Supreme Court should review

<sup>51</sup> See Phillip L. Durham, *Review in Name Alone: The Rise and Fall of Comparative Proportionality Review of Capital Sentences by the Supreme Court of Florida*, 17 ST. THOMAS L. REV. 299, 314 (2004).

<sup>52</sup> *Id.* at 319-320.

<sup>53</sup> *Id.* at 349. The study attributed this drop-off in vacations of death sentences on proportionality grounds to the political pressure from the executive and legislative branches regarding the disposition of death penalty appeals and the changing composition of the Court. *Id.*

cases in which the death penalty was sought but not imposed and cases in which the death penalty could have been sought but was not.

Chapter Eight: State Post-Conviction Proceedings

The importance of state post-conviction proceedings to the fair administration of justice in capital cases cannot be overstated. Because many capital defendants receive inadequate counsel at trial and on appeal, state post-conviction proceedings often provide the first real opportunity to establish meritorious constitutional claims. For this reason, all post-conviction proceedings should be conducted in a manner designed to permit the adequate development and judicial consideration of all claims. In this chapter, we examined Florida’s laws, procedures, and practices relevant to state post-conviction proceedings and assessed whether they comply with the ABA’s policies on state post-conviction.

A summary of Florida’s overall compliance with the ABA’s policies on state post-conviction proceedings is illustrated in the following chart.

<b>State Post-Conviction Proceedings</b>						
<i>Compliance</i>		<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
<b>Recommendation</b>						
<b>Recommendation #1:</b> All post-conviction proceedings at the trial court level should be conducted in a manner designed to permit adequate development and judicial consideration of all claims. Trial courts should not expedite post-conviction proceedings unfairly; if necessary, courts should stay executions to permit full and deliberate consideration of claims. Courts should exercise independent judgment in deciding cases, making findings of fact and conclusions of law only after fully and carefully considering the evidence and the applicable law.				X		
<b>Recommendation #2:</b> The state should provide meaningful discovery in post-conviction proceedings. Where courts have discretion to permit such discovery, the discretion should be exercised to ensure full discovery.			X			

State Post-Conviction Proceedings (Con't.)						
Recommendation	Compliance	In Compliance	Partially in Compliance	Not in Compliance	Insufficient Information to Determine Statewide Compliance	Not Applicable
	<b>Recommendation #3:</b> Trial judges should provide sufficient time for discovery and should not curtail discovery as a means of expediting the proceedings.			X		
<b>Recommendation #4:</b> When deciding post-conviction claims on appeal, state appellate courts should address explicitly the issues of fact and law raised by the claims and should issue opinions that fully explain the bases for dispositions of claims.	X					
<b>Recommendation #5:</b> On the initial state post-conviction application, state post-conviction courts should apply a “knowing, understanding and voluntary” standard for waivers of claims of constitutional error not preserved properly at trial or on appeal.				X		
<b>Recommendation #6:</b> When deciding post-conviction claims on appeal, state appellate courts should apply a “knowing, understanding and voluntary” standard for waivers of claims of constitutional error not raised properly at trial or on appeal and should liberally apply a plain error rule with respect to errors of state law in capital cases.					X	
<b>Recommendation #7:</b> The state should establish post-conviction defense organizations, similar in nature to the capital resources centers de-funded by Congress in 1996, to represent capital defendants in state post-conviction, federal habeas corpus, and clemency proceedings.			X			
<b>Recommendation #8:</b> The state should appoint post-conviction defense counsel whose qualifications are consistent with the <i>ABA Guidelines on the Appointment and Performance of Counsel in Death Penalty Cases</i> . The state should compensate appointed counsel adequately and, as necessary, provide sufficient funds for investigators and experts.			X			
<b>Recommendation #9:</b> State courts should give full retroactive effect to U.S. Supreme Court decisions in all proceedings, including second and successive post-conviction proceedings, and should consider in such proceedings the decisions of federal appeals and district courts.			X			
<b>Recommendation #10:</b> State courts should permit second and successive post-conviction proceedings in capital cases where counsels’ omissions or intervening court decisions resulted in possibly meritorious claims not previously being raised, factually or legally developed, or accepted as legally valid.			X			

State Post-Conviction Proceedings (Con't.)						
Compliance		In Compliance	Partially in Compliance	Not in Compliance	Insufficient Information to Determine Statewide Compliance	Not Applicable
Recommendation						
<b>Recommendation #11:</b> In post-conviction proceedings, state courts should apply the harmless error standard of <i>Chapman v. California</i> , requiring the prosecution to show that a constitutional error is harmless beyond a reasonable doubt.			X			
<b>Recommendation #12:</b> During the course of a moratorium, a “blue ribbon” commission should undertake a review of all cases in which individuals have been either wrongfully convicted or wrongfully sentenced to death and should recommend ways to prevent such wrongful results in the future.						X

The State of Florida has adopted some laws and procedures that facilitate the adequate development and judicial consideration of claims—for example, when deciding post-conviction claims on appeal, the Florida Supreme Court issues opinions addressing the issues of fact and law and explaining the basis for the disposition of the asserted claims. But some laws and procedures have the opposite effect:

- The State of Florida allows the post-conviction judge to adopt or copy either party’s proposed findings of fact and conclusions of law in the post-conviction court’s final order, which undermines the judge’s duty to exercise independent judgment in deciding cases;
- The State of Florida provides death-sentenced inmates only one year to file a post-conviction motion after their conviction and sentence become final, but provides inmates seeking post-conviction relief in non-death penalty cases two years from the date their conviction and sentence become final to file a post-conviction motion. The one-year time limitation in capital cases has the potential to inhibit the full development of viable claims;<sup>54</sup> and
- Although the State of Florida permits successive motions in certain instances, it will only allow intervening changes in the law to overcome the general bar against successive motions in limited circumstances and a movant may never claim that his/her earlier post-conviction counsel failed to raise a claim in the earlier post-conviction motion as a means of overcoming the bar against successive motions, because the movant does not have a state or federal

<sup>54</sup> We note that even if the State of Florida changed the filing deadline from one year to two years, the movant would still have to file his/her federal habeas corpus petition with the applicable federal district court within one year from the date on which: (1) the judgment became final; (2) the State impediment that prevented the petitioner from filing was removed; (3) the United States Supreme Court recognized a new right and made it retroactively applicable to cases on collateral review; or (4) the underlying facts of the claim(s) could have been discovered through due diligence. *See* 28 U.S.C. § 2244(d)(1) (2006). This one-year filing deadline may be tolled if the movant is pursuing a properly filed application for state post-conviction relief or other collateral review. *See* 28 U.S.C. § 2244(d)(2) (2006).

constitutional right to assert a claim of ineffective assistance of state post-conviction counsel.

The effect of these laws and procedures on the adequate development and judicial consideration of motions and/or claims is even more acute in post-conviction proceedings where the movant may not be represented by qualified counsel, which underscores the importance of establishing qualification standards consistent with the ABA Guidelines recommended by the Florida Death Penalty Assessment Team on page x of the Executive Summary.

Chapter Nine: Clemency

Given that the clemency process is the final avenue of review available to a death-row inmate, it is imperative that clemency decision-makers evaluate all of the factors bearing on the appropriateness of the death sentence without regard to constraints that may limit a court’s or jury’s decision-making. In this chapter, we reviewed Florida’s laws, procedures, and practices concerning the clemency process, including, but not limited to, the Florida Board of Executive Clemency’s criteria for considering and deciding petitions and inmates’ access to counsel, and assessed whether they comply with the ABA’s policies on clemency.

A summary of Florida’s overall compliance with the ABA’s policies on clemency is illustrated in the following chart.

<b>Clemency</b>							
		<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
<b>Recommendation</b>							
<b>Recommendation #1:</b> The clemency decision making process should not assume that the courts have reached the merits on all issues bearing on the death sentence in a given case; decisions should be based upon an independent consideration of facts and circumstances.						X	
<b>Recommendation #2:</b> The clemency decision making process should take into account all factors that might lead the decision maker to conclude that death is not the appropriate punishment.						X	
<b>Recommendation #3:</b> Clemency decision makers should consider any pattern of racial or geographic disparity in carrying out the death penalty in the jurisdiction, including the exclusion of racial minorities from the jury panels that convicted and sentenced the death-row inmate.						X	

Clemency (Con't.)								
		Compliance		<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation								
<b>Recommendation #4:</b> Clemency decision-makers should consider the inmate's mental retardation, mental illness, or mental competency, if applicable, the inmate's age at the time of the offense, and any evidence of lingering doubt about the inmate's guilt.							X	
<b>Recommendation #5:</b> Clemency decision-makers should consider an inmate's possible rehabilitation or performance of positive acts while on death row.							X	
<b>Recommendation #6:</b> Death-row inmates should be represented by counsel and such counsel should have qualifications consistent with the <i>ABA Guidelines on the Appointment and Performance of Counsel in Death Penalty Cases</i> .				X				
<b>Recommendation #7:</b> Prior to clemency hearings, counsel should be entitled to compensation, access to investigative and expert resources and provided with sufficient time to develop claims and to rebut the State's evidence.				X				
<b>Recommendation #8:</b> Clemency proceedings should be formally conducted in public and presided over by the Governor or other officials involved in making the determination.						X		
<b>Recommendation #9:</b> If two or more individuals are responsible for clemency decisions or for making recommendations to clemency decision makers, their decisions or recommendations should be made only after in-person meetings with petitioners.				X				
<b>Recommendation #10:</b> Clemency decision-makers should be fully educated and should encourage public education about clemency powers and limitations on the judicial system's ability to grant relief under circumstances that might warrant grants of clemency.						X		
<b>Recommendation #11:</b> To the maximum extent possible, clemency determinations should be insulated from political considerations or impacts.							X	

The Florida Constitution authorizes the Governor to grant clemency with the approval of two other members of the Board of Executive Clemency (Board), which is composed of the Governor and the members of the Cabinet. However, the Governor acting alone may deny clemency at any time, for any reason. The process the Governor and the other Board members follow in considering a clemency application is largely undefined; for example:

- The Florida Parole Commission (Commission), which serves as the investigative arm of the Board, is responsible for conducting a “thorough and detailed investigation into all factors relevant to the issue of clemency” and for submitting

- a report of its findings to the Board, but the scope of a “thorough and detailed investigation” is not delineated in either the Florida Statutes or the Florida Rules of Executive Clemency (Rules);
- Neither the Florida Statutes nor the Rules recommend that the Board consider the findings of the Commission’s investigation or any specific factors when assessing a death-sentenced inmate’s eligibility for clemency;
  - While the Commission’s “thorough and detailed investigation” should include an interview with the inmate, the Commission’s findings from the interview need not be considered by the Board nor is the inmate guaranteed a hearing before the Board; and
  - Nothing recommends that the Board give reasons for its decisions.

Not only is the clemency process largely undefined, but parts of the clemency decision-making process are confidential. All records and documents generated and gathered in the clemency process are confidential and unavailable for inspection by any person except members of the Board and their staff, and only the Governor has the discretion to allow such documents to be inspected or copied.

In light of the ambiguities and confidentiality surrounding Florida’s clemency process, the State of Florida should adopt the Florida Death Penalty Assessment Team’s recommendations previously discussed on page xi of the Executive Summary to ensure a transparent clemency process.

#### Chapter Ten: Capital Jury Instructions

Due to the complexities inherent in capital proceedings, trial judges must present fully and accurately, through jury instructions, the applicable law to be followed and the “awesome responsibility” of deciding whether another person will live or die. Often, however, jury instructions are poorly written and poorly conveyed, which confuses the jury about the applicable law and the extent of their responsibilities. In this chapter, we reviewed Florida’s laws, procedures, and practices on capital jury instructions and assessed whether they comply with the ABA’s policies on capital jury instructions.

A summary of Florida’s overall compliance with the ABA’s policies on capital jury instructions is illustrated in the following chart.

<b>Capital Jury Instructions</b>					
<b>Compliance</b>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
<b>Recommendation</b>					
<b>Recommendation #1:</b> Jurisdictions should work with attorneys, judges, linguists, social scientists, psychologists and jurors to evaluate the extent to which jurors understand instructions, revise the instructions as necessary to ensure that jurors understand applicable law, and monitor the extent to which jurors understand revised instructions to permit further revision as necessary.		X			
<b>Recommendation #2:</b> Jurors should receive written copies of court instructions to consult while the court is instructing them and while conducting deliberations.	X				
<b>Recommendation #3:</b> Trial courts should respond meaningfully to jurors' requests for clarification of instructions by explaining the legal concepts at issue and meanings of words that may have different meanings in everyday usage and, where appropriate, by directly answering jurors' questions about applicable law.			X		
<b>Recommendation #4:</b> Trial courts should instruct jurors clearly on available alternative punishments and should, upon the defendant's request during the sentencing phase, permit parole officials or other knowledgeable witnesses to testify about parole practices in the state to clarify jurors' understanding of alternative sentences.		X			
<b>Recommendation #5:</b> Trial courts should instruct jurors that a juror may return a life sentence, even in the absence of any mitigating factor and even where an aggravating factor has been established beyond a reasonable doubt, if the juror does not believe that the defendant should receive the death penalty.			X		
<b>Recommendation #6:</b> Trial courts should instruct jurors that residual doubt about the defendant's guilt is a mitigating factor. Jurisdictions should implement Model Penal Code section 210.3(1)(f), under which residual doubt concerning the defendant's guilt would, by law, require a sentence less than death.			X		
<b>Recommendation #7:</b> In states where it is applicable, trial courts should make clear in jury instructions that the weighing process for considering aggravating and mitigating factors should not be conducted by determining whether there are a greater number of aggravating factors than mitigating factors.			X		

Jurors in Florida appear to be having difficulty understanding their roles and responsibilities, as described by trial judges in their instructions to juries. In particular, studies have shown that Florida capital jurors have difficulty understanding two crucial concepts: (1) mitigation evidence, and (2) the effect of finding certain aggravating circumstances.

Florida's standard jury instructions do not define the term "mitigation," but they do help to define the overall concept of mitigation by listing seven possible mitigating circumstances and by requiring the judge to explain to the jury that it may consider any other evidence regarding the defendant's background and character in mitigation. The standard jury instructions also clearly state that unlike aggravating circumstances, mitigating circumstance need not be proven beyond a reasonable doubt, and if the jury is reasonably convinced of the existence of a mitigating circumstance, it may consider it established. Despite this information, a recent study found that:

- Approximately 15 percent of interviewed capital jurors in Florida thought that only a specific list of mitigating circumstances could be considered and 35 percent did not know that any evidence could be considered in mitigation; and
- Approximately 50 percent of interviewed Florida capital jurors believed that the defense had to prove mitigating circumstances beyond a reasonable doubt.

Accordingly, Florida capital jurors are confused not only about the scope of mitigation evidence that they may consider but also about the applicable burden of proof. Further, contrary to the ABA's recommendations, jurors are not told that residual doubt about guilt can be a mitigating factor and are not told that they may recommend a life sentence even if they find no mitigating circumstances exist.

Similarly, capital jurors in Florida have difficulty understanding the requirements associated with finding the existence of certain statutory and non-statutory aggravating circumstances. Specifically, capital jurors fail to understand the effect of finding that the defendant's conduct was "heinous, vile or depraved" or that the defendant would be dangerous in the future. For example, the same study found that:

- Although a sentence of death is not required upon a finding of one or more aggravating circumstances, 36 percent of interviewed Florida capital jurors believed that they were required to sentence the defendant to death if they found the defendant's conduct to be "heinous, vile, or depraved" beyond a reasonable doubt; and
- Twenty-five percent of interviewed Florida capital jurors believed that if they found the defendant to be a future danger to society, they were required by law to sentence him/her to death, despite the fact that future dangerousness is not a statutory aggravating circumstance and that non-statutory aggravating circumstances are not allowed.

In an effort to prevent these common juror misconceptions, the State of Florida should adopt the Florida Death Penalty Assessment Team’s recommendations previously discussed on page x of the Executive Summary.

Chapter Eleven: Judicial Independence

In some states, judicial elections, appointments, and confirmations are influenced by consideration of judicial nominees’ or candidates’ purported views of the death penalty or of judges’ decisions in capital cases. In addition, judges’ decisions in individual cases sometimes are or appear to be improperly influenced by electoral pressures. This erosion of judicial independence increases the possibility that judges will be selected, elevated, and retained in office by a process that ignores the larger interests of justice and fairness, and instead focuses narrowly on the issue of capital punishment, thus undermining society’s confidence that individuals in court are guaranteed a fair hearing. In this chapter, we reviewed Florida’s laws, procedures, and practices on the judicial election/appointment and decision-making processes and assessed whether they comply with the ABA’s policies on judicial independence.

A summary of Florida’s overall compliance with the ABA’s policies on judicial independence is illustrated in the following chart.

<b>Judicial Independence</b>					
<b>Compliance</b>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
<b>Recommendation</b>					
<b>Recommendation #1:</b> States should examine the fairness of their judicial election/appointment process and should educate the public about the importance of judicial independence and the effect of unfair practices on judicial independence.			X		
<b>Recommendation #2:</b> A judge who has made any promise regarding his/her prospective decisions in capital cases that amounts to prejudgment should not preside over any capital case or review any death penalty decision in the jurisdiction.				X	
<b>Recommendation #3:</b> Bar associations and community leaders should speak out in defense of judges who are criticized for decisions in capital cases; bar associations should educate the public concerning the roles and responsibilities of judges and lawyers in capital cases; bar associations and community leaders should publicly oppose any questioning of candidates for judicial appointment or re-appointment concerning their decisions in capital cases; and purported views on the death penalty or on habeas corpus should not be litmus tests or important factors in the selection of judges.		X			

<b>Judicial Independence (Con't.)</b>						
<i>Compliance</i>		<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
<b>Recommendation</b>						
<b>Recommendation #4:</b> A judge who observes ineffective lawyering by defense counsel should inquire into counsel's performance and, where appropriate, take effective actions to ensure defendant receives a proper defense.					X	
<b>Recommendation #5:</b> A judge who determines that prosecutorial misconduct or other unfair activity has occurred during a capital case should take immediate action to address the situation and to ensure the capital proceeding is fair.					X	
<b>Recommendation #6:</b> Judges should do all within their power to ensure that defendants are provided with full discovery in capital cases.					X	

Florida's judicial election format for trial judges, combined with the rising costs and increasing political nature of judicial campaigns, have called into question the fairness of the judicial election process in Florida for two specific reasons:

- The influx of money into Florida judicial elections from parties that may come before the judicial candidate has the potential to undermine the impartiality of the judiciary. Since 2000, "the average amount of money [that] campaigns of circuit judges and circuit judicial candidates have raised has increased more than 10 percent," while the average amount from "sources other than the candidate, such as lawyers and businesses, has increased more than 36 percent;" and
- The nature of the judicial election and reelection process has the potential to influence judges' decisions in death penalty cases. One study identified three Florida judges who may have been less than neutral about the death penalty because of the political pressure of reelection. Data also suggests that concerns about being reelected have influenced trial judges' decisions to override a jury recommendation of life imprisonment for death.

Based on this information, the State of Florida should at a minimum adopt the Florida Death Penalty Assessment Team's recommendation on page x of the Executive Summary to give the jury the final decision-making authority in capital sentencing proceedings, and thus should eliminate judicial override in cases where the jury recommends life imprisonment without the possibility of parole.

Chapter Twelve: Racial and Ethnic Minorities

To eliminate the impact of race in the administration of the death penalty, the ways in which race infects the system must be identified and strategies must be devised to root

out the discriminatory practices. In this chapter, we examined Florida’s laws, procedures, and practices pertaining to the treatment of racial and ethnic minorities and assessed whether they comply with the ABA’s policies.

A summary of Florida’s overall compliance with the ABA’s policies on racial and ethnic minorities and the death penalty is illustrated in the following chart.

<b>Racial and Ethnic Minorities</b>					
<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
<b>Recommendation</b>					
<b>Recommendation #1:</b> Jurisdictions should fully investigate and evaluate the impact of racial discrimination in their criminal justice systems and develop strategies that strive to eliminate it.		X			
<b>Recommendation #2:</b> Jurisdictions should collect and maintain data on the race of defendants and victims, on the circumstances of the crime, on all aggravating and mitigating circumstances, and on the nature and strength of the evidence for all potential capital cases (regardless of whether the case is charged, prosecuted, or disposed of as a capital case). This data should be collected and maintained with respect to every stage of the criminal justice process, from reporting of the crime through execution of the sentence.			X		
<b>Recommendation #3:</b> Jurisdictions should collect and review all valid studies already undertaken to determine the impact of racial discrimination on the administration of the death penalty and should identify and carry out any additional studies that would help determine discriminatory impacts on capital cases. In conducting new studies, states should collect data by race for any aspect of the death penalty in which race could be a factor.			X		
<b>Recommendation #4:</b> Where patterns of racial discrimination are found in any phase of the death penalty administration, jurisdictions should develop, in consultation with legal scholars, practitioners, and other appropriate experts, effective remedial and prevention strategies to address the discrimination.		X			
<b>Recommendation #5:</b> Jurisdictions should adopt legislation explicitly stating that no person shall be put to death in accordance with a sentence sought or imposed as a result of the race of the defendant or the race of the victim. To enforce this law, jurisdictions should permit defendants and inmates to establish <i>prima facie</i> cases of discrimination based upon proof that their cases are part of established racially discriminatory patterns. If a <i>prima facie</i> case is established, the state should have the burden of rebutting it by substantial evidence.			X		

<b>Racial and Ethnic Minorities (Con't.)</b>					
<b>Compliance</b>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
<b>Recommendation</b>					
<b>Recommendation #6:</b> Jurisdictions should develop and implement educational programs applicable to all parts of the criminal justice system to stress that race should not be a factor in any aspect of death penalty administration. To ensure that such programs are effective, jurisdictions also should impose meaningful sanctions against any state actor found to have acted on the basis of race in a capital case.		X			
<b>Recommendation #7:</b> Defense counsel should be trained to identify and develop racial discrimination claims in capital cases. Jurisdictions also should ensure that defense counsel are trained to identify biased jurors during <i>voir dire</i> .			X		
<b>Recommendation #8:</b> Jurisdictions should require jury instructions indicating that it is improper to consider any racial factors in their decision making and that they should report any evidence of racial discrimination in jury deliberations.			X		
<b>Recommendation #9:</b> Jurisdictions should ensure that judges recuse themselves from capital cases when any party in a given case establishes a reasonable basis for concluding that the judge's decision making could be affected by racially discriminatory factors.				X	
<b>Recommendation #10:</b> States should permit defendants or inmates to raise directly claims of racial discrimination in the imposition of death sentences at any stage of judicial proceedings, notwithstanding any procedural rule that otherwise might bar such claims, unless the state proves in a given case that a defendant or inmate has knowingly and intelligently waived the claim.			X		

The State of Florida—through the Florida Supreme Court and the Governor’s Task Force on Capital Cases—has explored at varying levels of degree the impact of race on Florida’s criminal justice system. Between 1990 and 1991, the Florida Supreme Court’s Racial and Ethnic Bias Study Commission reviewed Florida’s criminal justice system and released two reports addressing: (1) the dearth of minorities in Florida’s courthouses; (2) the treatment accorded minorities by law enforcement organizations; (3) the processing of delinquency cases of minority juvenile offenders; (4) the disproportionate number of minorities in the criminal justice system; and (5) the lack of minority presence within the legal profession. Not only were minorities found to be significantly underrepresented in the judiciary, but they were found to be treated differently by law enforcement

organizations. Similarly, on the issue of the death penalty, the Commission stated in the following words:

- (1) The application of the death penalty in Florida is not colorblind, inasmuch as a criminal defendant in a capital case is, other things being equal, 3.4 times more likely to receive the death penalty if the victim is white than if the victim is an African-American;
- (2) Since 1972, 18 percent of all capital cases have involved a judicial override of a jury recommendation of life imprisonment. The discretionary authority of the judge to override a jury's recommendation of life opens up an additional window of opportunity for bias to enter into the capital sentencing decision. This discretion is too often influenced by public pressure for punishment and retribution; and
- (3) Society must intensify its efforts to address the underlying economic and social issues and conditions which contribute to the tragically high rate of incarceration of minorities on death row.<sup>55</sup>

To address these issues and others like them, the Commission made over eighty recommendations for reform, including the elimination of judicial override. The effect of these recommendations on Florida's criminal justice system was explored in 2000, when then-Chief Justice Charles Wells of the Florida Supreme Court directed an Advisory Committee to review the implementation status of the Commission's recommendations. Although the Advisory Committee found that some of the recommendations had been implemented either in whole or in part, it found that additional progress needed to be made in a number of areas, including, but not limited to, "reducing the disparate impact of sentencing policies and practices on racial and ethnic minorities."

In 2000, the Governor's Task Force on Capital Cases—which was directed to study evidence of discrimination, if any, in the sentencing of defendants in capital cases—largely discounted previous studies concluding that racial bias exists in Florida's death penalty system, but still recommended that further study be conducted on this issue by a committee of experts in death penalty litigation. The Task Force also recommended, among other things, that the Florida Legislature establish an information clearinghouse on race and the death penalty at Florida A&M University.

To date, however, it does not appear that a committee of experts has been appointed, or that the information clearinghouse has been established. Therefore, the State of Florida is neither collecting the data necessary to fully evaluate the impact of race in capital sentencing nor taking steps to develop new strategies to eliminate the role of race in capital sentencing. Based on this information, the State of Florida should, at a minimum, adopt the Florida Death Penalty Assessment Team's recommendation, found on page xi of the Executive Summary, to sponsor a study to determine the existence or non-existence of unacceptable disparities, racial, socio-economic, geographic, or otherwise in

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<sup>55</sup> See *supra* note 25.

its death penalty system, or at the least, implement the recommendations of its 2000 Governor’s Task Force on Capital Cases.

Chapter Thirteen: Mental Retardation and Mental Illness

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the United States Supreme Court held that it is unconstitutional to execute offenders with mental retardation. This holding, however, does not guarantee that individuals with mental retardation will not be executed, as each state has the authority to make its own rules for determining whether a capital defendant is mentally retarded. In this chapter, we reviewed Florida’s laws, procedures, and practices pertaining to mental retardation in connection with the death penalty and assessed whether they comply with the ABA’s policy on mental retardation and the death penalty.

A summary of Florida’s overall compliance with the ABA’s policies on mental retardation is illustrated in the following chart.

<b>Mental Retardation</b>					
<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
<b>Recommendation</b>					
<b>Recommendation #1:</b> Jurisdictions should bar the execution of individuals who have mental retardation, as defined by the American Association on Mental Retardation. Whether the definition is satisfied in a particular case should be based upon a clinical judgment, not solely upon a legislatively prescribed IQ measure, and judges and counsel should be trained to apply the law fully and fairly. No IQ maximum lower than 75 should be imposed in this regard. Testing used in arriving at this judgment need not have been performed prior to the crime.		X			
<b>Recommendation #2:</b> All actors in the criminal justice system should be trained to recognize mental retardation in capital defendants and death-row inmates.		X			

<b>Mental Retardation (Con't.)</b>					
<b>Compliance</b>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
<b>Recommendation</b>					
<b>Recommendation #3:</b> The jurisdiction should have in place policies that ensure that persons who may have mental retardation are represented by attorneys who fully appreciate the significance of their client's mental limitations. These attorneys should have training sufficient to assist them in recognizing mental retardation in their clients and understanding its possible impact on their clients' ability to assist with their defense, on the validity of their "confessions" (where applicable) and on their eligibility for capital punishment. These attorneys should also have sufficient funds and resources (including access to appropriate experts, social workers and investigators) to determine accurately and prove the mental capacities and adaptive skill deficiencies of a defendant who counsel believes may have mental retardation.				X	
<b>Recommendation #4:</b> For cases commencing after <i>Atkins v. Virginia</i> or the state's ban on the execution of the mentally retarded (the earlier of the two), the determination of whether a defendant has mental retardation should occur as early as possible in criminal proceedings, preferably prior to the guilt/innocence phase of a trial and certainly before the penalty stage of a trial.	X				
<b>Recommendation #5:</b> The burden of disproving mental retardation should be placed on the prosecution, where the defense has presented a substantial showing that the defendant may have mental retardation. If, instead, the burden of proof is placed on the defense, its burden should be limited to proof by a preponderance of the evidence.			X		
<b>Recommendation #6:</b> During police investigations and interrogations, special steps should be taken to ensure that the <i>Miranda</i> rights of a mentally retarded person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.		X			
<b>Recommendation #7:</b> The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of mentally retarded persons are protected against "waivers" that are the product of their mental disability.	X				

The State of Florida statutorily prohibited the execution of the mentally retarded in 2001, but the statute applied only to mentally retarded defendants sentenced after the statute's effective date of June 12, 2001. On October 1, 2004, after the United States Supreme Court's decision in *Atkins v. Virginia*, the Florida Supreme Court promulgated a rule that

(1) prohibits the execution of all mentally retarded defendants; (2) provides for the filing of a motion and a determination of mental retardation as a bar to execution before trial; and (3) grants inmates sentenced to death before June 12, 2001 an opportunity to present a claim of mental retardation as a bar to execution. However, these statutory and judicially-created procedures do not fully comply with the ABA’s recommendations on mental retardation, and some are particularly problematic, for example:

- Defendants who fail to raise their claim of mental retardation as a bar to execution within the time periods specified by Florida Rule of Criminal Procedure 3.203 waive the claim. Defendants who were sentenced to death before the promulgation of rule 3.203 on October 1, 2004, were given sixty days from October 1, 2004 to file a motion claiming mental retardation as a bar to execution, and defendants who are sentenced to death after the promulgation of the rule must file such motion no later than ninety days before trial;
- The State of Florida places the burden of proving mental retardation on the defendant, rather than requiring the prosecution to disprove the defendant’s substantial showing of mental retardation; and
- The State of Florida requires defendants to prove their mental retardation by clear and convincing evidence, which is a standard of proof greater than preponderance of the evidence.

We also reviewed Florida’s laws, procedures, and practices pertaining to mental illness in connection with the death penalty and assessed whether they comply with the ABA’s policy on mental illness and the death penalty. Mental illness can affect every stage of a capital trial. It is relevant to the defendant’s competence to stand trial; it may provide a defense to the murder charge; and it can be the centerpiece of the mitigation case. Conversely, when the judge, prosecutor, and jurors are misinformed about the nature of mental illness and its relevance to the defendant’s culpability and life experience, tragic consequences often follow for the defendant.

A summary of Florida’s overall compliance with the ABA’s policies on mental illness is illustrated in the following chart.

<b>Mental Illness</b>						
<i>Compliance</i>		<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
<b>Recommendation</b>						
<b>Recommendation #1:</b> All actors in the criminal justice system, including police officers, court officers, prosecutors, defense attorneys, judges, and prison authorities, should be trained to recognize mental illness in capital defendants and death-row inmates.			<b>X</b>			

<b>Mental Illness (Con't.)</b>					
<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
<b>Recommendation</b>					
<b>Recommendation #2:</b> During police investigations and interrogations, special steps should be taken to ensure that the <i>Miranda</i> rights of a mentally ill person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.			X		
<b>Recommendation #3:</b> The jurisdiction should have in place policies that ensure that persons who may have mental illness are represented by attorneys who fully appreciate the significance of their client's mental disabilities. These attorneys should have training sufficient to assist them in recognizing mental disabilities in their clients and understanding its possible impact on their clients' ability to assist with their defense, on the validity of their "confessions" (where applicable) and on their initial or subsequent eligibility for capital punishment. These attorneys should also have sufficient funds and resources (including access to appropriate experts, social workers, and investigators) to determine accurately and prove the disabilities of a defendant who counsel believes may have mental disabilities.				X	
<b>Recommendation #4:</b> Prosecutors should employ, and trial judges should appoint, mental health experts on the basis of their qualifications and relevant professional experience, not on the basis of the expert's prior status as a witness for the state. Similarly, trial judges should appoint qualified mental health experts to assist the defense confidentially according to the needs of the defense, not on the basis of the expert's current or past status with the state.				X	
<b>Recommendation #5:</b> Jurisdictions should provide adequate funding to permit the employment of qualified mental health experts in capital cases. Experts should be paid in an amount sufficient to attract the services of those who are well trained and who remain current in their fields. Compensation should not place a premium on quick and inexpensive evaluations, but rather should be sufficient to ensure a thorough evaluation that will uncover pathology that a superficial or cost-saving evaluation might miss.				X	
<b>Recommendation #6:</b> Jurisdictions should forbid death sentences and executions for everyone who, at the time of the offense, had significant limitations in intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury.			X		

<b>Mental Illness (Con't.)</b>					
<b>Compliance</b>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
<b>Recommendation</b>					
<b>Recommendation #7:</b> The jurisdiction should forbid death sentences and executions with regard to everyone who, at the time of the offense, had a severe mental disorder or disability that significantly impaired the capacity (a) to appreciate the nature, consequences or wrongfulness of one's conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform one's conduct to the requirements of the law.			X		
<b>Recommendation #8:</b> To the extent that a mental disorder or disability does not preclude imposition of the death sentence pursuant to a particular provision of law, jury instructions should communicate clearly that a mental disorder or disability is a mitigating factor, not an aggravating factor, in a capital case; that jurors should not rely upon the factor of a mental disorder or disability to conclude that the defendant represents a future danger to society; and that jurors should distinguish between the defense of insanity and the defendant's subsequent reliance on mental disorder or disability as a mitigating factor.			X		
<b>Recommendation #9:</b> Jury instructions should adequately communicate to jurors, where applicable, that the defendant is receiving medication for a mental disorder or disability, that this affects the defendant's perceived demeanor, and that this should not be considered in aggravation.		X			
<b>Recommendation #10:</b> The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of persons with mental disorders or disabilities are protected against "waivers" that are the product of a mental disorder or disability. In particular, the jurisdiction should allow a "next friend" acting on a death-row inmate's behalf to initiate or pursue available remedies to set aside the conviction or death sentence, where the inmate wishes to forego or terminate post-conviction proceedings but has a mental disorder or disability that significantly impairs his or her capacity to make a rational decision.	X				

<b>Mental Illness (Con't.)</b>					
<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
<b>Recommendation</b>					
<b>Recommendation #11:</b> The jurisdiction should stay post-conviction proceedings where a prisoner under sentence of death has a mental disorder or disability that significantly impairs his or her capacity to understand or communicate pertinent information, or otherwise to assist counsel, in connection with such proceedings and the prisoner's participation is necessary for a fair resolution of specific claims bearing on the validity of the conviction or death sentence. The jurisdiction should require that the prisoner's sentence be reduced to the sentence imposed in capital cases when execution is not an option if there is no significant likelihood of restoring the prisoner's capacity to participate in post-conviction proceedings in the foreseeable future.		X			
<b>Recommendation #12:</b> The jurisdiction should provide that a death-row inmate is not "competent" for execution where the inmate, due to a mental disorder or disability, has significantly impaired capacity to understand the nature and purpose of the punishment or to appreciate the reason for its imposition in the inmate's own case. It should further provide that when such a finding of incompetence is made after challenges to the conviction's and death sentence's validity have been exhausted and execution has been scheduled, the death sentence shall be reduced to the sentence imposed in capital cases when execution is not an option.			X		
<b>Recommendation #13:</b> Jurisdictions should develop and disseminate—to police officers, attorneys, judges, and other court and prison officials—models of best practices on ways to protect mentally ill individuals within the criminal justice system. In developing these models, jurisdictions should enlist the assistance of organizations devoted to protecting the rights of mentally ill citizens.			X		

The State of Florida has taken steps to protect the rights of individuals with mental disorders or disabilities by requiring the education of certain actors in the criminal justice system about mental illness and by adopting certain relevant court procedures. For example, all law enforcement officers receive—as part of their basic training course—twelve hours of training on mental illness, including training on identifying symptoms and behaviors of common mental disorders and methods for responding to individuals with mental disorders. Additionally, the State of Florida has also adopted some mechanisms—including provision for the filing of “next friend” petitions—to protect

individuals with mental disorder or disabilities from waivers that are a product of their mental disorder or disability. Despite these steps, the State of Florida does not provide a system in which the rights of individuals with mental illness are fully protected; for example:

- Although the State of Florida has adopted a standard jury instruction on the administration of psychotropic medication, the instruction does not allude to the medication's possibly tranquilizing effects or to the fact that the possible effects of the medication on the defendant's demeanor should not be considered in aggravation;
- The State of Florida does not formally commute the death sentence upon a finding that the inmate is permanently incompetent to proceed on factual matters requiring the prisoner's input; and
- The State of Florida prohibits the execution of individuals found to be "insane" to be executed, yet the standard used to assess an individual's insanity is insufficient to protect against the execution of the insane. Specifically, although the State of Florida allows for inquiry into an inmate's rational appreciation of the reason why s/he is to be executed, it does not require that such rational appreciation exist in order for a death-row inmate to be found sane for execution.

Based on this information, the State of Florida should adopt the Florida Death Penalty Assessment Team's recommendations previously discussed on pages xi through xii of the Executive Summary.

## INTRODUCTION

### GENESIS OF THE ABA'S DEATH PENALTY ASSESSMENTS PROJECT

Fairness and accuracy together form the foundation of the American criminal justice system. As the United States Supreme Court has recognized, these goals are particularly important in cases in which the death penalty is sought. Our system cannot claim to provide due process or protect the innocent unless it provides a fair and accurate system for every person who faces the death penalty.

Over the course of the past thirty years, the American Bar Association (ABA) has become increasingly concerned that capital jurisdictions too often provide neither fairness nor accuracy in the administration of the death penalty. In response to this concern, on February 3, 1997, the ABA called for a nationwide moratorium on executions until serious flaws in the system are identified and eliminated. The ABA urges capital jurisdictions to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed.

In the autumn of 2001, the ABA, through the Section of Individual Rights and Responsibilities, created the Death Penalty Moratorium Implementation Project (the Project). The Project collects and monitors data on domestic and international death penalty developments; conducts analyses of governmental and judicial responses to death penalty administration issues; publishes periodic reports; encourages lawyers and bar associations to press for moratoriums and reforms in their jurisdictions; convenes conferences to discuss issues relevant to the death penalty; and encourages state government leaders to establish moratoriums, undertake detailed examinations of capital punishment laws and processes, and implement reforms.

To assist the majority of capital jurisdictions that have not yet conducted comprehensive examinations of their death penalty systems, the Project decided in February 2003 to examine several U.S. jurisdictions' death penalty systems and preliminarily determine the extent to which they achieve fairness and provide due process. In addition to the Florida assessment, the Project has released state assessments of Alabama, Arizona, and Georgia. In the future, it plans to release reports in, at a minimum, Indiana, Ohio, Pennsylvania, Tennessee, and Virginia. The assessments are not designed to replace the comprehensive state-funded studies necessary in capital jurisdictions, but instead are intended to highlight individual state systems' successes and inadequacies.

All of these assessments of state law and practice use as a benchmark the protocols set out in the ABA Section of Individual Rights and Responsibilities' 2001 publication, *Death without Justice: A Guide for Examining the Administration of the Death Penalty in the United States* (the Protocols). While the Protocols are not intended to cover exhaustively all aspects of the death penalty, they do cover seven key aspects of death penalty administration: defense services, procedural restrictions and limitations on state post-conviction and federal habeas corpus proceedings, clemency proceedings, jury

instructions, an independent judiciary, racial and ethnic minorities, and mental retardation and mental illness. Additionally, the Project added five new areas to be reviewed as part of the assessments: preservation and testing of DNA evidence, identification and interrogation procedures, crime laboratories and medical examiners, prosecutors, and the direct appeal process.

Each assessment has been or is being conducted by a state-based assessment team. The teams are comprised of or have access to current or former judges, state legislators, current or former prosecutors, current or former defense attorneys, active state bar association leaders, law school professors, and anyone else whom the Project felt was necessary. Team members are not required to support or oppose the death penalty or a moratorium on executions.

The state assessment teams are responsible for collecting and analyzing various laws, rules, procedures, standards, and guidelines relating to the administration of the death penalty. In an effort to guide the teams' research, the Project created an Assessment Guide that detailed the data to be collected. The Assessment Guide includes sections on the following: (1) death-row demographics, DNA testing, and the location, testing, and preservation of biological evidence; (2) law enforcement tools and techniques; (3) crime laboratories and medical examiners; (4) prosecutors; (5) defense services during trial, appeal, and state post-conviction and clemency proceedings; (6) direct appeal and the unitary appeal process; (7) state post-conviction relief proceedings; (8) clemency; (9) jury instructions; (10) judicial independence; (11) racial and ethnic minorities; and (12) mental retardation and mental illness.

The assessment findings of each team provide information on how state death penalty systems are functioning in design and practice and are intended to serve as the bases from which states can launch comprehensive self-examinations. Because capital punishment is the law in each of the assessment states and because the ABA takes no position on the death penalty *per se*, the assessment teams focused exclusively on capital punishment laws and processes and did not consider whether states, as a matter of morality, philosophy, or penological theory, should have the death penalty.

This executive summary consists of a summary of the findings and proposals of the Florida Death Penalty Assessment Team. The body of this report sets out these findings and proposals in more detail. The Project and the Florida Death Penalty Assessment Team have attempted to describe as accurately as possible information relevant to the Florida death penalty. The Project would appreciate notification of any errors or omissions in this report so that they may be corrected in any future reprints.

## **MEMBERS OF THE FLORIDA DEATH PENALTY ASSESSMENT TEAM**

### **Chair, Professor Christopher Slobogin**

Professor Slobogin is the Stephen C. O'Connell Chair and Professor of Law at the University of Florida Fredric G. Levin College of Law. He is also Associate Director of the Center on Children and the Law and an Affiliate Professor of Psychiatry at the University of Florida School of Medicine. Professor Slobogin's teaching and scholarship focus primarily on criminal law, criminal procedure, and mental health law. He has co-authored various books including *Law and the Mental Health System: Civil and Criminal Aspects* (2003), *Criminal Procedure: An Analysis of Cases and Concepts* (2000), and *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers* (1997), and has written numerous articles on the fourth amendment, the insanity defense, the admissibility of expert testimony, and preventative detection. Prior to his tenure at the University of Florida, Professor Slobogin was Director of the Western State Legal Aid Society as well as Director of the Virginia Forensic Psychiatry Training and Evaluation Center. Professor Slobogin received his undergraduate degree from Princeton University and his J.D. and LL.M. from the University of Virginia.

### **Judge O.H. Eaton, Jr.**

Judge Eaton is a judge on the 18th Judicial Circuit Court of Florida, where he has served in every division of the court including criminal, civil, family, juvenile, and probate. He served as Chief Judge from 1989 to 1991. Prior to his election to the court in 1986, Judge Eaton was in private practice from 1973 to 1986, and served as Assistant State Attorney from 1971 to 1973. Judge Eaton is a member of The Florida Bar Criminal Law Section Executive Council and the Supreme Court Criminal Court Steering Committee. He previously served as Chair of The Florida Bar Criminal Procedure Rules Committee, and as Chair of the Criminal Justice Section of the Florida Conference of Circuit Judges. He was also a member of the Florida Sentencing Commission. Judge Eaton has received numerous awards and honors including the State Attorney's Victim's Rights Award (1987), the Florida Council on Crime and Delinquency's Distinguished Service Award for the Judiciary (1988), and the Williams/Johnson Outstanding Jurist Award (1998). Judge Eaton received both his undergraduate and law degrees from the University of Florida.

### **Dr. Mark R. Fondacaro**

Dr. Fondacaro is an Associate Professor of Psychology at the University of Florida and an Associate Director of the Levin College of Law's Center on Children and Families. He will join the faculty at John Jay College of Criminal Justice-CUNY as Professor of Psychology in September 2006. Dr. Fondacaro has a wide range of teaching and research interests—including procedural and distributive justice, ecological jurisprudence, and family conflict resolution. Before joining the University of Florida faculty in 1997, Dr. Fondacaro was a Research Assistant Professor at the University of Nebraska's Center on Children, Families and the Law. He also previously practiced environmental law at Pillsbury, Madison & Sutro in San Francisco, California. Dr. Fondacaro received his B.A. from the State University of New York at Stony Brook and his Ph.D in Clinical Psychology from Indiana University-Bloomington. He received his post-doctoral

training in Clinical and Community Psychology at Stanford University. Dr. Fondacaro is also a graduate of Columbia Law School.

**Michael J. Minerva**

Mr. Minerva retired from the Florida Public Defender's Office for the Second Judicial Circuit in 2001 after nearly thirty years. Since his retirement, Mr. Minerva has served as a training consultant for the Public Defender of the Ninth Judicial Circuit in Orlando, and as a coach for the Florida State University mock trial team. While at the Public Defender's Office, Mr. Minerva served as Assistant Public Defender and as Public Defender. He also served as Director of the Office of Capital Collateral Representative of Florida, the state agency representing death-sentenced individuals in post-conviction. Mr. Minerva was the 1992 recipient of the Craig Barnard Memorial Award from the Florida Public Defenders Association and the 2003 recipient of the Steven M. Goldstein Criminal Justice Award from the Florida Association of Criminal Defense Lawyers. Mr. Minerva is currently a member of the Tallahassee Bar Association and the Tallahassee Chapter of the Association of Criminal Defense Lawyers. Mr. Minerva received both his undergraduate and law degrees from the University of Florida.

**Mark Schlakman**

Mr. Schlakman is a Program Director for the Center for the Advancement of Human Rights at Florida State University. Prior to joining FSU's faculty, Mr. Schlakman held several government positions at the state and federal levels including, special counsel to Florida Governor Lawton Chiles; advisor for Governor Jeb Bush during his transition into office; senior advisor to Governor Kenneth H. "Buddy" MacKay, Jr., when the Governor served as White House Special Envoy for the Americas during the final two years of the Clinton administration; and special advisor to US Senator Bob Graham (FL). Mr. Schlakman also served as a Foreign Affairs Officer for the US Department of State and received its Superior Honor Award in recognition of his service within the Bureau of Western Hemisphere Affairs while at the White House. Mr. Schlakman is a member in good standing of The Florida Bar and serves as Board Chair for The Florida Innocence Initiative, a not-for-profit organization that advocates for exoneration of wrongfully convicted inmates based on DNA evidence. He received his undergraduate degree from the University of Miami and his law degree from the Georgetown University Law Center.

**Justice Leander J. Shaw, Jr.**

Justice Shaw is a former Justice on the Florida Supreme Court. He was appointed to the Supreme Court by Governor Bob Graham in 1983, where he served until his retirement in 2003. Prior to his appointment to the Supreme Court, Justice Shaw served on the First District Court of Appeals. Before his judicial appointments, Justice Shaw was appointed to the Florida Industrial Relations Board, and was in private practice at the Tallahassee law firm of Harrison, Finegold & Shaw. Justice Shaw served on the staff of Florida's State Attorney's Office, heading the Capital Crimes Division and serving as an adviser to the grand jury. Justice Shaw is a member of the American Bar Association and the National Bar Association, as well as The Florida Bar, the Florida Government Bar, and the Tallahassee Bar Associations. Justice Shaw received his undergraduate degree from

West Virginia State College and his J.D. from Howard University Law School. He holds honorary Doctor of Law degrees from West Virginia State College, Nova University, and Washington and Lee University. Justice Shaw was also awarded an honorary Doctor of Public Affairs degree from Florida International University.

**Harry L. Shorstein**<sup>1</sup>

Mr. Shorstein is the State Attorney for the Fourth Judicial Circuit of Florida. He was appointed State Attorney in 1991 by Governor Lawton Chiles. During his tenure as State Attorney, Mr. Shorstein has implemented a successful and highly acclaimed juvenile justice program that combines prevention with punishment and rehabilitation. The approach is based on early intervention for at-risk youth, incarceration for violent and repeat offenders, and extensive education and rehabilitation programs. Mr. Shorstein has experience in both the defense and prosecution of criminal cases. Prior to his appointment as State Attorney, Mr. Shorstein served as Division Head in the Office of the Public Defender, as well as Division Head and Chief Assistant State Attorney. He also worked in the General Counsel's office for the City of Jacksonville, Florida. He also was in private practice in Jacksonville for fifteen years. Mr. Shorstein served as a Captain in the Third Marine Division during the Vietnam Conflict for which he received numerous commendations, including a Bronze Star. Mr. Shorstein received both his undergraduate and law degrees from the University of Florida.

**Sylvia H. Walbolt**

Ms. Walbolt is a Shareholder with the Tampa law firm of Carlton Fields, where she specializes in federal and state appeals in all areas of litigation including tort, products liability, commercial, constitutional, and employment. At Carlton Fields, she is Chair of the Board of Directors and of the Appellate Practice Group. Ms. Walbolt was a Charter Member of The Florida Bar, and was named one of the top 10 women litigators by the National Law Journal in 2001. She is a Fellow of the American College of Trial Lawyers, and a past President of the American Academy of Appellate Lawyers. Ms. Walbolt has received numerous awards including the Herbert G. Goldberg Outstanding Trial Lawyer of the Year Award in 1998, recognizing professionalism, ethics, and devotion to the practice of law. She was also the first woman recipient of the 2003 George C. Carr Memorial Award, which is the highest award presented by the Federal Bar Association's Tampa Bay Chapter. The award recognizes excellence in federal practice and distinguished service to the Federal Bar. Ms. Walbolt received both her undergraduate and law degrees from the University of Florida.

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<sup>1</sup> On the issue of the death penalty, Harry Shorstein provides the following comment: "I am a proponent of the Death Penalty. It is my hope that this report will facilitate efforts to effect positive changes in the policies and administration of the Death Penalty."

## **Law Student Researchers**

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## CHAPTER ONE

### AN OVERVIEW OF FLORIDA'S DEATH PENALTY SYSTEM

#### I. DEMOGRAPHICS OF FLORIDA'S DEATH ROW

##### A. Historical Data

The State of Florida reenacted the death penalty in December 1972. Between 1972 and 1999, 857 defendants were sentenced to death.<sup>1</sup> During the same years, 166 jury recommendations of life were overridden by trial judges in favor of death sentences.<sup>2</sup>

Since 1972, sixty individuals have been executed by the State of Florida.<sup>3</sup> Their death sentences were imposed in thirty of Florida's sixty-seven counties and the majority of the sentences were imposed in three of the thirty counties.<sup>4</sup> All of those executed but two were male, thirty-seven (61.67 percent) were white, twenty (33.33 percent) were African American, two (3.33 percent) were Hispanic, and one (1.67 percent) was Native American.<sup>5</sup> Forty-six of the executed defendants (thirty-eight white defendants, seven African American defendants, and one Hispanic defendant) murdered victims of their own race.<sup>6</sup> Of the remaining fourteen—which were interracial murders—thirteen

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<sup>1</sup> Michael Radelet, *Recent Developments in the Death Penalty in Florida*, at tbl. 1, available at <http://www.cuadp.org/florida/fldpinfo.html> (last visited on Aug. 18, 2006).

<sup>2</sup> *Id.* at tbl. 2.

<sup>3</sup> Florida Department of Corrections, Execution List, 1976-Present, at [www.dc.state.fl.us/oth/deathrow/execlist.html](http://www.dc.state.fl.us/oth/deathrow/execlist.html) (last visited on July 24, 2006).

<sup>4</sup> Florida Department of Corrections Bureau of Research & Data Analysis, Table 15.1 (2005) (on file with author). Nearly half of the individuals were tried, convicted and sentenced to death in more than one county; specifically, 24 of the 60 individuals executed were tried, convicted, and sentenced to death in more than one county. *See id.*

<sup>5</sup> Florida Department of Corrections, Execution List, 1976-Present, at [www.dc.state.fl.us/oth/deathrow/execlist.html](http://www.dc.state.fl.us/oth/deathrow/execlist.html) (last visited on July 24, 2006). This chart lists Rigoberto Sanchez-Velasco and Daniel Remeta as "Other," and Edward Castro as "Hispanic." *Id.* But see Clark County Prosecuting Attorneys Office, Rigoberto Sanchez-Velasco, at <http://www.clarkprosecutor.org/html/death/US/sanchez804.htm> (last visited on July 24, 2006) (listing Rigoberto Sanchez-Valasco as Hispanic); Daniel Remeta, *Create a Story*, available at <http://home.c2i.net/sissel.norway/createstory.htm> (last visited on July 24, 2006) (Daniel Remeta describing himself as Native American).

<sup>6</sup> Radelet, *supra* note 1, at tbl. 3 (listing only executions until 2001); Clark County Prosecuting Attorneys Office, Rigoberto Sanchez-Velasco, at <http://www.clarkprosecutor.org/html/death/US/sanchez804.htm> (last visited on July 24, 2006) (Hispanic man executed for killing a Hispanic victim); Clark County Prosecuting Attorneys Office, Aileen Carol Wuornos, at <http://www.clarkprosecutor.org/html/death/US/wuornos805.htm> (last visited on July 24, 2006) (white woman executed for killing multiple white victims); Clark County Prosecuting Attorneys Office, Linroy Bottoson, at <http://www.clarkprosecutor.org/html/death/US/bottoson813.htm> (last visited on July 24, 2006) (African American man executed for killing an African American victim); Clark County Prosecuting Attorneys Office, Newton Carlton Slawson, at <http://www.clarkprosecutor.org/html/death/US/slawson854.htm> (last visited on July 24, 2006) (white man executed for killing multiple white victims); Clark County Prosecuting Attorneys Office, Glen James Ocha, at <http://www.clarkprosecutor.org/html/death/US/ocha957.htm> (last visited on July 24, 2006) (white man executed for killing a white victim); Clark County Prosecuting Attorneys Office, Paul Jennings Hill, at <http://www.clarkprosecutor.org/html/death/US/hill873.htm> (last visited on July 24, 2006) (white man

African American defendants killed white victims and one Native American defendant killed a white victim.<sup>7</sup> There have been no executions of white defendants for killing African American victims.<sup>8</sup>

Twenty-two people have been exonerated from Florida's death row; eighteen of these individuals were sentenced after 1972.<sup>9</sup> The guilt of two additional men—one of whom was executed in 1998, and the other of whom was granted a new trial and pleaded no contest to second degree murder—has been called into question by the Death Penalty Information Center.<sup>10</sup>

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executed for killing multiple white victims); Clark County Prosecuting Attorneys Office, John Richard Blackwelder, at <http://www.clarkprosecutor.org/html/death/US/blackwelder911.htm> (last visited on July 24, 2006) (white man executed for killing a white victim). *But see* Clark County Prosecuting Attorneys Office, Edward Castro, at <http://www.clarkprosecutor.org/html/death/US/castro681.htm> (last visited on July 24, 2006) (listing Edward Castro as Hispanic with a white victim).

<sup>7</sup> Radelet, *supra* note 1, at tbl. 3 (listing only executions until 2001); Clark County Prosecuting Attorneys Office, Amos Lee King, at <http://www.clarkprosecutor.org/html/death/US/king834.htm> (last visited on July 24, 2006) (African American man executed for killing a white victim); Clark County Prosecuting Attorneys Office, Johnny L. Robinson, at <http://www.clarkprosecutor.org/html/death/US/robinson895.htm> (last visited on July 24, 2006) (African American man executed for killing a white victim).

<sup>8</sup> Radelet, *supra* note 1, at tbl. 3 (listing only executions until 2001). For executions after 2001, see *supra* notes 6 - 7.

<sup>9</sup> See Death Penalty Information Center, Cases of Innocence 1973 - Present, available at <http://www.deathpenaltyinfo.org/article.php?scid=6&did=110> (last updated on Feb 3, 2006). The names of the 22 exonerated individuals are as follows: David Keaton (charges dismissed and released in 1973), Wilbert Lee (pardoned and released in 1975), Freddie Pitts (pardoned and released in 1975), Delbert Tibbs (charges dismissed and released in 1977), Annibal Jaramillo (charges dismissed and released in 1982), Anthony Brown (acquitted on retrial and released in 1986), Joseph Green Brown (charges dismissed and released in 1987), Anthony Peek (acquitted on retrial and released in 1987), Juan Ramos (acquitted on retrial and released in 1987), Willie Brown (charges dismissed and released in 1988), Larry Troy (charges dismissed and released in 1988), Robert Cox (charges dismissed and released in 1989), James Richardson (acquitted on retrial and released in 1989), Bradley P. Scott (acquitted on retrial in 1991), Andrew Golden (charges dismissed and released in 1994), Robert Hayes (acquitted on retrial and released in 1997), Joseph Nahume Green (charges dismissed and released in 2000), Frank Lee Smith (exonerated posthumously using DNA testing in 2000), Joaquin Jose Martinez (acquitted on retrial in 2001), Juan Roberto Melendez (charges dismissed and released in 2002), Rudolph Holton (charges dismissed and released in 2003), and John Ballard (conviction overturned and acquittal ordered in 2006). The definition of innocence used by the Death Penalty Information Center (DPIC) in placing defendants on the list of exonerated individuals is that "they had been convicted and sentenced to death, and subsequently either a) their conviction was overturned and they were acquitted at a re-trial, or all charges were dropped, or b) they were given an absolute pardon by the governor based on new evidence of innocence." *Id*

<sup>10</sup> The first man, Leo Jones, was convicted in 1981 of murdering a police officer in Jacksonville, Florida, and was executed in 1998. See Death Penalty Information Center, Additional Innocence Information, Executed but Possibly Innocent, available at <http://www.deathpenaltyinfo.org/article.php?scid=6&did=111#executed> (last visited on July 24, 2006). In the mid-1980s (over a decade before Jones' execution), the police officer who arrested Jones and the detective who took his confession were forced out of uniform for ethical violations. *Id*. The police officer was later identified by a fellow officer as having used torture, and many witnesses have come forward identifying another suspect. *Id*. The second man, Joseph Spaziano, was convicted in 1976 primarily on the testimony of an unreliable witness following hypnosis. See Death Penalty Information Center, Additional Innocence Information, Released from Death Row, Probably or Possible Innocence, available at <http://www.deathpenaltyinfo.org/article.php?scid=6&did=111#Released> (last visited on July 24, 2006).

## B. *A Current Profile of Florida's Death Penalty System*

Currently, Florida's death row houses 376 men, of which 233 are white, 132 are African American, and eleven are described as "other."<sup>11</sup> Combined, their death sentences were imposed in forty-six of Florida's sixty-seven counties.<sup>12</sup> "Of the [twenty-two] new death sentences in 2000, six came from the First Judicial Circuit, two from the Second, and one from the Third. Hence, north Florida and the panhandle accounted for [forty-one] percent of the new death sentences in that year."<sup>13</sup> Similarly, in 2001, three of the fifteen death sentences came from these same Circuits.<sup>14</sup>

## II. THE STATUTORY EVOLUTION OF FLORIDA'S DEATH PENALTY SCHEME

### A. *Florida's Post-Furman Death Penalty Scheme*

#### 1. Florida's Murder, Penalties, and Death Penalty Statutes

Less than six months after<sup>15</sup> the United States Supreme Court held, in *Furman v. Georgia*,<sup>16</sup> the imposition of the death penalty as practiced in Florida and elsewhere in the United States violated the Eighth and Fourteenth Amendments of the United States Constitution, the Florida Legislature passed a new death penalty law.<sup>17</sup> The new law amended several statutes, including: (1) the murder statute,<sup>18</sup> classifying which offenses constitute murder in the first degree and are thereby capital felonies, (2) the penalties statute,<sup>19</sup> authorizing penalties for capital felonies and other felonies, and (3) the death penalty statute,<sup>20</sup> describing the sentencing procedures for capital cases and enumerating the statutory aggravating and mitigating circumstances.<sup>21</sup>

The new murder statute classified three offenses as capital felonies:

- (1) premeditated murder of an intended victim or any other human being;

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This witness recently recanted his testimony. *Id.* Spaziano was granted a new trial in 1996, and two years later he pleaded no contest to second degree murder and was sentenced to time served. *Id.* He remains incarcerated for other charges. *Id.*

<sup>11</sup> Florida Department of Corrections, Death Row Roster, available at <http://www.dc.state.fl.us/activeinmates/deathrowroster.asp> (last visited on July 25, 2006).

<sup>12</sup> *Id.*

<sup>13</sup> Radelet, *supra* note 1 at tbl. 3.

<sup>14</sup> *Id.*

<sup>15</sup> The United States Supreme Court decided the case of *Furman v. Georgia*, 408 U.S. 238 (1972), on June 29, 1972, and less than six months later, the Florida Legislature enacted its new death penalty statute, which became effective on December 9, 1972.

<sup>16</sup> 408 U.S. 238 (1972).

<sup>17</sup> 1972 Fla. Laws ch. 724.

<sup>18</sup> Fla. Stat. § 782.04 (1972).

<sup>19</sup> Fla. Stat. § 775.082 (1972).

<sup>20</sup> Fla. Stat. § 921.141(1972).

<sup>21</sup> 1972 Fla. Laws ch. 724, §§ 2, 3, 9; *see also* State v. Dixon, 283 So. 2d 1 (Fla. 1973) (upholding the constitutionality of Florida's death penalty statutes following the adoption of 1972 Fla. Laws ch. 724).

- (2) felony murder, including the killing of a human being during the commission of or attempt to commit an arson, rape, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb; and
- (3) murder by drug distribution, by an individual over the age of 17, involving the unlawful killing of a human being proximately caused by the unlawful distribution of heroin.<sup>22</sup>

The sentence to be imposed on a defendant convicted of a capital felony under the new statute was life with the possibility of parole after twenty-five calendar years unless the court sentenced the defendant to death after the penalty phase.<sup>23</sup> The statute provided for the penalty phase to be held separately from the guilt/innocence phase of the death penalty trial<sup>24</sup> but before the same jury that presided over the guilt/innocence phase.<sup>25</sup> Defendants who entered a plea of guilty or waived a jury for the guilt phase of the trial could waive a jury for the penalty phase of the trial or have a jury empanelled for the specific purpose of making a penalty recommendation.<sup>26</sup>

The statute provided for the state and defendant to present any evidence that the court deemed relevant to the sentence and to any of the statutory aggravating and mitigating circumstances.<sup>27</sup> The statutory aggravating circumstances included:

- (1) the capital felony was committed by a person under sentence of imprisonment;
- (2) the defendant was previously convicted for another capital felony or a felony involving the use or threat of violence to a person;
- (3) the defendant knowingly created a great risk of death to many persons;
- (4) the capital felony was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb;
- (5) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;
- (6) the capital felony was committed for pecuniary gain;
- (7) the capital felony was committed for the purpose of disrupting or hindering the lawful exercise of any governmental function or the enforcement of laws; and
- (8) the capital felony was especially heinous, atrocious, or cruel.<sup>28</sup>

The statutory mitigating circumstances included:

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<sup>22</sup> 1972 Fla. Laws ch. 724, § 3; FLA. STAT. § 782.04(1)(a) (1973).

<sup>23</sup> 1972 Fla. Laws ch. 724, § 2; FLA. STAT. § 775.082(1) (1973).

<sup>24</sup> 1972 Fla. Laws ch. 724, § 9; FLA. STAT. § 921.141(1) (1973).

<sup>25</sup> 1972 Fla. Laws ch. 724, § 9; FLA. STAT. § 921.141(1) (1973).

<sup>26</sup> 1972 Fla. Laws ch. 724, § 9; FLA. STAT. § 921.141(1) (1973).

<sup>27</sup> 1972 Fla. Laws ch. 724, § 9; FLA. STAT. § 921.141(1) (1973).

<sup>28</sup> 1972 Fla. Laws ch. 724, § 9; FLA. STAT. § 921.141(6)(a)-(h) (1973).

- (1) the defendant had no significant history of criminal activity;
- (2) the capital felony was committed while defendant was under the influence of extreme mental or emotional disturbance;
- (3) the victim was a participant in the defendant's conduct or consented to the act;
- (4) the defendant was an accomplice in the capital felony committed by another person and his[/her] participation was relatively minor;
- (5) the defendant acted under extreme duress or under the substantial domination of another person;
- (6) the defendant's capacity to appreciate the criminality of his[/her] conduct or to conform his[/her] conduct to the requirements of law was substantially impaired; and
- (7) the defendant's age at the time of the crime.<sup>29</sup>

After hearing the evidence presented, the jury was responsible for rendering an advisory recommendation as to the defendant's sentence based on whether there were "sufficient" aggravating and mitigating circumstances and whether the "sufficient" mitigating circumstances found outweighed the aggravating circumstances found.<sup>30</sup> The jury's sentencing recommendation was determined by majority vote,<sup>31</sup> and the court was not required to follow the jury's recommendation.<sup>32</sup>

Given that the jury's recommendation was only advisory, the court had to independently weigh the aggravating and mitigating circumstances and enter a sentence of either life with the possibility of parole after twenty-five calendar years or death.<sup>33</sup> A death sentence had to be supported in writing with specific findings of fact as to the existence of any "sufficient" aggravating circumstances and explain why the "sufficient" mitigating circumstances did not outweigh them.<sup>34</sup> Failure to support findings of fact in writing required the court to impose a sentence of life imprisonment with the possibility of parole after twenty-five calendar years.<sup>35</sup>

The Florida Supreme Court automatically reviewed all convictions and sentences in cases in which the defendant was sentenced to death.<sup>36</sup> The Court was required to review these convictions and sentences within sixty days after the sentencing court certified the entire record unless the court extended the deadline for "good cause."<sup>37</sup> The Court could not extend the deadline for a period in excess of thirty days.<sup>38</sup>

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<sup>29</sup> 1972 Fla. Laws ch. 724, § 9; FLA. STAT. § 921.141(7)(a)-(g) (1973).

<sup>30</sup> 1972 Fla. Laws ch. 724, § 9; FLA. STAT. § 921.141(2)(a), (b) (1973).

<sup>31</sup> 1972 Fla. Laws ch. 724, § 9; FLA. STAT. § 921.141(3) (1973).

<sup>32</sup> 1972 Fla. Laws ch. 724, § 9; FLA. STAT. § 921.141(3) (1973).

<sup>33</sup> 1972 Fla. Laws ch. 724, § 9; FLA. STAT. § 921.141(3) (1973).

<sup>34</sup> 1972 Fla. Laws ch. 724, § 9; FLA. STAT. § 921.141(3)(a), (b) (1973).

<sup>35</sup> 1972 Fla. Laws ch. 724, § 9; FLA. STAT. §§ 921.141(4), 775.082 (1973).

<sup>36</sup> 1972 Fla. Laws ch. 724, § 9; FLA. STAT. § 921.141(5) (1973).

<sup>37</sup> 1972 Fla. Laws ch. 724, § 9; FLA. STAT. § 921.141(5) (1973).

<sup>38</sup> 1972 Fla. Laws ch. 724, § 9; FLA. STAT. § 921.141(5) (1973).

In the event that the Florida Supreme Court or the United States Supreme Court declared the death penalty unconstitutional, a defendant's sentence of death was to be changed to life imprisonment with the possibility of parole after twenty-five years.<sup>39</sup>

## 2. Constitutionality of Florida's Post-Furman Death Penalty Scheme

### a. *State v. Dixon*<sup>40</sup>

In *State v. Dixon*, the Florida Supreme Court upheld the validity of Florida's 1972 death penalty scheme.<sup>41</sup> In doing so, the Court found that the relevant statutes protected against the United States Supreme Court's concerns articulated in *Furman v. Georgia*, because such statutes contained the safeguards necessary to ensure that judges' discretion will be "reasonable and controlled, rather than capricious and discriminatory."<sup>42</sup> The Court additionally noted that the statutes' safeguards ensured that the death penalty would be reserved "for only the most aggravated, the most indefensible of crimes."<sup>43</sup>

### b. *Proffitt v. Florida*<sup>44</sup>

The United States Supreme Court, in *Proffitt v. Florida*, upheld the constitutionality of Florida's death penalty scheme on Eighth and Fourteenth Amendment grounds in light of its decision in *Gregg v. Georgia*,<sup>45</sup> which found that Georgia's new death penalty procedures protected against the arbitrary and capricious application of the death penalty by requiring a finding of at least one aggravating circumstance before the death penalty could be imposed and by requiring the Georgia Supreme Court to review the proportionality of all death sentences.<sup>46</sup> In *Proffitt*, the Court found that Florida's death penalty scheme, like the procedures in Georgia, "appear to meet the constitutional deficiencies identified in *Furman*."<sup>47</sup>

*B. Amendments to Florida's Murder Statute, Fla. Stat. § 782.04; Penalties Statute, Fla. Stat. § 775.082; and Death Penalty Statute, Fla. Stat. § 921.141*

Since 1972, the Florida Legislature has amended Florida's death penalty scheme on several occasions. Changes were made to Florida's murder, penalties, and death penalty statutes. The following sections will discuss the legislature's amendments to each of these three statutes.

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<sup>39</sup> 1972 Fla. Laws ch. 724, § 2; FLA. STAT. § 775.082(2) (1973).

<sup>40</sup> 283 So. 2d 1 (Fla. 1973).

<sup>41</sup> *Id.* at 7.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 8.

<sup>44</sup> 428 U.S. 242 (1976).

<sup>45</sup> 428 U.S. 153, 207 (1976).

<sup>46</sup> *Proffitt*, 428 U.S. at 242; *Gregg*, 428 U.S. at 207.

<sup>47</sup> *Proffitt*, 428 U.S. at 251.

## 1. Amendments to Florida’s Murder Statute, Fla. Stat. § 782.04

In 1974, the Florida Legislature passed a new law amending the murder statute in two distinct ways: (1) the law added “sodomy” to the list of felonies punishable by death when committed or attempted to be committed in conjunction with the killing of a human being;<sup>48</sup> and (2) the law increased the minimum age at which individuals could be charged with proximately causing the death of a human being through the distribution of heroin from seventeen to eighteen years old.<sup>49</sup>

The following year, the legislature made a minor word change to section 782.04(1)(a) of the Florida Statutes by replacing the felonies of “rape” and “sodomy” with “involuntary sexual battery” in the section on crimes that are punishable by death when perpetrated or attempted to be perpetrated in conjunction with the killing of a human being.<sup>50</sup>

In 1976, the legislature added opium and specified opium products to the list of drugs mentioned in section 782.04(1)(a)(3) of the Florida Statutes.<sup>51</sup> As a result, unlawful distribution of these drugs by an individual over the age of 18 which proximately causes the death of a human being was made punishable by death.<sup>52</sup>

Between 1982 and 1984, the legislature added three offenses to the list of felonies punishable by death when committed or attempted to be committed in conjunction with the unlawful killing of a human being: (1) “trafficking offense prohibited by [section] 893.135(1);”<sup>53</sup> (2) “escape;”<sup>54</sup> and (3) aggravated child abuse.<sup>55</sup>

In 1987, the legislature once again expanded the list of drugs mentioned in section 782.04(1)(a)(3) to include “any substance controlled under [section] 893.03(1) [and] cocaine as described in [section] 893.03(2)(a)(4).”<sup>56</sup> Thereafter, any individual over the age of 18 who unlawfully distributed any of the aforementioned illegal substances could be charged with a capital felony if the distribution of such substance proximately caused the death of a human being.

In 1993 through 2001, the legislature amended the list of felonies that are punishable by death when committed or attempted to be committed in conjunction with the killing of a human being by adding seven additional felonies. The new felonies included: (1) carjacking;<sup>57</sup> (2) home-invasion robbery;<sup>58</sup> (3) “aggravated stalking;”<sup>59</sup> (4) “aggravated

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<sup>48</sup> 1974 Fla. Laws ch. 383, § 14; FLA. STAT. § 782.04(1)(a)(2) (1974).

<sup>49</sup> 1974 Fla. Laws ch. 383, § 14; FLA. STAT. § 782.04(1)(a)(3)(1974).

<sup>50</sup> 1975 Fla. Laws ch. 298; FLA. STAT. § 782.04(1)(a)(2) (1975).

<sup>51</sup> 1976 Fla. Laws ch. 141; FLA. STAT. § 782.04(1)(a)(3) (1976).

<sup>52</sup> 1976 Fla. Laws ch. 141; FLA. STAT. § 782.04(1)(a)(3) (1976).

<sup>53</sup> 1982 Fla. Laws ch. 69, § 1; FLA. STAT. § 782.04(1)(a)(3) (1982).

<sup>54</sup> 1982 Fla. Laws ch. 69, § 1; FLA. STAT. § 782.04(1)(a)(2) (1982).

<sup>55</sup> 1984 Fla. Laws ch. 16, § 1; FLA. STAT. § 782.04(1)(a)(2) (1984).

<sup>56</sup> 1987 Fla. Laws ch. 243, § 6; FLA. STAT. § 782.04(1)(a)(3) (1987).

<sup>57</sup> 1993 Fla. Laws ch. 212, § 3; FLA. STAT. § 782.04(1)(a)(2) (1993).

<sup>58</sup> 1993 Fla. Laws ch. 212, § 3; FLA. STAT. § 782.04(1)(a)(2) (1993).

<sup>59</sup> 1995 Fla. Laws ch. 195, § 11; FLA. STAT. § 782.04(1)(a)(2) (1995).

abuse of an elderly person or disabled adult;”<sup>60</sup> (5) “murder of another human being;”<sup>61</sup> (6) “resisting an officer with violence to his or her person;”<sup>62</sup> and (7) felony act of terrorism.<sup>63</sup>

## 2. Amendments to Florida’s Penalties Statute, Fla. Stat. § 775.082

In 1974, the legislature deleted the word “calendar” which proceeded “years,” thereby denoting that the defendant must serve twenty-five years before being eligible for parole.<sup>64</sup>

Twenty years later, in 1994, the legislature amended the penalties statute by adopting life imprisonment without the possibility of parole as the only alternate punishment to death for defendants convicted of first-degree murder or a section 790.161 violation, which involved the making and use of a destructive device that resulted in the death of another person.<sup>65</sup> The legislature preserved life with the possibility of parole after twenty-five years for defendants convicted of all other capital felonies.<sup>66</sup>

The following year, however, the legislature made all capital felonies punishable by death or by life imprisonment without the possibility of parole.<sup>67</sup>

Consistent with these changes, in 1997, the legislature added subsection (2) to section 775.082 of the Florida Statutes providing as follows:

In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1) [which mandates life imprisonment].<sup>68</sup>

In 1998, the legislature added a second sentence to this subsection that provided as follows: “No sentence of death shall be reduced as a result of a determination that a method of execution is held to be unconstitutional under the State Constitution or the Constitution of the United States.”<sup>69</sup>

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<sup>60</sup> 1996 Fla. Laws ch. 322, § 18; FLA. STAT. § 782.04(1)(a)(2) (1996).

<sup>61</sup> 1998 Fla. Laws ch. 417, § 1; FLA. STAT. § 782.04(1)(a)(2) (1998).

<sup>62</sup> 2000 Fla. Laws ch. 320, § 2; FLA. STAT. § 782.04(1)(a)(2) (2000).

<sup>63</sup> 2001 Fla. Laws ch. 357, § 2; FLA. STAT. § 782.04(1)(a)(2) (2001).

<sup>64</sup> 1974 Fla. Laws ch. 383, § 5; FLA. STAT. § 775.082(1) (1974).

<sup>65</sup> 1994 Fla. Laws ch. 228, § 1; FLA. STAT. § 775.082(1)(a) (1994).

<sup>66</sup> 1994 Fla. Laws ch. 228, § 1; FLA. STAT. § 775.082(1)(b) (1994).

<sup>67</sup> 1995 Fla. Laws ch. 294, § 3; FLA. STAT. § 775.082(1) (1995).

<sup>68</sup> 1997 Fla. Laws ch. 239, § 2; FLA. STAT. § 775.082(2) (1997).

<sup>69</sup> 1998 Fla. Laws ch. 3, § 2; FLA. STAT. § 775.082(2) (1998).

### 3. Amendments to Florida's Death Penalty Statute, Fla. Stat. § 921.141

In 1974, the legislature amended the death penalty statute by granting the trial judge the ability to summon a second or special jury in situations in which it is impossible or impractical for the trial jury to reconvene for the penalty phase.<sup>70</sup>

The legislature, in 1979, expanded the list of aggravating circumstances by adding the following aggravator: “the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.”<sup>71</sup>

Between 1987 and 1988, the legislature again expanded the list of aggravating circumstances by adding two new aggravators: (1) the victim of the capital felony was a law enforcement officer engaged in the performance of his official duties;<sup>72</sup> and (2) the victim of the capital felony was an elected or appointed public official engaged in the performance of his official duties.<sup>73</sup>

In 1991, the legislature modified the aggravator codified in section 921.141(5)(a), which applied only to individuals under a sentence of imprisonment at the time of the capital felony, to include individuals who were placed on community control at the time of the capital felony.<sup>74</sup>

The following year, the legislature added subsection (7) to section 921.141 allowing the state to introduce “victim impact evidence,” demonstrating the victim’s unique character and the effect the victim’s death had on the community.<sup>75</sup> Evidence that includes “characterizations and opinions about the crime, the defendant, and the appropriate sentence [must] not be permitted as a part of victim impact evidence.”<sup>76</sup> The state may introduce permissible victim impact evidence only after it has provided evidence of the existence of one or more aggravating circumstances.<sup>77</sup>

In 1995, the legislature added “aggravated child abuse” to the list of felonies that constitute aggravating circumstances when committed or attempted to be committed in conjunction with the killing of a human being.<sup>78</sup> The amendment also provided for an additional aggravator when the victim of a capital felony was under the age of 12.<sup>79</sup>

In 1996, the legislature adopted various amendments to the death penalty statute. First, the legislature restricted the amount of time judges have to draft and submit their written

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<sup>70</sup> 1974 Fla. Laws ch. 379, § 1; FLA. STAT. § 921.141(1) (1974).

<sup>71</sup> 1979 Fla. Laws ch. 353; FLA. STAT. § 921.141(5)(i) (1979).

<sup>72</sup> 1987 Fla. Laws ch. 368, § 1; FLA. STAT. § 921.141(5)(j) (1987).

<sup>73</sup> 1988 Fla. Laws ch. 381, § 10; FLA. STAT. § 921.141(5)(k) (1988).

<sup>74</sup> 1991 Fla. Laws ch. 270, § 1; FLA. STAT. § 921.141(5)(a) (1991).

<sup>75</sup> 1992 Fla. Laws ch. 81, § 1; FLA. STAT. § 921.141(7) (1992).

<sup>76</sup> 1992 Fla. Laws ch. 81, § 1; FLA. STAT. § 921.141(7) (1992).

<sup>77</sup> 1992 Fla. Laws ch. 81, § 1; FLA. STAT. § 921.141(7) (1992).

<sup>78</sup> 1995 Fla. Laws ch. 159, § 1; FLA. STAT. § 921.141(5)(d) (1995).

<sup>79</sup> 1995 Fla. Laws ch. 159, § 1; FLA. STAT. § 921.141(5)(l) (1995).

findings in cases in which they entered a sentence of death.<sup>80</sup> Specifically, the amendment required judges to submit their written findings of fact “within 30 days after the rendition of the judgment and sentence.”<sup>81</sup> Additionally, the legislature amended section 921.141(4) by requiring the Florida Supreme Court to render a disposition on direct appeal within two years of filing the notice of appeal instead of requiring automatic review by the court within sixty days after certification of the entire record.<sup>82</sup>

During that same year, the legislature expanded the list of aggravating circumstances to include: (1) the capital felony was committed against an elderly person or a disabled adult, or by an individual in a position of authority, either familial or custodial, over the victim;<sup>83</sup> and (2) the capital felony was committed by a criminal street gang member, as defined in section 847.03.<sup>84</sup> The legislature also modified the aggravator under section 921.141(5)(a) to state as follows: “the capital felony was committed by an individual who previously was convicted of a felony and under sentence of imprisonment or placed on community control or on felony<sup>85</sup> probation.”<sup>86</sup> The legislature also added “the abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement” to the list of offenses that constitute aggravating circumstances when committed or attempted to be committed in conjunction with the killing of a human being.<sup>87</sup> Additionally, the legislature amended section 921.141(6) by adding a new catch-all mitigating circumstance allowing the defense to present and the jury to consider “any other factors in the defendant’s background that would mitigate against imposition of the death penalty.”<sup>88</sup>

Finally, in 2005, the legislature added another aggravating circumstance and clarified the standards for victim-impact evidence. Subsection (5)(o) was added to section 921.141, stating:

The capital felony was committed by a person designated as a sexual predator [] or a person previously designated as a sexual predator who had the sexual-predator designation removed.<sup>89</sup>

The legislature also clarified the victim-impact evidence standards by amending section 921.141(7) to read “the prosecution may introduce . . . victim impact evidence to the jury.”<sup>90</sup>

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<sup>80</sup> 1996 Fla. Laws ch. 290, § 5; FLA. STAT. § 921.141(3) (1996).

<sup>81</sup> 1996 Fla. Laws ch. 290, § 5; FLA. STAT. § 921.141(3) (1996).

<sup>82</sup> 1996 Fla. Laws ch. 290, § 5; FLA. STAT. § 921.141(4) (1996).

<sup>83</sup> 1996 Fla. Laws ch. 290, § 5; 1996 Fla. Laws ch. 302 § 1; FLA. STAT. § 921.141(5)(m) (1996).

<sup>84</sup> 1996 Fla. Laws ch. 290, § 5; FLA. STAT. § 921.141(5)(n) (1996).

<sup>85</sup> 1996 Fla. Laws ch. 290, § 5 (adding the phrase “or on probation”); 1996 Fla. Laws ch. 96-302, § 1 (inserting the word “felony” in between the words “on” and “probation”); FLA. STAT. § 921.141(5)(a) (1996).

<sup>86</sup> 1996 Fla. Laws ch. 290, § 5; 1996 Fla. Laws ch. 302 § 1; FLA. STAT. § 921.141(5)(a) (1996).

<sup>87</sup> 1996 Fla. Laws ch. 302, § 1; FLA. STAT. § 921.141(5)(d) (1996).

<sup>88</sup> 1996 Fla. Laws ch. 290, § 5; 1996 Fla. Laws ch. 96-302, § 1; FLA. STAT. § 921.141(6)(h) (1996).

<sup>89</sup> 2005 Fla. Laws ch. 28, § 7; FLA. STAT. § 921.141(5)(o) (2005).

<sup>90</sup> 2005 Fla. Laws ch. 64, § 2; FLA. STAT. § 921.141(7) (2005).

### C. *Capital Felonies Added After the Adoption of Florida’s 1972 Death Penalty Scheme*

In addition to amending Florida’s death penalty scheme, the Florida Legislature has also added three capital felonies since 1972: sexual battery, the capital felony involving the making and use of a destructive device, and capital drug trafficking.

#### 1. Sexual Battery

In 1974, the legislature adopted a new statute, section 794.011, proscribing the offense of sexual battery, which was defined as “oral, anal, vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any object.”<sup>91</sup> Section 794.011(2) provided that when this offense or its attempt results in an injury to the sexual organs and is committed by an individual eighteen years or older upon an individual “eleven years of age or younger” it is a capital felony punishable by death pursuant to section 921.141.<sup>92</sup>

##### a. Amendments to Florida’s Sexual Battery Statute, Fla. Stat. § 794.011

In 1984, the legislature amended section 794.011(2) by substituting “eleven years of age or younger” with “less than twelve years.”<sup>93</sup>

In 1993, the legislature made a technical amendment to section 794.011(2) to clarify that the injury to the sexual organs must have occurred “in an attempt to commit sexual battery.”<sup>94</sup> In addition, the legislature added subsection (8) to section 794.011, which provided in relevant part that when a perpetrator of this offense is “a person who is in a position of familial or custodial authority to a person less than 18 years of age,” the willingness of the victim or the victim’s consent is not a defense to prosecution.<sup>95</sup>

Two years later, section 794.011(1)(a) was amended slightly to clarify the meaning of consent; specifically, “[c]onsent’ shall not be deemed or construed to mean the failure by the alleged victim to offer physical resistance to the offender.”<sup>96</sup>

##### b. Constitutionality of Imposing Death for Sexual Battery, Fla. Stat. § 794.011

In 1981, the Florida Supreme Court held, in *Buford v. State*, that the imposition of the death penalty for sexual battery under section 794.011 constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution.<sup>97</sup> The Court reasoned that, in light of the United States Supreme Court’s

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<sup>91</sup> 1974 Fla. Laws ch. 121, § 2; FLA. STAT. § 794.011(1)(h) (1974).

<sup>92</sup> 1974 Fla. Laws ch. 121, § 2; FLA. STAT. § 794.011(2) (1974).

<sup>93</sup> 1984 Fla. Laws ch. 86, § 1; FLA. STAT. § 794.011(2) (1984).

<sup>94</sup> 1993 Fla. Laws ch. 156, § 3; FLA. STAT. § 794.011(2) (1993).

<sup>95</sup> 1993 Fla. Laws ch. 156, § 3; FLA. STAT. § 794.011(8) (1993).

<sup>96</sup> 1995 Fla. Laws ch. 348, § 2; FLA. STAT. § 794.011(1)(a) (2005).

<sup>97</sup> 403 So. 2d 943, 951 (Fla. 1981).

decision in *Coker v. Georgia*,<sup>98</sup> “a sentence of death is grossly disproportionate and [an] excessive punishment” for the offense of sexual battery.<sup>99</sup> Despite the Court’s holding in *Buford*, the Florida Legislature has yet to amend section 794.011.

## 2. The Capital Offense Involving the Making and Use of a Destructive Device

In 1976, the Florida Legislature amended section 790.161<sup>100</sup> by classifying the offense prescribed therein—the making and use of a destructive device that results in the death of another person—as a capital offense.<sup>101</sup> Section 790.161 stated as follows:

A person who makes, possesses, throws, places, discharges, or attempts to discharge any destructive device, with intent to do bodily harm to any person or with intent to do damage to property:

...

If the act results in death of another person, shall be guilty of a capital felony, punishable by death. In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment, and such person shall be required to serve a term of imprisonment of not less than 25 calendar years before becoming eligible for parole.<sup>102</sup>

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<sup>98</sup> 433 U.S. 584, 592 (1977) (holding that the punishment of death for rape of an adult woman violates the cruel and unusual punishment clause of the Eighth Amendment because it is “grossly disproportionate and excessive” in relation to the crime committed).

<sup>99</sup> *Buford*, 403 So. 2d at 951.

<sup>100</sup> Prior to the 1976 amendments, a section 790.161 offense that resulted in death was punishable as a “life felony” not as a “capital felony.” Section 790.161 stated as follows:

It is unlawful for any person to throw, place, discharge, or attempt to discharge any destructive device, as defined herein, with intent to do bodily harm to any person or with intent to do damage to property, and any person convicted thereof shall be guilty of a felony and punished in the following manner:

(1) When such action, or attempt at such action, results in the death of another person, the person so convicted shall be guilty of a life felony, punishable as provided in s. 775.082.

(2) When such action, or attempt at such action, results not in the death of any person, but does result in personal injury to a person or in damage to property, the person so convicted shall be guilty of a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. A sentence not exceeding life imprisonment is specifically authorized when great bodily harm to another or serious disruption of governmental operations results.

FLA. STAT. § 790.161 (1972).

<sup>101</sup> 1976 Fla. Laws ch. 38; FLA. STAT. § 790.161 (1976).

<sup>102</sup> 1976 Fla. Laws ch. 38; FLA. STAT. § 790.161 (1976).

In 1988, the Florida Legislature expanded section 790.161 to include “projecting” any destructive device in addition to making, possessing, throwing, placing, and discharging destructive devices.<sup>103</sup> The legislature also added the offenses of attempting to “throw, place, [or] project” any destructive device and attempting to “discharge any destructive device.”<sup>104</sup> Lastly, the legislature inserted the term “wrongfully” after “intent” and before “to do damage to property,” thereby indicating that the offender must have intended to wrongfully do damage to the property in order to be convicted under section 790.161.<sup>105</sup>

Two years later, in 1990, the legislature rewrote section 790.161 to require that the acts proscribed (e.g., possessing, throwing) be “willful and unlawful,” and changed the words “shall be guilty of” in the first sentence to “commits.”<sup>106</sup>

In 1994, the Florida Legislature amended section 790.161(4) by replacing the words “by death,” which referenced the applicable punishment, with “as proscribed in [section] 775.082” and by substituting “if convicted of murder in the first-degree or of a capital felony under this subsection, and such person shall be ineligible for parole” for “such person shall be required to serve a term of imprisonment of not less than [twenty-five] calendar years before becoming eligible for parole.”<sup>107</sup>

Four years later, in 1998, the legislature added the same sentence to this provision that it added to section 775.082: “No sentence of death shall be reduced as a result of a determination that a method of execution is held to be unconstitutional under the State Constitution or the Constitution of the United States.”<sup>108</sup>

### 3. Capital Drug Trafficking Felonies Punishable by Life Imprisonment or Death

In 1990, the Florida Legislature passed a new law amending its drug trafficking statute, section 893.135, by classifying trafficking in 150 kilograms or more of cocaine or thirty kilograms or more of any morphine, opium, or any salt, isomer, or salt of an isomer, including heroin, or thirty kilograms or more of any mixture containing any such substance, as a first-degree trafficking felony punishable by life imprisonment without the possibility of parole.<sup>109</sup> However, if an individual commits a first-degree felony trafficking offense and either (1) “intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results,” or (2) “is determined to have had a highly culpable mental state which may be taken into account when making a capital sentencing judgment when the defendant’s conduct causes its natural, though also not inevitable, lethal result,” such individual commits a capital drug trafficking felony punishable by either life imprisonment without the

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<sup>103</sup> 1988 Fla. Laws ch. 381, § 44; FLA. STAT. § 790.161 (1988).

<sup>104</sup> 1988 Fla. Laws ch. 381, § 44; FLA. STAT. § 790.161 (1988).

<sup>105</sup> 1988 Fla. Laws ch. 381, § 44; FLA. STAT. § 790.161 (1988).

<sup>106</sup> 1990 Fla. Laws ch. 124, § 3; 1990 Fla. Laws ch. 176, § 3; FLA. STAT. § 790.161 (1990).

<sup>107</sup> 1994 Fla. Laws ch. 228, § 2; FLA. STAT. § 790.161(4) (1994).

<sup>108</sup> Compare 1998 Fla. Laws ch. 3, § 3 and FLA. STAT. § 790.161(4) (1998) with 1998 Fla. Laws ch. 3, § 2 and FLA. STAT. § 775.082(2) (1998).

<sup>109</sup> 1990 Fla. Laws ch. 112, § 1; FLA. STAT. § 893.135(1)(b)(2), (c)(2) (1990).

possibility of parole or death.<sup>110</sup> For the purposes of section 893.135(1)(b)(2) and (c)(2), “highly culpable mental state” is defined as “a reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death.”<sup>111</sup>

The 1990 law also created a new statute, section 921.142, providing for a separate sentencing hearing for capital drug trafficking felonies.<sup>112</sup> Section 921.142, as adopted in 1990, mirrored the 1990 version of the death penalty statute for first-degree murder, section 921.141, except it provided for different statutory aggravating and mitigating circumstances.<sup>113</sup>

The statutory aggravating circumstances included:

- (1) the capital felony was committed by a person under a sentence of imprisonment;
- (2) the defendant was previously convicted of another capital felony or of a state or federal offense involving the distribution of a controlled substance that is punishable by a sentence of at least [one] year of imprisonment;
- (3) the defendant knowingly created a grave risk of death to one or more persons such that participation in the offense constituted reckless indifference or disregard for human life,
- (4) the defendant used a firearm or knowingly directed, advised, authorized, or assisted another to use a firearm to threaten, intimidate, assault, or injure a person in committing the offense or in furtherance of the offense;
- (5) the offense involved the distribution of controlled substances to persons under the age of 18 years, the distribution of controlled substances within school zones, or the use or employment of persons under the age of 18 years in aid of distribution of controlled substances;
- (6) the offense involved distribution of controlled substances known to contain a potentially lethal adulterant;
- (7) the defendant either (a) intentionally killed the victim, (b) intentionally inflicted serious bodily injury which resulted in the death of the victim, or (c) intentionally engaged in conduct intending that the victim be killed or that lethal force be employed against the victim, which resulted in the death of the victim;
- (8) the defendant committed the offense as consideration for the receipt, or the expectation of the receipt of anything of pecuniary value;
- (9) the defendant committed the offense after planning and premeditation; and
- (10) the defendant committed the offense in an heinous, cruel, or depraved manner in that the offense involved torture or serious physical abuse to the victim.<sup>114</sup>

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<sup>110</sup> 1990 Fla. Laws ch. 112, § 1; FLA. STAT. § 893.135(1)(a), (b), (c)(2)(a),(b) (1990).

<sup>111</sup> 1990 Fla. Laws ch. 112, § 1; FLA. STAT. § 893.135(1)(b)(2), (c)(2) (1990).

<sup>112</sup> 1990 Fla. Laws ch. 112, § 2; FLA. STAT. § 921.142 (1990).

<sup>113</sup> Compare FLA. STAT. § 921.141 (1990) with 1990 ch. Fla. Laws 112, § 2.

<sup>114</sup> 1990 Fla. Laws ch. 112, § 2; FLA. STAT. § 921.142(6) (1990).

The statutory mitigating circumstances included:

- (1) the defendant had no significant history of prior criminal activity;
- (2) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;
- (3) the defendant was an accomplice in the capital felony committed by another person, and the defendant's participation was relatively minor;
- (4) the defendant was under extreme duress or under the substantial domination of another person;
- (5) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was substantially impaired;
- (6) the age of the defendant at the time of the offense;
- (7) the defendant could not have reasonably foreseen that his/her conduct in the course of the commission of the offense would cause or would create a grave risk of death to one or more persons; and
- (8) the existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.<sup>115</sup>

- a. Amendments to Florida's Drug Trafficking Statute, Fla. Stat. § 893.135(1)(b)(2), (c)(2)

In 1993, the legislature slightly reworded both subsections (b)(2)(b) and (c)(2)(b) of section 893.135(1) to read as follows: “[The person] is determined, with respect to the commission of that act, to have had a highly culpable mental state and, as a result of that act, the defendant's conduct led to a natural, though not inevitable, lethal result, which state may be taken into account in any capital sentencing judgment.”<sup>116</sup>

The legislature, in 1995, changed the punishment for a first-degree trafficking felony from “life imprisonment without the possibility of parole” to “life imprisonment [without the possibility of] any form of discretionary early release except conditional medical release.”<sup>117</sup> The legislature also added oxycodone, hydrocodone, and hydromorphone, as well as their derivatives, to the list of drugs that when trafficked in specified amounts may be punishable by life imprisonment or death.<sup>118</sup>

One year later, the legislature made several changes to subsections (b)(2) and (c)(2) of section 893.135(1). First, the legislature set maximum limits on the drug quantities for which individuals can be charged under subsections (b)(2) and (c)(2) of section 893.135(1).<sup>119</sup> Specifically, only individuals who traffic between 150 and 300 kilograms of cocaine or between thirty and sixty kilograms of morphine, opium, oxycodone, hydrocodone, hydromorphone, or any salt, derivative, isomer, or salt of an isomer,

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<sup>115</sup> 1990 Fla. Laws ch. 112, § 1; FLA. STAT. § 921.142(7) (1990).

<sup>116</sup> 1993 Fla. Laws ch. 92, § 3; FLA. STAT. § 893.135(1)(b)(2), (c)(2) (1993).

<sup>117</sup> 1995 Fla. Laws ch. 184, § 15; FLA. STAT. § 893.135(1)(b)(2), (c)(2) (1995).

<sup>118</sup> 1995 Fla. Laws ch. 415, § 5; FLA. STAT. § 893.135(1)(b)(2), (c)(2) (1995).

<sup>119</sup> 1996 Fla. Laws ch. 388, § 54; FLA. STAT. § 893.135(1)(b)(2), (c)(2) (1996).

including heroin, or between thirty and sixty kilograms of any mixture containing any such substance may be charged under subsections (b)(2) or (c)(2) of section 893.135(1).<sup>120</sup> Second, the legislature altered the punishments available for first-degree drug trafficking felons by permitting early release by pardon or executive clemency, if applicable.<sup>121</sup> Third, the legislature rewrote subsections (b)(2) and (c)(2) of section 893.135(1) to state:

However, if the court determines that, in addition to committing any act specified in this paragraph [such as first-degree drug trafficking]:

- (a) the person intentionally killed an individual or counseled, commanded, induced, procured, or caused the intentional killing of an individual and such killing results; or
- (b) the persons conduct in committing that act led to a natural, though not inevitable, lethal result,

such person commits the capital felony of trafficking in [a specified illegal substance], punishable as provided in [sections] 775.082 and 921.142.<sup>122</sup>

During that same year, the legislature deleted the definition of “highly culpable mental state.”<sup>123</sup> The legislature also added a new section to sub-subsections (b) and (c) of section 893.135(1), creating a new capital drug trafficking felony known as “capital importation of illegal drugs.”<sup>124</sup> Capital importation of illegal drugs includes:

- (1) the importation of 300 kilograms or more of cocaine or [sixty] kilograms or more of any morphine, opium, oxycodone, hydrocodone, hydromorphone, or any salt, derivative, isomer, or salt of an isomer, including heroin, or [sixty] kilograms or more of any mixture containing any such substance; and
- (2) with the knowledge that the probable result of such importation would be the death of any person.<sup>125</sup>

In 1997, the legislature added subsection (1)(g) to section 893.135, providing penalties for trafficking in flunitrazepam. Subsection (1)(g)(2) makes such trafficking punishable by death in certain circumstances; specifically, it states:

Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state or who is knowingly in actual or constructive possession of [thirty] kilograms or more of flunitrazepam or any mixture containing flunitrazepam as described in [section] 893.03(1)(a) commits

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<sup>120</sup> 1996 Fla. Laws ch. 388, § 54; FLA. STAT. § 893.135(1)(b)(2), (c)(2) (1996).

<sup>121</sup> 1996 Fla. Laws ch. 388, § 54; FLA. STAT. § 893.135(1)(b)(2), (c)(2) (1996).

<sup>122</sup> 1996 Fla. Laws ch. 388, § 54; FLA. STAT. § 893.135(1)(b)(2), (c)(2) (1996).

<sup>123</sup> 1996 Fla. Laws ch. 388, § 54; FLA. STAT. § 893.135(1)(b)(2), (c)(2) (1996).

<sup>124</sup> 1996 Fla. Laws ch. 388, § 54; FLA. STAT. § 893.135(1)(b)(2), (c)(2) (1996).

<sup>125</sup> 1996 Fla. Laws ch. 388, § 54; FLA. STAT. § 893.135(1)(b)(2), (c)(2) (1996).

the first-degree felony of trafficking in flunitrazepam. A person who has been convicted of the first-degree felony of trafficking in flunitrazepam under this subparagraph shall be punished by life imprisonment and is ineligible for any form of discretionary early release except pardon or executive clemency or conditional medical release under [section] 947.149. However, if the court determines that, in addition to committing any act specified in this paragraph:

- (a) The person intentionally killed an individual or counseled, commanded, induced, procured, or caused the intentional killing of an individual and such killing was the result; or
- (b) The person's conduct in committing that act led to a natural, though not inevitable, lethal result,

such person commits the capital felony of trafficking in flunitrazepam, punishable as provided in [sections] 775.082 and 921.142.<sup>126</sup>

In 1999, the legislature deleted the maximum amount of drugs added in 1996.<sup>127</sup>

The following year, the legislature amended and added language to the statute. Subsection (1)(f)(2) of section 893.135 was amended to penalize as a capital felony the manufacture (as well as transport) of 400 grams or more of amphetamine, where the offender knows that its probable result will be an individual's death.<sup>128</sup> The legislature also added subsection (1)(j)(3) to section 893.135, stating:

- (3) Any person who knowingly manufactures or brings into this state 30 kilograms or more of any of the following substances described in [section] 893.03(1)(a) or (c):
  - (a) 3,4-Methylenedioxyamphetamine (MDMA);
  - (b) 4-Bromo-2,5-dimethoxyamphetamine;
  - (c) 4-Bromo-2,5-dimethoxyphenethylamine;
  - (d) 2,5-Dimethoxyamphetamine;
  - (e) 2,5-Dimethoxy-4-ethylamphetamine (DOET);
  - (f) N-ethylamphetamine;
  - (g) N-Hydroxy-3,4-methylenedioxyamphetamine;
  - (h) 5-Methoxy-3,4-methylenedioxyamphetamine;
  - (i) 4-methoxyamphetamine;
  - (j) 4-Methyl-2,5-dimethoxyamphetamine;
  - (k) 3,4-Methylenedioxy-N-ethylamphetamine;
  - (l) 3,4-Methylenedioxyamphetamine;

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<sup>126</sup> 1997 Fla. Laws ch. 1, § 3; FLA. STAT. § 893.135(1)(g)(2) (1997). The same year, the legislature also added "or she" in subsection (5) to ensure the statute was gender neutral.

<sup>127</sup> 1999 Fla. Laws ch. 188, § 9; FLA. STAT. § 893.135(1)(b)(2), (c)(2) (1999).

<sup>128</sup> 2000 Fla. Laws ch. 320, § 4; FLA. STAT. § 893.135(1)(f)(2) (2000) (inserting "manufacture(s) or" between "knowingly" and "brings," between "such" and "importation," and between "capital" and "importation").

- (m) N,N-dimethylamphetamine; or
- (n) 3,4,5-Trimethoxyamphetamine,

individually or in any combination of or any mixture containing any substance listed in sub-subparagraphs a-n, and who knows that the probable result of such manufacture or importation would be the death of any person[,] commits capital manufacture or importation of Phenethylamines, a capital felony punishable as provided in [sections] 775.082 and 921.142.<sup>129</sup>

Additionally, subsections (1)(h)(2) and (1)(i)(2) were added to section 893.135; the subsections were identical except (1)(h)(2) referred to gamma-hydroxybutyric acid (GHB) and (1)(i)(2) referred to 1, 4-Butanediol.<sup>130</sup> Each stated that:

Any person who knowingly manufactures or brings into the state 150 kilograms or more of [the respective substance], as described in [section 893.03], or any mixture containing [the respective substance] and who knows that the probable result of such manufacture or importation would be the death of any person commits capital manufacture of [the respective substance], a capital felony punishable as provided in [sections] 775.082 and 921.142.<sup>131</sup>

In 2001, the legislature added a new paragraph to subsection (1) of section 893.135 that was identical to the paragraph mentioned above except it pertained to gamma-butyrolactone (GBL).<sup>132</sup> It also added 4-methoxymethamphetamine to the list of substances in paragraph (1)(k)(3) (formerly subsection(1)(j)(3)).<sup>133</sup> The legislature also added subsection (1)(l), which provides penalties for manufacturing or trafficking lysergic acid diethylamide (LSD).<sup>134</sup> Subsection (1)(l)(2) mirrors subsections (1)(g)(2), (1)(h)(2), and (1)(i)(2), which are discussed above; the only modification being the seven gram or more (rather than 150 kilogram or more) limit.<sup>135</sup> Lastly, the legislature added to section 893.135(1)(c)(3) additional references for the definition of “capital importation of illegal drugs,” to include Schedule II and III drugs as well as Schedule I drugs.<sup>136</sup>

Four years later, the legislature added pseudoephedrine to section 893.135(1)(f)(2), which criminalizes the manufacture or importation of 400 grams or more of amphetamine, methamphetamine, or of any mixture containing amphetamine or methamphetamine, or a list of other drugs in conjunction with other chemicals and equipment used in the

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<sup>129</sup> 2000 Fla. Laws ch. 320, § 4; FLA. STAT. § 893.135(1)(j)(3) (2000).

<sup>130</sup> 2000 Fla. Laws ch. 320, § 4; FLA. STAT. § 893.135(1)(h),(1)(i) (2000).

<sup>131</sup> 2000 Fla. Laws ch. 320, § 4; FLA. STAT. § 893.135(1)(h)(2), (1)(i)(2) (2000).

<sup>132</sup> 2001 Fla. Laws ch. 57, § 7; FLA. STAT. § 893.135(1)(i)(2) (2001) (other paragraphs redesignated to include addition of subsection (1)(i)).

<sup>133</sup> 2001 Fla. Laws ch. 57, § 7; FLA. STAT. § 893.135(1)(i)(2) (2001).

<sup>134</sup> 2001 Fla. Laws ch. 57, § 7; FLA. STAT. § 893.135(1)(i)(2) (2001).

<sup>135</sup> 2001 Fla. Laws ch. 57, § 7; FLA. STAT. § 893.135(1)(i)(2) (2001).

<sup>136</sup> 2001 Fla. Laws ch. 55, § 2; FLA. STAT. § 893.135(1)(c)(3) (2001).

manufacture of amphetamine or methamphetamine, while knowing that the probable result of such manufacture or importation would be the death of any person.<sup>137</sup>

b. Amendments to Florida's Capital Drug Trafficking Statute, Fla. Stat. § 921.142

In 1992, the legislature added a new subsection to section 921.142 allowing the state to introduce victim impact evidence once it has established the existence of one or more aggravating circumstances.<sup>138</sup> The amendment to section 921.142 is identical to the 1992 amendment to section 921.141 concerning the introduction of victim impact evidence.<sup>139</sup>

Similarly, in 1996, the legislature adopted indistinguishable amendments to sections 921.141 and 921.142. The amendments limited the amount of time judges have to draft and submit their written findings by requiring that such findings be submitted "within [thirty] days after the rendition of the judgment and sentence."<sup>140</sup> Additionally, the amendments required the Florida Supreme Court to render a disposition on direct appeal within two years of filing the notice of appeal instead of requiring automatic review by the court within sixty days after certification of the entire record.<sup>141</sup>

*D. Florida Constitutional Amendments Relating to the Death Penalty*

In 1998, the Florida Legislature proposed and voters later approved an amendment to Section 17 of Article 1 of the Florida Constitution that changed the prohibition against cruel *or* unusual punishment to a prohibition against cruel *and* unusual punishment.<sup>142</sup> The amendment also added the following paragraph to Section 17:

The death penalty is an authorized punishment for capital crimes designated by the legislature. The prohibition against cruel or unusual, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution. Any method of execution shall be allowed, unless prohibited by the United States Constitution. Methods of execution may be designated by the legislature, and a change in any method of execution may be applied retroactively. A sentence of death shall not be reduced on the basis that a method of execution is invalid. In any case in which an execution method is declared invalid, the death sentence shall remain in

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<sup>137</sup> 2005 Fla. Laws ch. 128, § 3; FLA. STAT. § 893.135(1)(f)(2) (2005).

<sup>138</sup> 1992 Fla. Laws ch. 81, § 2; FLA. STAT. § 921.141(8) (1992).

<sup>139</sup> Compare 1992 Fla. Laws ch. 81, § 1 with 1992 Fla. Laws ch. 92, § 2.

<sup>140</sup> 1996 Fla. Laws ch. 290, § 6; FLA. STAT. § 921.141(4) (1996).

<sup>141</sup> 1996 Fla. Laws ch. 290, § 6; FLA. STAT. § 921.141(5) (1996). One year later, language was added to section 921.142 to ensure that the statute was gender-neutral. See 1997 Fla. Laws ch. 102, § 1837; FLA. STAT. § 921.142(2), (7)(e), (7)(g) (1997).

<sup>142</sup> FLA. CONST. art. 1, § 17 (commentary to 1998 amendment).

force until the sentence can be lawfully executed by any valid method.  
This section shall apply retroactively.<sup>143</sup>

### III. THE PROGRESSION OF A FLORIDA DEATH PENALTY CASE FROM ARREST TO EXECUTION

#### A. *Pretrial Process*

##### 1. Grand Jury Indictment

Capital felonies are prosecuted by indictment in Florida. In order to indict an individual accused of a capital felony, a grand jury<sup>144</sup> must find that probable cause<sup>145</sup> exists that the individual committed a capital offense.<sup>146</sup>

##### 2. Appointment of Counsel

An individual charged with a capital offense is eligible for appointed counsel—either a public defender<sup>147</sup> or a private court-appointed counsel<sup>148</sup>—if s/he is indigent and desires representation.<sup>149</sup> An individual is indigent if:

[s/he] has an income equal to or below 200 percent of the then-current federal poverty guidelines prescribed for the size of the household of the [accused] by the United States Department of Health and Human Services or if [s/he] is receiving Temporary Assistance for Needy Families-Cash Assistance, poverty-related veterans' benefits, or Supplemental Security Income (SSI).<sup>150</sup>

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<sup>143</sup> *Id.*

<sup>144</sup> A grand jury is composed of between fifteen and twenty-one individuals. *See* FLA. STAT. § 905.01(1) (2006). The purpose of a grand jury is to determine whether an indictment should be returned based on whether sufficient evidence exists to establish probable cause that the accused committed the alleged offense(s). *See* FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES §§ 2.4-2.6 (5th ed. 2005); FLA. STAT. § 905.16 (2006) (detailing the duties of a grand jury); *see also* FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES ch. 30 (5th ed. 2005) (grand jury handbook).

<sup>145</sup> *See* *State v. Barnett*, 339 So. 2d 1159 (Fla. 2d DCA 1976); *Anderson v. State*, 241 So. 2d 390 (Fla. 1970), *vacated in part*, 408 U.S. 938 (noting the burden of proof as probable cause).

<sup>146</sup> *See* FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES §§ 2.4-2.6 (5th ed. 2005).

<sup>147</sup> FLA. STAT. § 27.51 (2006) (detailing the duties of public defenders).

<sup>148</sup> FLA. STAT. § 27.5304 (2006) (detailing the maximum fees for private court-appointed counsel who defended capital cases and appeals of such cases—the maximum payment at the trial level being \$3,500 and the maximum payment on appeal being \$2,000); *see also* 14 FLA. JUR. 2D *Criminal Law* §§ 544-46 (2006) (detailing the right of an indigent defendant to counsel at trial, on appeal, and in executive clemency petitions, respectively).

<sup>149</sup> *Traylor v. State*, 596 So. 2d 957, 968 (Fla. 1992) (“[T]he defendant is entitled to decide at each crucial stage of the proceedings whether he or she requires the assistance of counsel. At the commencement of each such stage, an unrepresented defendant must be informed of the right to counsel and the consequences of waiver. Any waiver of this right must be knowing, intelligent, and voluntary, and courts generally will indulge every reasonable presumption against waiver of this fundamental right. Where the right to counsel has been properly waived, the state may proceed with the stage in issue; but the waiver applies only to the present stage and must be renewed at each subsequent crucial stage where the defendant is unrepresented.”); *see also* FLA. R. CRIM. P. 3.111(d).

<sup>150</sup> FLA. STAT. § 27.52(2)(a)(1), (2) (2006).

Another factor to be considered is whether the accused is unable to pay for the services of an attorney without substantial hardship to his/her family.<sup>151</sup> If eligible for representation, the accused will be appointed qualified counsel<sup>152</sup> “when the person is formally charged with an offense, or as soon as feasible after custodial restraint, or at the first appearance before a committing judge, whichever occurs earliest.”<sup>153</sup> The accused may waive his/her right to counsel on the record while in court or by filing a written waiver of representation.<sup>154</sup>

3. Arraignment, Notice of Intent to Seek the Death Penalty, Notice of Intent to Present Expert Testimony of Mental Mitigation, and Plea-Bargaining

Following the indictment, the defendant will be ordered to appear for an arraignment, at which time the court will orally inform the defendant of the charges and ask him/her to enter a plea to the charges.<sup>155</sup> The defendant may plead guilty, not guilty, or, with consent of the court, *nolo contendere*.<sup>156</sup> Defendants who are represented by counsel may waive arraignment by entering a written plea of not guilty.<sup>157</sup> Defendants who wish to plead guilty must personally appear and enter the plea in open court.<sup>158</sup>

The state has the option, but is not required, to file a “Notice of Intent to Seek the Death Penalty” within forty-five days after the date of arraignment.<sup>159</sup> The filing of the notice places the duty upon the defendant to file a “Notice of Intent to Present Expert Testimony of Mental Mitigation” at least twenty days prior to trial, if the defendant intends to raise mental retardation or a mental mitigating circumstance during the penalty phase of the trial.<sup>160</sup>

Prior to the trial, attorneys for the state and defense are encouraged to discuss and agree on pleas that may be entered by the defendant.<sup>161</sup> Defendants who plead guilty without an agreement as to the sentence, proceed to the penalty phase before a jury empanelled

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<sup>151</sup> FLA. STAT. § 27.52(4)(a)(3) (2006); FLA. R. CRIM. P. 3.111(b)(4).

<sup>152</sup> FLA. R. CRIM. P. 3.112(e)-(g) (stating the minimum standards for trial attorneys in capital cases). The Florida Supreme Court has extended these standards to private counsel in capital trials and on direct appeal. *See In re Amendment to Florida Rules of Criminal Procedure – Rule 3.112 Minimum Standards for Attorneys in Capital Cases*, 820 So. 2d 185, 186-87 (Fla. 2002).

<sup>153</sup> FLA. R. CRIM. P. 3.111(a); FLA. R. CRIM. P. 3.160(e) (stating that defendant must be informed of his/her right to counsel prior to arraignment).

<sup>154</sup> FLA. R. CRIM. P. 3.111(d)(4) (requiring that a written waiver must be signed by not less than two witnesses attesting that the signature was obtained voluntarily); FLA. R. CRIM. P. 3.160(e). For examples of defendants waiving counsel in a capital trial see *Weaver v. State*, 894 So. 2d 178 (Fla. 2004) and *Goode v. State*, 365 So. 2d 381, 383-84 (Fla. 1978).

<sup>155</sup> FLA. R. CRIM. P. 3.160(a). Either the judge, clerk, or prosecuting attorney may read the indictment at the arraignment. *Id.*

<sup>156</sup> FLA. R. CRIM. P. 3.170(a).

<sup>157</sup> FLA. R. CRIM. P. 3.160(a), 3.170(a).

<sup>158</sup> FLA. R. CRIM. P. 3.160(c); FLA. R. CRIM. P. 3.172(a) (noting that all pleas must be voluntary); FLA. R. CRIM. P. 3.180(a)(2).

<sup>159</sup> FLA. R. CRIM. P. 3.202(a).

<sup>160</sup> FLA. STAT. § 921.137(3) (2006); FLA. R. CRIM. P. 3.202(b), (c).

<sup>161</sup> FLA. R. CRIM. P. 3.171(a).

for that purpose.<sup>162</sup> However, defendants who plead not guilty proceed to the guilt/innocence phase.

## *B. Capital Trial*

Capital trials are heard before the circuit court and conducted in two phases: the guilt/innocence phase and, if the defendant is found guilty, the penalty phase.

### 1. Guilt/Innocence Phase

Individuals charged with a capital felony have the right to a trial by jury;<sup>163</sup> however, they also possess the right to waive a jury trial with the consent of the state.<sup>164</sup> If the defendant does not waive his/her right to a jury trial, then the court, in conjunction with the state and defense, must select twelve jurors and, if deemed necessary by the court, alternates as well.<sup>165</sup>

When selecting the jury, the court will first examine the prospective jurors either individually or collectively and then the state and defense will have an opportunity to examine the jurors.<sup>166</sup> The state and defense may challenge any juror for cause for the following reasons:

- (1) the juror does not have the required qualifications;
- (2) the juror is of unsound mind or has a bodily defect that renders him/her incapable of performing the duties of a juror;
- (3) the juror has conscientious beliefs that would preclude him/her from finding the defendant guilty;
- (4) the juror served on the grand jury that found the indictment or on a coroner's jury that inquired into the death of a person whose death is the subject of the indictment;
- (5) the juror served on a jury formerly sworn to try the defendant for the same offense;
- (6) the juror served on a jury that tried another person for the offense charged in the indictment;
- (7) the juror served as a juror in a civil action brought against the defendant for the act charged as an offense;
- (8) the juror is an adverse party to the defendant in a civil action, or has complained against or been accused by the defendant in a criminal prosecution;
- (9) the juror is related by blood or marriage within the third degree to the defendant, the attorneys of either party, the person alleged to be injured by

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<sup>162</sup> FLA. STAT. § 921.141(1) (2006).

<sup>163</sup> FLA. CONST. art. I, § 22; FLA. R. CRIM. P. 3.251.

<sup>164</sup> FLA. R. CRIM. P. 3.260 (stating that the waiver must be in writing with the consent of the state).

<sup>165</sup> FLA. STAT. § 913.10 (2006) (indicating that apart from juries for death penalty cases, juries for all other criminal cases are composed of six individuals); FLA. CONST. art. I, § 22 (stating that all defendants have a right to trial by jury of not less than six individuals); FLA. R. CRIM. P. 3.280(a).

<sup>166</sup> FLA. R. CRIM. P. 3.300(b).

- the offense charged, or the person on whose complaint the prosecution was instituted;
- (10) the juror has a state of mind regarding the defendant, the case, the person alleged to have been injured by the offense charged, or the person on whose complaint the prosecution was instituted, that will prevent the juror from acting with impartiality;
  - (11) the juror was a witness for the state or the defendant at the preliminary hearing or before the grand jury or is to be a witness for either party at the trial; and
  - (12) the juror is a surety on defendant's bail bond in the case.<sup>167</sup>

In addition, the state may exclude for cause any juror who has “scruples” against the death penalty that would interfere with his/her ability to recommend the death penalty in cases where it is warranted, and the defense may exclude for cause any juror who would automatically recommend the death penalty if a conviction of a capital felony occurs.<sup>168</sup> Finally, the state and the defense may each peremptorily challenge up to ten jurors<sup>169</sup> and in cases in which there are alternate jurors, each side has one additional peremptory challenge per alternate juror to be used only on alternate jurors.<sup>170</sup>

Once empanelled, the jury’s duty is to assess the evidence presented<sup>171</sup> and to determine whether the state has proven that the defendant is guilty of a capital offense or any other lesser-included offense<sup>172</sup> beyond a reasonable doubt.<sup>173</sup> During the guilt/innocence phase, both the state and defense will present opening and closing arguments as well as witnesses and other types of evidence, and have the opportunity to cross-examine all

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<sup>167</sup> FLA. STAT. § 913.03 (2006).

<sup>168</sup> FLA. STAT. § 913.13 (2006). *See Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968); *Wainwright v. Witt*, 469 U.S. 412, 424 (1985); *Morgan v. Illinois*, 504 U.S. 719, 729 (1992). In 1968, the United States Supreme Court, in *Witherspoon*, found that a defendant’s right to an impartial jury, under the Sixth and Fourteenth Amendments of the United States Constitution, is violated when prospective jurors who possess “general objections to the death penalty or conscientious or religious scruples against its infliction” are excluded for cause. *See Witherspoon*, 391 U.S. at 522. Almost twenty years later, the Court, in *Witt*, established the standard for determining when a prospective juror may be excluded for cause because of his/her views on the death penalty. *See Witt*, 469 U.S. at 424. The standard includes the following: “whether the juror’s views would ‘prevent or substantially impair the performance of his[her] duties as a juror in accordance with his[her] instructions and his[her] oath.’” *Id.* In *Morgan*, the Court identified prospective jurors who would “automatically vote for the death penalty in every case” as individuals who may be removed for cause because such individuals are biased and would be unwilling to consider the court’s evidence as required by its instructions. *See Morgan*, 504 U.S. at 729.

<sup>169</sup> FLA. STAT. § 913.08(1)(a) (2006); FLA. R. CRIM. P. 3.350(a)(1).

<sup>170</sup> FLA. R. CRIM. P. 3.350(d).

<sup>171</sup> FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 3.9 (5th ed. 2005) (instructing the jury on how to assess the reliability of the evidence presented).

<sup>172</sup> Lesser-included offenses of capital murder (first-degree) are: murder in the second degree and attempted second-degree murder, voluntary manslaughter and attempted voluntary manslaughter, third-degree murder, vehicular homicide, aggravated assault, aggravated battery, assault, battery, felony battery, and culpable negligence. *See FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 7.2* (5th ed. 2005).

<sup>173</sup> FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 2.1 (5th ed. 2005); FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 3.7 (5th ed. 2005) (stating the appropriate definition of “reasonable doubt” which should be read to the jury); *see also Davis v. State*, 90 So. 2d 629, 631 (Fla. 1956).

witnesses presented by the other side.<sup>174</sup> After both sides have presented their closing arguments, the court will instruct the jury, orally and in writing, as to the law of the case.<sup>175</sup> If the defendant is found guilty of a capital felony, then the case proceeds to the second phase of a death penalty trial, the penalty phase.

## 2. Penalty Phase

The purpose of the penalty phase is for the judge and the jury to determine whether the appropriate sentence for a defendant convicted of a capital felony is life without the possibility of parole or death.<sup>176</sup> The jury's sentencing recommendation will serve as an advisory sentence to the judge who makes the ultimate sentencing decision.<sup>177</sup>

The penalty phase will be conducted before the trial jury, including alternates unless the defendant waives a jury.<sup>178</sup> The court may empanel a special jury to make the sentencing recommendation if a jury was waived for the guilt phase, the defendant entered a plea, or the judge is unable to reconvene the entire trial jury.<sup>179</sup>

The judge and the trial jury will hear evidence during the penalty phase as to the nature of the crime and the character of the defendant, as well as evidence specifically relating to the applicable statutory aggravating and mitigating circumstances.<sup>180</sup> Both the state and the defense may make opening and closing arguments, present witnesses, and cross-examine all witnesses presented by the opposing party.<sup>181</sup> Additionally, after the state has presented evidence as to the existence of one or more aggravating circumstances, it may introduce evidence about the victim's life and the affect of the victim's death on the community.<sup>182</sup>

Based on the evidence presented by the state and defense, the jury must assess whether the state has proven any of the statutory aggravating factors beyond a reasonable doubt.<sup>183</sup> The jury is only required to make a recommendation as to the defendant's sentence; it is not required to answer any interrogatories as to the finding of the existence

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<sup>174</sup> FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 2.1 (5th ed. 2005).

<sup>175</sup> FLA. R. CRIM. P. 3.390(a), (b), 3.985; FLA. STAT. § 918.10(1) (2006).

<sup>176</sup> FLA. STAT. § 921.141(1), (2) (2006); *see also* FLA. CONST. art. 1, § 17 (2006) (stating that “[t]he death penalty is an authorized punishment for capital crimes designated by the legislature”).

<sup>177</sup> FLA. STAT. §§ 921.141(2), 921.142(3) (2006).

<sup>178</sup> FLA. STAT. §§ 921.141(1), 921.142(2) (2006); FLA. R. CRIM. P. 3.280(b).

<sup>179</sup> FLA. STAT. §§ 921.141(1), 921.142(2) (2006); FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 7.11 (5th ed. 2005) (indicating that if the same jury is empanelled for both the trial and the sentencing phase, then those jurors' advisory sentence may be based on evidence they heard at trial and during the sentencing phase; but that if a new jury has been impaneled for the sentencing phase, then those jurors may not question the verdict of guilt).

<sup>180</sup> FLA. STAT. §§ 921.141(1), 921.142(2) (2006); FLA. R. CRIM. P. 3.780(a).

<sup>181</sup> FLA. R. CRIM. P. 3.780(a), (c).

<sup>182</sup> FLA. STAT. § 921.141(7) (2006).

<sup>183</sup> FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 7.11 (5th ed. 2005).

of aggravating or mitigating circumstances, the vote of the jury as to each of them, or how the various circumstances were weighed.<sup>184</sup>

If the jury finds that the state has failed to prove any of the statutory aggravating circumstances beyond a reasonable doubt or that the aggravating circumstances proven do not justify the death penalty, the jury must recommend life without the possibility of parole.<sup>185</sup> In contrast, if the jury finds that the state has proven one or more of the aggravating circumstances beyond a reasonable doubt and the jury believes that such aggravating circumstances justify the death penalty, then the jury must assess whether any mitigating circumstances exist to outweigh the proven aggravating circumstances.<sup>186</sup>

However, the jury is never required to recommend the death penalty regardless of whether the mitigating circumstances outweigh the aggravating circumstances.<sup>187</sup> If six or more jurors believe that the sentence should be life without the possibility of parole, then the jury must recommend such sentence accordingly.<sup>188</sup>

Apart from the jury's advisory sentence, the judge also must independently weigh the aggravating and mitigating circumstances.<sup>189</sup> However, in doing so, the judge must give "great weight" to the jury's advisory sentence.<sup>190</sup> In order for a judge to override a jury's verdict of life imprisonment without the possibility of parole, the facts suggesting a death sentence must be so clear and convincing that no reasonable person could differ as to the appropriate sentence.<sup>191</sup>

If, upon weighing the aggravating and mitigating circumstances, the judge finds the appropriate sentence to be death, then the judge must set forth in writing a detailed explanation for the decision by explaining which aggravating circumstances were proven and why the proven mitigating circumstances, if any, failed to outweigh the aggravating circumstances.<sup>192</sup>

Death sentences are automatically appealed to the Florida Supreme Court.<sup>193</sup>

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<sup>184</sup> *Steele v. State*, 921 So. 2d 538, 545-46 (Fla. 2005); *see also Ibar v. State*, 2006 WL 560586 (Fla. Sup. Ct. March 9, 2006).

<sup>185</sup> FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 7.11 (5th ed. 2005).

<sup>186</sup> *Id.*

<sup>187</sup> *Franqui v. State*, 804 So. 2d 1185 (Fla. 2002).

<sup>188</sup> FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 7.11 (5th ed. 2005); *see Rose v. State*, 425 So. 2d 521, 524-25 (Fla. 1982).

<sup>189</sup> FLA. STAT. §§ 921.141(3), 921.142(4) (2006); *see King v. State*, 623 So. 2d 486, 489 (Fla. 1993); *Grossman v. State*, 525 So. 2d 833, 840 (Fla. 1988).

<sup>190</sup> *Webb v. State*, 433 So. 2d 496, 499 (Fla. 1983); *McCrae v. State*, 395 So. 2d 1145, 1155 (Fla. 1980); *Williams v. State*, 386 So. 2d 538, 543 (Fla. 1980); *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975).

<sup>191</sup> *Tedder*, 322 So. 2d at 910; *see Engle v. State*, 438 So. 2d 803, 812 (Fla. 1983); *Stevens v. State*, 419 So. 2d 1058, 1065 (Fla. 1982).

<sup>192</sup> FLA. STAT. § 921.141(3) (2006); *see Campbell v. State*, 571 So. 2d 415, 419 (Fla. 1990) (stating that "when addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature").

<sup>193</sup> FLA. CONST. art. 5, § 3(b)(1) (explaining "[t]he Supreme Court [s]hall hear appeals from final judgments of trial courts imposing the death penalty"); FLA. STAT. § 921.141(4) (2006); FLA. R. APP. P.

### C. Direct Appeal

An appeal to the Florida Supreme Court is commenced by the filing of a notice of appeal with the lower court within thirty days of the rendition of the sentencing order.<sup>194</sup> During the appeal process, both counsel for the appellant<sup>195</sup> and the state have the opportunity to file appellate briefs<sup>196</sup> and make oral arguments before the Florida Supreme Court.<sup>197</sup> The Florida Supreme Court will review the enumerations of error,<sup>198</sup> the sufficiency of the evidence used to convict the defendant,<sup>199</sup> and the proportionality of the appellant's death sentence.<sup>200</sup> In addition, the Court is required to review the sufficiency of the evidence<sup>201</sup> and the proportionality of the appellant's death sentence, even if these issues are not presented for review by the appellant.<sup>202</sup>

Once the Florida Supreme Court has reviewed the record, it must render a judgment within two years after the filing of the notice of appeal.<sup>203</sup> The Court's judgment may affirm the trial court's decision or remand the case to the trial court for a new sentencing trial, or direct the trial court to reduce the sentence to life or enter a judgment of acquittal.

If the Florida Supreme Court affirms the appellant's conviction and sentence, the appellant has ninety days after the decision is entered to file a petition for a writ of *certiorari* with the United States Supreme Court, seeking discretionary review of the Florida Supreme Court's decision affirming the appellant's conviction and sentence.<sup>204</sup> The United States Supreme Court may either deny or accept the appellant's case for review.<sup>205</sup> If the United States Supreme Court accepts the case, the Court may affirm the

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9.030(a)(1) (indicating that the Florida Supreme Court must review all "final orders of courts imposing sentences of death").

<sup>194</sup> FLA. R. APP. P. 9.140(b)(3) (stating that "the defendant shall file the notice [of appeal] prescribed by rule 9.110(d) with the clerk of the lower tribunal at any time between the rendition of a final judgment and 30 days following rendition of a written order imposing sentence"); *see also* FLA. R. APP. P. 9.030(a)(1)(A)(i) (referencing FLA. R. APP. P. 9.140).

<sup>195</sup> FLA. STAT. § 27.5303(4)(A) (2006) (stating that "[i]f the defendant is convicted and the death sentence is imposed, the appointed attorney shall prosecute an appeal to the Supreme Court"); FLA. R. APP. P. 9.140(d) (stating that an "attorney of record for a defendant in criminal proceeding shall not be relieved of any professional duties, or be permitted to withdraw as defense counsel of record, . . . until either the time has expired for filing an authorized notice of appeal and no such notice has been filed by the defendant or the state"); *see also* *Davis v. State*, 789 So. 2d 978, 981 (Fla. 2001) (stating "in Florida there is no state constitutional right to proceed pro se in direct appeals in capital cases").

<sup>196</sup> FLA. R. APP. P. 9.142(a)(2).

<sup>197</sup> FLA. R. APP. P. 9.142(a)(4).

<sup>198</sup> FLA. STAT. § 924.051 (2006).

<sup>199</sup> FLA. STAT. § 921.141(4) (2006); FLA. R. APP. P. 9.142(a)(6).

<sup>200</sup> FLA. STAT. § 921.141(4) (2006); FLA. R. APP. P. 9.142(a)(6).

<sup>201</sup> FLA. STAT. § 921.141(4) (2006); FLA. R. APP. P. 9.142(a)(6); *Taylor v. State*, 855 So. 2d 1, 14 (Fla. 2003); *Sexton v. State*, 775 So. 2d 923, 933-934 (Fla. 2000).

<sup>202</sup> FLA. STAT. § 921.141(4) (2006); FLA. R. APP. P. 9.142(a)(6); *Farr v. State*, 656 So. 2d 448, 450 (Fla. 1995) (stating "[t]he Florida Constitution imposes upon the Court an absolute obligation of determining whether death is a proportionate penalty").

<sup>203</sup> FLA. STAT. § 921.141(4) (2006).

<sup>204</sup> 28 U.S.C. § 1257 (2006).

<sup>205</sup> SUP. CT. R. 16.

conviction and the sentence, affirm the conviction and overturn the sentence, or overturn both the conviction and sentence.<sup>206</sup>

If, following the United States Supreme Court's decision, the appellant wishes to continue challenging the conviction and/or sentence, a motion for post-conviction relief may be filed with the trial court.

#### *D. State Post-Conviction Relief*

Upon issuance of the Florida Supreme Court's decision affirming the trial court judgment, the Florida Supreme Court must issue an order appointing the appropriate Capital Collateral Regional Counsel or private post-conviction counsel<sup>207</sup> to represent the movant in all state court collateral relief proceedings.<sup>208</sup> Within thirty days of the issuance of the Florida Supreme Court's decision, the Capital Collateral Regional Counsel must file a notice of appearance in the trial court,<sup>209</sup> unless the movant refuses representation.<sup>210</sup>

To initiate state court collateral relief proceedings, the movant or his/her counsel must file a rule 3.851 motion with the clerk of the trial court.<sup>211</sup> In order for the motion to be considered, it must be under oath and include:

- (1) a statement specifying the judgment and sentence under attack and the name of the court that rendered the judgment;
- (2) a statement of each issue raised on appeal and the disposition;
- (3) the nature of the relief sought;
- (4) a detailed allegation of the factual basis for any claim for which an evidentiary hearing is sought; and
- (5) a detailed allegation as to the basis for any purely legal or constitutional claim for which an evidentiary hearing is not required and the reason that this claim could not have been or was not raised on direct appeal.<sup>212</sup>

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<sup>206</sup> 28 U.S.C. § 2106 (2006).

<sup>207</sup> FLA. R. CRIM. P. 3.851(b). Minimum standards adopted for public defenders and private attorneys representing capital defendants at trial and on direct appeal do not apply in collateral state appeals. *See* FLA. R. CRIM. P. 3.112; *In re* Amendment to Florida Rules of Criminal Procedure – Rule 3.112 Minimum Standards for Attorneys in Capital Cases, 820 So. 2d 185, 186, 188 (Fla. 2002).

<sup>208</sup> FLA. R. CRIM. P. 3.851(b)(1).

<sup>209</sup> FLA. R. CRIM. P. 3.851(b)(2).

<sup>210</sup> FLA. R. CRIM. P. 3.111(d); *Traylor v. State*, 596 So. 2d 957, 968 (Fla. 1992) (“[T]he defendant is entitled to decide at each crucial stage of the proceedings whether he or she requires the assistance of counsel. At the commencement of each such stage, an unrepresented defendant must be informed of the right to counsel and the consequences of waiver. Any waiver of this right must be knowing, intelligent, and voluntary, and courts generally will indulge every reasonable presumption against waiver of this fundamental right. Where the right to counsel has been properly waived, the [s]tate may proceed with the stage in issue; but the waiver applies only to the present stage and must be renewed at each subsequent crucial stage where the defendant is unrepresented.”).

<sup>211</sup> FLA. R. CRIM. P. 3.851(f)(1).

<sup>212</sup> FLA. R. CRIM. P. 3.851(e)(1).

The movant must file a memorandum of law with the motion, setting forth the applicable case law as to each claim.<sup>213</sup> Claims that could have been raised or should have been raised before trial, at trial, or on direct appeal will not be considered.<sup>214</sup>

The movant's rule 3.851 motion must be filed within one year after the conviction and sentence become final.<sup>215</sup> However, the time limitation is contingent upon the assignment of counsel within thirty days after issuance of a judgment by the Florida Supreme Court affirming the movant's conviction and sentence on direct appeal.<sup>216</sup> The Florida Supreme Court also may grant an extension of time if movant's counsel makes a showing of "good cause" for counsel's inability to file the motion within the one-year period.<sup>217</sup>

Additionally, a motion filed after the time limitation will be accepted if it alleges:

- (1) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence;
- (2) the fundamental constitutional right asserted was not established within one year after movant's conviction and sentence became final and has been held to apply retroactively; or
- (3) post-conviction counsel failed to file the motion.<sup>218</sup>

The state must file a response to the motion within sixty days after service of the motion.<sup>219</sup> The trial court must hold a "case management conference" to determine whether an evidentiary hearing is necessary.<sup>220</sup> Although the court is not required to conduct an evidentiary hearing, it must hear oral arguments on any purely legal claims not based on disputed facts during the conference.<sup>221</sup> If the court determines that an evidentiary hearing is necessary, the court will hear evidence on claims listed by the defendant that require a factual determination.<sup>222</sup> The hearing must take place within ninety days after the state files its answer to the motion.<sup>223</sup> Once the court hears oral arguments and reviews the evidence, it must issue a ruling on each claim considered at

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<sup>213</sup> *Id.*

<sup>214</sup> FLA. STAT. § 924.051(5) (2006).

<sup>215</sup> FLA. R. CRIM. P. 3.851(d). A conviction and sentence become final when the United States Supreme Court renders its decision on the petition for a writ of *certiorari* or once the time for filing a writ of *certiorari* has expired, which occurs ninety days after the Florida Supreme Court's decision becomes final. *Id.*

<sup>216</sup> FLA. R. CRIM. P. 3.851(d)(4).

<sup>217</sup> FLA. R. CRIM. P. 3.851(d)(5).

<sup>218</sup> FLA. R. CRIM. P. 3.851(d)(2).

<sup>219</sup> FLA. R. CRIM. P. 3.851(f)(3). The state's response must address the legal insufficiency of the claims in the motion, respond to the allegations in the motion, and address any procedural bars. *Id.*

<sup>220</sup> FLA. R. CRIM. P. 3.851(f)(5).

<sup>221</sup> FLA. R. CRIM. P. 3.851(f)(5)(A).

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* The court may, "for good cause," extend the time for holding an evidentiary hearing for ninety days. FLA. R. CRIM. P. 3.581(f)(5)(B).

the evidentiary hearing and all other claims raised in the motion, making detailed findings of fact and conclusions of law with respect to each claim.<sup>224</sup>

The decision of the post-conviction court may be appealed to the Florida Supreme Court within thirty days from the date the court rendered its order on the post-conviction motion.<sup>225</sup> If the movant wishes to challenge the adequacy of counsel on direct appeal, a petition for a writ of habeas corpus must be filed with the Florida Supreme Court at the same time the movant files the appeal of the judgment on the rule 3.851 motion.<sup>226</sup>

The Florida Supreme Court may dispose of the rule 3.851 appeal, the petition for habeas corpus, or a combination thereof, by either denying relief or ordering a new trial, a new penalty phase, or a new direct appeal. At that time, the movant may, under the circumstances described below, file a second rule 3.851 motion or a petition for a writ of federal habeas corpus challenging the constitutionality of the conviction and sentence.

A second or successive motion<sup>227</sup> may be filed, but such motion is generally barred if the same or similar claims were already litigated and decided,<sup>228</sup> or if the claims could have been raised in the first or earlier motion. Second or successive motions must explain why the claims raised were not raised in the previous motion(s)<sup>229</sup> and provide contact information for supporting witnesses as well as information as to their ability to testify under oath and an explanation as to why such witnesses may have been unable to testify previously.<sup>230</sup> The remedies available to a movant under a second or successive rule 3.851 motion are the same as for the initial motion. All motions filed after a death warrant has been issued are considered successive motions.<sup>231</sup>

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<sup>224</sup> FLA. R. CRIM. P. 3.581(f)(5)(D). The movant may file a motion for a rehearing by the trial/sentencing court of any final order denying a Rule 3.851 motion, which must be filed within fifteen days, responded to within ten days, and disposed of by the trial court within ten days of the response. FLA. R. CRIM. P. 3.851(f)(7) (stating that all motions for rehearing must be filed within fifteen days of the date of service of the order); FLA. STAT. § 924.059(5) (2006).

<sup>225</sup> FLA. R. APP. P. 9.110(b), 9.140(b)(1)(D), (b)(3).

<sup>226</sup> FLA. R. CRIM. P. 3.851(d)(3); *Nixon v. State*, 2006 WL 1027135, \*10 (Fla. Apr. 20, 2006) (citing *Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000)).

<sup>227</sup> Any motion filed after the initial Rule 3.851 motion is considered “second” or “successive,” as a state court has already ruled on a post-conviction motion challenging the same conviction and death sentence. *See* FLA. R. CRIM. P. 3.851(e)(2).

<sup>228</sup> *See, e.g., Johnson v. State*, 904 So. 2d 400, 412 (Fla. 2005) (rejecting movant’s successive claim that lethal injection constitutes cruel and unusual punishment because it was raised and rejected in the movant’s previous post-conviction proceeding).

<sup>229</sup> *See, e.g., Hill v. State*, 921 So. 2d 579, 584 (Fla. 2006) (holding that the movant’s successive claim alleging that he was mentally retarded and, therefore, could not be executed pursuant to *Atkins v. Virginia*, 536 U.S.304 (2002), was procedurally barred because the movant gave no reason why the claim could not have been raised in his 2003 Rule 3.851 motion, which was filed after the issuance of the *Atkins* decision).

<sup>230</sup> FLA. R. CRIM. P. 3.851(e)(2). The state must file its response within twenty days of the filing of all successive motions. Fla. R. Crim. P. 3.851(f)(3)(B).

<sup>231</sup> FLA. R. CRIM. P. 3.851(h)(5).

Collateral proceedings against mentally incompetent defendants will not take place if the issue involves any matter of disputed fact for which the defendant's input is necessary; issues of law, however, can be adjudicated despite a defendant's incompetency.<sup>232</sup>

As indicated above, the movant may also file a petition for a writ of federal habeas corpus with a federal court. The next section will discuss the federal habeas corpus process at length.

### *E. Federal Habeas Corpus*

A petitioner wishing to challenge a conviction or death sentence as being in violation of federal law may file a petition for a writ of habeas corpus with the federal district court in Florida having jurisdiction over the case. The petitioner may be entitled to appointed counsel to prepare the petition if the petitioner "is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services."<sup>233</sup>

The petitioner must have raised all relevant federal claims in state court before filing the petition for a writ of habeas corpus.<sup>234</sup> The petitioner's failure to exhaust all state remedies available on appeal and collateral review could result in the federal court denying the petition on the merits.<sup>235</sup>

The petitioner must identify and raise all possible grounds of relief and summarize the facts supporting each ground in the petition for writ of habeas corpus.<sup>236</sup> If the petitioner challenges a state court's determination of a factual issue, the petitioner has the burden of rebutting, by clear and convincing evidence, the federal presumption that state court factual determinations are correct.<sup>237</sup> Additionally, if the petitioner raises a claim that the state court decided on the merits, the petitioner must establish that the state court's decision of the claim was contrary to or involved an unreasonable application of federal law or was based on an unreasonable determination of the facts in light of the evidence presented.<sup>238</sup> In addition to the petition, the petitioner may, but is not required to, attach certified copies of the indictment, plea, and judgment to the petition.<sup>239</sup> If the petitioner does not include these documents with the petition, the respondent must promptly file copies of said documents with the court.<sup>240</sup>

The petition must be filed in the federal district court for the district wherein the petitioner is in custody or in the district where the petitioner was convicted and

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<sup>232</sup> FLA. R. CRIM. P. 3.851(g).

<sup>233</sup> 18 U.S.C. § 3599(a)(2) (2006); *McFarland v. Scott*, 512 U.S. 849, 856-57 (1994) (citing 21 U.S.C. § 848(q)(4)(B), which has since been repealed).

<sup>234</sup> 28 U.S.C. § 2254(b)(1) (2006).

<sup>235</sup> 28 U.S.C. § 2254(b)(2) (2006).

<sup>236</sup> RULE 2(c) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

<sup>237</sup> 28 U.S.C. § 2254(e)(1) (2006).

<sup>238</sup> 28 U.S.C. § 2254(d) (2006).

<sup>239</sup> 28 U.S.C. § 2249 (2006).

<sup>240</sup> *Id.*

sentenced.<sup>241</sup> The deadline for filing the petition is one year<sup>242</sup> from the date on which: (1) the judgment became final; (2) the state impediment that prevented the petitioner from filing was removed; (3) the United States Supreme Court recognized a new right and made it retroactively applicable to cases on collateral review; or (4) the underlying facts of the claim(s) could have been discovered through due diligence.<sup>243</sup> The one-year time limitation may be tolled if the petitioner is pursuing a properly filed application for state post-conviction relief or other collateral review.<sup>244</sup>

Once the petition is filed, a district court judge reviews it to determine whether, based on the face of the petition, the petitioner is entitled to relief in the district court.<sup>245</sup> If the judge finds that the petitioner is not entitled to relief, the petition may be summarily dismissed.<sup>246</sup> In contrast, if the judge finds that the petitioner may be entitled to district court relief, the judge will order the respondent to file an answer replying to the allegations contained in the petition.<sup>247</sup> In addition to the answer, the respondent must furnish all portions of the state court transcripts it deems relevant to the petition.<sup>248</sup> The judge on his/her own motion or on the motion of the petitioner may order that additional portions of the state court transcripts be provided to the parties.<sup>249</sup>

Additionally, either party may submit a request for the invocation of the discovery process.<sup>250</sup> The judge may grant such request if the requesting party establishes “good

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<sup>241</sup> 28 U.S.C. § 2241(d) (2006); RULE 3(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.; FED. R. APP. P. 22(a).

<sup>242</sup> In states that have “opted-in” to the “Special Habeas Corpus Procedures in Capital Cases,” 28 U.S.C. §§ 2261-2266, the deadline for federal habeas corpus petitions is 180 days after the conviction and death sentence have been affirmed on direct review or the time allowed for seeking such review has expired. *See* 28 U.S.C. § 2263(a) (2006). However, a state may only “opt-in” to these expedited procedures if (1) the Attorney General of the United States certifies that the state has established a mechanism for providing counsel in post-conviction proceedings as provided in 28 U.S.C. § 2265; and (2) counsel was appointed pursuant to that mechanism, petitioner validly waived counsel, petitioner retained counsel, or petitioner was found not to be indigent. *See* 28 U.S.C. § 2261(b) (2006). The mechanism for appointing, compensating, and reimbursing competent counsel must:

- (1) offer counsel to all state prisoners under capital sentence, and
- (2) provide the court of record the opportunity to enter an order—(a) appointing one or more counsel to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable completely to decide whether to accept or reject the offer; (b) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or (c) denying the appointment of counsel upon a finding that the prisoner is not indigent.

*See* 28 U.S.C. § 2261(c) (2006).

<sup>243</sup> 28 U.S.C. § 2244(d)(1) (2006).

<sup>244</sup> 28 U.S.C. § 2244(d)(2) (2006).

<sup>245</sup> RULE 4 OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

<sup>246</sup> *Id.*

<sup>247</sup> RULES 4 & 5 OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

<sup>248</sup> RULE 5 OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

<sup>249</sup> *Id.*

<sup>250</sup> RULE 6(b) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

cause.”<sup>251</sup> The judge also may direct the parties to expand the record by providing additional evidence relevant to the merits of the petition.<sup>252</sup> This may include: letters predating the filing of the petition, documents, exhibits, answers to written interrogatories, and affidavits.<sup>253</sup>

Upon review of the state court proceedings and the evidence presented, the judge must determine whether an evidentiary hearing is required.<sup>254</sup> The judge may not hold an evidentiary hearing on a claim that was not factually developed during the state court proceedings unless: (1) it is necessary to find facts underlying a newly recognized constitutional rule or newly discovered, previously unavailable evidence, or (2) the facts underlying the claim would be sufficient to establish that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.<sup>255</sup> If the judge decides that an evidentiary hearing is unnecessary, the judge will make a decision on the petition without additional evidence.<sup>256</sup> However, if an evidentiary hearing is required, the judge should appoint counsel to the petitioner<sup>257</sup> and conduct the hearing as promptly as possible.<sup>258</sup>

During the evidentiary hearing, the judge will resolve any factual discrepancies that are material to the petitioner’s claims. Based on the evidence presented, the judge may grant the petitioner a new trial, a new penalty phase, a new direct appeal, or deny relief.

In order to appeal the district court judge’s decision, the applicant for the appeal must file a notice of appeal with the district court within thirty days after the judgment.<sup>259</sup> The petitioner must request a “certificate of appealability” from either a district or circuit court judge.<sup>260</sup> A judge may issue a “certificate of appealability” only if the petitioner makes a substantial showing of the denial of a constitutional right in the request for the certificate.<sup>261</sup> If the “certificate of appealability” is granted, the appeal will proceed to the Eleventh Circuit Court of Appeals.

In rendering its decision, the Eleventh Circuit may consider the record from the federal district court, the briefs submitted by the parties, and the oral arguments, if permitted. Based on the evidence, the Eleventh Circuit may order a new appeal in the federal district court or the state court, an evidentiary hearing by the federal district court, or a new guilt/innocence phase or penalty phase in the state court.

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<sup>251</sup> RULE 6(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

<sup>252</sup> RULE 7(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

<sup>253</sup> RULE 7(b) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

<sup>254</sup> RULE 8(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

<sup>255</sup> 28 U.S.C. § 2254(e)(2) (2006).

<sup>256</sup> RULE 8(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

<sup>257</sup> RULE 8(c) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.; 18 U.S.C. § 3006A(g) (2006) (denoting the qualifications for federal habeas corpus counsel).

<sup>258</sup> RULE 8(c) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

<sup>259</sup> FED. R. APP. P. 4(a)(1)(A).

<sup>260</sup> 28 U.S.C. § 2253(c)(1) (2006); FED. R. APP. P. 22(b)(3).

<sup>261</sup> 28 U.S.C. § 2253(c)(2) (2006).

Both parties may then seek review of the Eleventh Circuit Court's decision by filing a petition for a writ of *certiorari* in the United States Supreme Court.<sup>262</sup> The United States Supreme Court may either grant or deny review of the petition. If the Court grants review of the petition it may deny the petitioner relief or order a new guilt/innocence phase, a new penalty phase, or a new appeal.

If the petitioner wishes to file a second or successive habeas corpus petition with the district court, s/he must submit a motion to the Eleventh Circuit Court of Appeals requesting an order authorizing the petitioner to file the petition and the district court to consider it.<sup>263</sup> A three-judge panel of the Eleventh Circuit must consider the motion.<sup>264</sup> The panel must specifically assess whether the petition makes a *prima facie* showing that the claim presented in the second or successive petition was not previously raised and that the new claim (1) relies on a new, previously unavailable constitutional rule, or (2) relies on newly discovered, previously unascertainable facts that, if proven, would establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.<sup>265</sup> Claims of factual innocence ("actual innocence") must meet the requirements of the latter provision.<sup>266</sup> Any second or successive petition that presents a claim raised in a prior petition will be dismissed.<sup>267</sup>

If the Eleventh Circuit denies the motion, the petitioner may not seek appellate review of such decision.<sup>268</sup> If the Eleventh Circuit grants the motion, then the second or successive motion will proceed through the same process that the initial petition went through.

The petitioner may seek final review of his/her conviction and sentence by pursuing clemency relief.

#### *F. Clemency*

The Governor possesses the power to grant reprieves of not more than sixty days<sup>269</sup> and to deny clemency applications at any time for any reason.<sup>270</sup> The Governor may grant full or conditional pardons and commutations of death sentences to life imprisonment without the possibility of parole only if s/he obtains the approval of two other members

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<sup>262</sup> 28 U.S.C. § 1254(1) (2006).

<sup>263</sup> 28 U.S.C. § 2244(b)(3)(A) (2006).

<sup>264</sup> 28 U.S.C. § 2244(b)(3)(B) (2006).

<sup>265</sup> 28 U.S.C. § 2244(b)(2) (2006).

<sup>266</sup> 28 U.S.C. § 2244(b)(2)(B) (2006); *In re Medina*, 109 F.3d 1556, 1565-66 (11th Cir. 1997) (noting that the "[section] 2244(b)(2)(B) exception to the bar against second habeas applications has no application to claims that relate only to the sentence"); see also *Habeas Relief for State Prisoners*, 91 GEO. L. J. 817, 843-85 n.2617 (2003).

<sup>267</sup> 28 U.S.C. § 2244(b)(1) (2006).

<sup>268</sup> 28 U.S.C. § 2244(b)(3)(E) (2006).

<sup>269</sup> The Governor may grant two or more successive reprieves in the same case, which combined exceed sixty days, but one reprieve may not exceed sixty days. See *In re Advisory Opinion to Governor*, 62 Fla. 7 (1911).

<sup>270</sup> FLA. R. EXEC. CLEMENCY 4, available at <http://www.state.fl.us/fpc/Policies/ExecClemency/ROEC06202003.pdf> (last visited on July 27, 2006).

of the Board of Executive Clemency (Board).<sup>271</sup> The Board is comprised of the Governor and members of the Cabinet.<sup>272</sup> For a detailed discussion on this subject, see Chapter Nine: Clemency.

### G. Execution

An inmate's death sentence may not be carried out until the Governor issues a death warrant.<sup>273</sup> A death warrant may be issued after the inmate has pursued all possible collateral remedies within the designated time limit or after the inmate has failed to pursue said remedies within the time limit.<sup>274</sup> Upon issuance of a death warrant, the Governor must transmit the warrant to the warden, directing him/her to set the day for the execution within the week designated by the Governor in the warrant.<sup>275</sup>

An inmate's death sentence will be carried out by lethal injection unless the inmate requests to be executed by electrocution.<sup>276</sup> The warden (or a deputy) must be present at the execution,<sup>277</sup> and must select twelve individuals to witness the execution.<sup>278</sup> A qualified physician, the inmate's counsel, a minister of religion (if requested), representatives of the media, and prison and correctional officers may be present.<sup>279</sup> Immediately before the inmate's execution, the death warrant will be read to the inmate.<sup>280</sup> The qualified physician will announce when death has been inflicted.<sup>281</sup>

An inmate who is sentenced to death but found to be "insane to be executed"<sup>282</sup> may not be executed.<sup>283</sup> An inmate is insane to be executed if s/he does not possess the "mental

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<sup>271</sup> FLA. CONST. art. IV, § 8(a); FLA. STAT. § 940.01(1) (2006); FLA. R. EXEC. CLEMENCY 1, available at <http://www.state.fl.us/fpc/Policies/ExecClemency/ROEC06202003.pdf> (last visited on July 27, 2006).

<sup>272</sup> FLA. R. EXEC. CLEMENCY 1, available at <http://www.state.fl.us/fpc/Policies/ExecClemency/ROEC06202003.pdf> (last visited on July 27, 2006). The following individuals currently comprise the Board of Executive Clemency: Jeb Bush, Governor; Charlie Crist, Attorney General; Tom Gallagher, Chief Financial Officer; and Charles Bronson, Commissioner of Agriculture. See Florida Parole Commission, Florida Board of Executive Clemency, available at <https://fpc.state.fl.us/Clemency.htm> (last visited on July 27, 2006).

<sup>273</sup> FLA. STAT. § 922.052(1) (2006).

<sup>274</sup> FLA. STAT. § 922.095 (2006).

<sup>275</sup> FLA. STAT. § 922.11(1) (2006).

<sup>276</sup> FLA. STAT. §§ 922.10, 922.105 (2006) (stating that "the election for death by electrocution shall be waived unless it is personally made in writing and delivered to the warden of the correctional facility within [thirty] days after the issuance of mandate pursuant to a decision by the Florida Supreme Court affirming the sentence of death").

<sup>277</sup> FLA. STAT. § 922.11(1) (2006).

<sup>278</sup> FLA. STAT. § 922.11(2) (2006).

<sup>279</sup> *Id.*

<sup>280</sup> FLA. STAT. § 922.10 (2006).

<sup>281</sup> FLA. STAT. § 922.11(2) (2006).

<sup>282</sup> In 1986, the United States Supreme Court, in *Ford v. Wainwright*, found that Florida's procedures for assessing an inmate's mental competency violated the Eighth Amendment of the United States Constitution for the following reasons: (1) the procedures failed to include the inmate in the "truth-seeking process;" (2) the procedures denied the inmate the opportunity to challenge or impeach the state-appointed psychiatrists' opinions; and (3) the procedures placed the decision on the inmate's mental capacity wholly within the executive branch. See *Ford v. Wainwright*, 477 U.S. 399, 413-16 (1986). In response to the Court's decision in *Ford*, the Florida Supreme Court adopted two new Rules of Criminal Procedure to govern

capacity to understand the fact of the impending execution and the reason for it.”<sup>284</sup> For a detailed discussion on this subject, see Chapter Thirteen: Mental Retardation and Mental Illness.

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judicial proceedings involving the sanity of inmates who are pending execution—Florida Rules of Criminal Procedure 3.811 and 3.812. *See In re Amendments to the Florida Rules of Criminal Procedure*, 518 So. 2d 256, 257-258 (Fla. 1987). Rule 3.811 allows an inmate—who is found by the Governor to be insane to be executed—to submit a motion to stay his/her execution and to request a hearing on the issue of his/her insanity. *See* FLA. R. CRIM. P. 3.811(d). Rule 3.812 provides the procedure for the hearing on the inmate’s insanity and requires that the inmate prove his/her insanity by “clear and convincing” evidence. *See* FLA. R. CRIM. P. 3.812(e).

<sup>283</sup> FLA. R. CRIM. P. 3.812(e).

<sup>284</sup> FLA. R. CRIM. P. 3.811(b) (defining insanity); FLA. STAT. § 922.07(2) (2006).



## CHAPTER TWO

### COLLECTION, PRESERVATION, AND TESTING OF DNA AND OTHER TYPES OF EVIDENCE

#### INTRODUCTION TO THE ISSUE

DNA testing is a useful law enforcement tool that can help to establish guilt as well as innocence. In 2000, the American Bar Association adopted a resolution urging federal, state, local, and territorial jurisdictions to ensure that all biological evidence collected during the investigation of a criminal case is preserved and made available to defendants and convicted persons seeking to establish their innocence.<sup>1</sup> Since then, over thirty-five jurisdictions have adopted laws concerning post-conviction DNA testing.<sup>2</sup> However, the standards for preserving biological evidence and seeking and obtaining post-conviction DNA testing vary widely among the states.

Many who may have been wrongfully convicted cannot prove their innocence because states often fail to adequately preserve material evidence. Written procedures for collecting, preserving and safeguarding biological evidence should be established by every law enforcement agency, made available to all personnel, and designed to ensure compliance with the law.<sup>3</sup> The procedures should be regularly updated as new or improved techniques and methods are developed. The procedures should impose professional standards on all state and local officials responsible for handling or testing biological evidence, and the procedures should be enforceable through the agency disciplinary process.<sup>4</sup>

Thoroughness in criminal investigations should also be enhanced by utilizing the training standards and disciplinary policies and practices of Peace Officer Standards and Training Councils,<sup>5</sup> and through the priorities and practices of other police oversight groups.<sup>6</sup>

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<sup>1</sup> See ABA Criminal Justice Section, Recommendation 115, 2000 Annual Meeting, *available at* <http://www.abanet.org/crimjust/policy/cjpol.html#am00115> (last visited on Dec. 12, 2005).

<sup>2</sup> See National Conference of State Legislatures, DNA & Crime, *at* <http://www.ncsl.org/programs/health/genetics/dna.htm> (last visited on Dec. 12, 2005); *see also* Innocence Project, Legislative Page, *at* <http://www.innocenceproject.org/legislation/index.php> (last visited on Dec. 12, 2005).

<sup>3</sup> See 1 ABA Standards for Criminal Justice, Urban Police Function (2d ed. 1979) (Standard 1-4.3) (“Police discretion can best be structured and controlled through the process of administrative rule making, by police agencies.”); *Id.* (Standard 1-5.1) (police should be “made fully accountable” to their supervisors and to the public for their actions).

<sup>4</sup> See 1 ABA Standards for Criminal Justice, Urban Police Function (2d ed. 1979) (Standard 1-5.3(a)) (identifying “[c]urrent methods of review and control of police activities”).

<sup>5</sup> Peace Officer Standards and Training Councils are state agencies that set standards for law enforcement training and certification and provide assistance to the law enforcement community.

<sup>6</sup> Such organizations include the U.S. Department of Justice which is empowered to sue police agencies under authority of the pattern and practice provisions of the 1994 Crime Law. 28 U.S.C. § 14141 (2005); Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 814 (1999). In addition, the Commission on Accreditation for Law Enforcement Agencies, Inc., (CALEA) is an independent peer group that has accredited law enforcement agencies in all 50 states. Similar, state-based organizations exist in many places, as do government established independent

Training should include information about the possibility that the loss or compromise of evidence may lead to an inaccurate result. It also should acquaint law enforcement officers with actual cases where illegal, unethical or unprofessional behavior led to the arrest, prosecution or conviction of an innocent person.<sup>7</sup>

Initial training is likely to become dated rapidly, particularly due to advances in scientific and technical knowledge about effective and accurate law enforcement techniques. It is crucial, therefore, that officers receive ongoing, in-service training that includes review of previous training and instruction in new procedures and methods.

Even the best training and the most careful and effective procedures will be useless if the investigative methods reflected in the training or required by agency procedures or state law are unavailable.<sup>8</sup> Appropriate equipment, expert advice, investigative time, and other resources should be reasonably available to law enforcement personnel when law, policy or sound professional practice calls for them.<sup>9</sup>

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monitoring agencies. *See* CALEA Online, at <http://www.calea.org/> (last visited on Jan. 6, 2006). Crime laboratories may be accredited by the American Society of Crime Laboratory Directors–Laboratory Accreditation Board (ASCLD-LAB) or the National Forensic Science Technology Center (NFSTC). ASCLD-LAB, at <http://www/asclld-lab.org> (last visited on Jan. 6, 2006); NFSTC, at <http://www.nfstc.org/> (last visited on Jan. 6, 2006).

<sup>7</sup> Standard 1-7.3 provides:

- (a) Training programs should be designed, both in their content and in their format, so that the knowledge that is conveyed and the skills that are developed relate directly to the knowledge and skills that are required of a police officer on the job.
- (b) Educational programs that are developed primarily for police officers should be designed to provide an officer with a broad knowledge of human behavior, social problems, and the democratic process.

Standard 1-7.3; *see also* Standard 1-5.2(a) (noting value of “education and training oriented to the development of professional pride in conforming to the requirements of law and maximizing the values of a democratic society”).

<sup>8</sup> *See generally* 1 ABA Standards for Criminal Justice, Urban Police Function, Part VII (2d ed. 1979) (“Adequate Police Resources”).

<sup>9</sup> *See, e.g.*, ABA House of Delegates, Report No. 8A, 2004 Midyear Meeting (requiring videotaping of interrogations).

## I. FACTUAL DISCUSSION

Since the reinstatement of the death penalty in 1972, Florida has led the nation in death-row exonerations, with twenty-two individuals released from death row and one person exonerated posthumously.<sup>10</sup> In 2001, in order to provide inmates “with a means by which to challenge convictions when there is ‘credible concern that an injustice may have occurred and DNA (deoxyribonucleic acid) testing may resolve the issue,’”<sup>11</sup> the Florida Legislature adopted section 925.11 of the Florida Statutes.<sup>12</sup> The Florida Supreme Court followed by promulgating the procedural counterpart to section 925.11—Florida Rule of Criminal Procedure 3.853.<sup>13</sup> Combined, section 925.11 and rule 3.853 provide the means for the preservation of evidence and the mechanism for individuals to challenge their convictions and sentences by seeking DNA testing of evidence in certain instances.

### A. *Preservation of DNA Evidence and Other Types of Evidence*

Section 925.11(4)(b) of the Florida Statutes requires all governmental entities<sup>14</sup> to maintain any physical evidence collected in death penalty cases “for 60 days after execution of the sentence.”<sup>15</sup>

#### 1. Procedures for Pre-Trial Preservation of Evidence

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<sup>10</sup> See Death Penalty Information Center, Cases of Innocence 1973 - Present, available at <http://www.deathpenaltyinfo.org/article.php?scid=6&did=110> (last visited on Aug. 14, 2006). The names of the twenty-two exonerated individuals are as follows: David Keaton (charges dismissed and released in 1973), Wilbert Lee (pardoned and released in 1975), Freddie Pitts (pardoned and released in 1975), Delbert Tibbs (charges dismissed and released in 1977), Annibal Jaramillo (charges dismissed and released in 1982), Anthony Brown (acquitted on retrial and released in 1986), Joseph Green Brown (charges dismissed and released in 1987), Anthony Peek (acquitted on retrial and released in 1987), Juan Ramos (acquitted on retrial and released in 1987), Willie Brown (charges dismissed and released in 1988), Larry Troy (charges dismissed and released in 1988), Robert Cox (charges dismissed and released in 1989), James Richardson (acquitted on retrial and released in 1989), Bradley P. Scott (acquitted on retrial and released in 1991), Andrew Golden (charges dismissed and released in 1994), Robert Hayes (acquitted on retrial and released in 1997), Joseph Nahume Green (charges dismissed and released in 2000), Frank Lee Smith (exonerated posthumously using DNA testing in 2000), Joaquin Jose Martinez (acquitted on retrial and released in 2001), Juan Roberto Melendez (charges dismissed and released in 2002), Rudolph Holton (charges dismissed and released in 2003), and John Ballard (acquitted on retrial and released in 2006). The definition of innocence used by the Death Penalty Information Center in placing defendants on the list of exonerated individuals is that they had “been convicted and sentenced to death, and subsequently either a) their conviction was overturned and they were acquitted at a re-trial, or all charges were dropped, or b) they were given an absolute pardon by the governor based on new evidence of innocence.” *Id.*

<sup>11</sup> *Zollman v. State*, 820 So. 2d 1059, 1062 (Fla. 2d DCA 2002) (citing *In re Amendment to Fla. Rules of Criminal Procedure Creating Rule 3.853 (DNA Testing)*, 807 So. 2d 633, 636 (Fla. 2001) (Anstead, J., concurring)).

<sup>12</sup> 2001 Fla. Laws ch. 97 (effective October 1, 2001); FLA. STAT. § 925.11 (2006).

<sup>13</sup> *In re Amendments to Fla. Rules of Criminal Procedure Creating Rule 3.853 (DNA Testing)*, 807 So. 2d 633 (Fla. 2001) (effective October 18, 2001); FLA. R. CRIM. P. 3.853.

<sup>14</sup> FLA. STAT. § 925.11(4)(a) (2006) (giving a partial list of government entities that may be in possession of physical evidence in a case, including, but not limited to, any investigative law enforcement agency, the clerk of the court, the prosecuting authority, and the Florida Department of Law Enforcement).

<sup>15</sup> FLA. STAT. § 925.11(4)(b) (2006).

Law enforcement agencies in Florida that collect evidence during a criminal investigation are responsible for holding and maintaining that evidence during the pre-trial phase. All police departments, sheriffs' departments, state law enforcement agencies, state highway patrols, transportation police departments, training academies, and university police departments in Florida certified by the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA)<sup>16</sup> and/or the Commission for Florida Law Enforcement Accreditation (CFLEA)<sup>17</sup> are required to adopt written directives establishing procedures to be used in criminal investigations, including procedures on collecting, preserving, processing, and avoiding contamination of physical evidence.<sup>18</sup>

In addition to the requirements for law enforcement agency accreditation, individual law enforcement officers are statutorily required to meet certain criteria,<sup>19</sup> pass an examination,<sup>20</sup> and complete a basic training course<sup>21</sup> at a training academy authorized

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<sup>16</sup> Fifty-eight police departments, sheriff's departments, state law enforcement agencies, state highway patrols, transportation police departments, training academies, and university police departments in Florida have been accredited or are in the process of obtaining accreditation by the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA). See CALEA Online, Agency Search, at <http://www.calea.org/agcysearch/agencysearch.cfm> (last visited on Aug. 9, 2006) (use second search function, designating "U.S." and "Florida" as search criteria); see also CALEA Online, About CALEA, at <http://www.calea.org/newweb/AboutUs/Aboutus.htm> (last visited on Aug. 9, 2006) (noting that CALEA is an independent accrediting authority established by the four major law enforcement membership associations in the United States: International Association of Chiefs of Police (IACP); National Organization of Black Law Enforcement Executives (NOBLE); National Sheriffs' Association (NSA); and Police Executive Research Forum (PERF)). To obtain accreditation, a law enforcement agency must complete a comprehensive process consisting of: (1) purchasing an application; (2) executing an Accreditation Agreement and submitting a completed application; (3) completing an Agency Profile Questionnaire; (4) completing a thorough self-assessment to determine whether the law enforcement agency complies with the accreditation standards and developing a plan to come into compliance; (5) an on-site assessment by a team selected by the Commission to determine compliance who, in turn, will submit a compliance report to the Commission; and (6) a hearing where a final decision on accreditation is rendered. See CALEA Online, The Accreditation Process, at <http://www.calea.org/newweb/accreditation%20Info/process1.htm> (last visited on Aug. 9, 2006).

<sup>17</sup> One hundred twenty-nine police departments, sheriff's departments, state law enforcement agencies, state highway patrols, transportation police departments, training academies, and university police departments in Florida have obtained accreditation under the CFLEA standards. Commission for Florida Law Enforcement Accreditation, Accredited Agencies, at <http://www.flaccreditation.org/CFA%20Accredited%20Agencies.htm> (last visited on Aug. 9, 2006); see also COMMISSION FOR FLA. LAW ENFORCEMENT ACCREDITATION: STANDARDS MANUAL (4<sup>th</sup> ed. 2004) [hereinafter CFLEA STANDARDS] available at <http://www.flaccreditation.org/standards.htm> (last visited on Aug. 9, 2006) (click on "4th Edition Standards Manual").

<sup>18</sup> COMM'N ON ACCREDITATION OF LAW ENFORCEMENT AGENCIES, INC., STANDARDS FOR LAW ENFORCEMENT AGENCIES, THE STANDARDS MANUAL OF THE LAW ENFORCEMENT AGENCY ACCREDITATION PROGRAM 42-2, 83-1 (4th ed. 2001) [hereinafter CALEA STANDARDS] (Standards 42.2.1 and 83.2.1); CFLEA STANDARDS, *supra* note 17, at 35:2 (Standard 35.01).

<sup>19</sup> FLA. STAT. § 943.13 (2006). The law enforcement candidate must: (1) be at least 19 years of age; (2) be a citizen of the United States; (3) have obtained a high school diploma or the recognized equivalent; (4) not have been convicted of a felony or misdemeanor involving perjury or false statements; (5) be fingerprinted for a background check; (6) have passed a physical examination; and (7) possess good moral character. *Id.*

<sup>20</sup> The law enforcement candidate must obtain an acceptable score on the officer certification examination for the applicable criminal justice discipline. FLA. STAT. § 943.13(10) (2006).

by the Criminal Justice Standards and Training Commission (CJSTC), which is the regulatory body that oversees the training of law enforcement candidates.<sup>22</sup> The course consists of 756 hours of training,<sup>23</sup> including instruction in such relevant areas as crime scene processing and death investigations.<sup>24</sup> Specifically, the basic training course provides instruction regarding: (1) protection and preservation of the crime scene to prevent contamination of evidence;<sup>25</sup> (2) the proper methods for identifying, collecting, packaging, labeling, and preserving fibers, hair, dental evidence, skeletal remains and other bodily fluids, such as blood, saliva, urine, semen, perspiration, vaginal secretions, feces, and vomit, in order to prevent contamination and misidentification;<sup>26</sup> (3) proper procedures for documenting evidence collection and chain of custody;<sup>27</sup> and (4) transporting evidence to laboratories from evidence-holding facilities.<sup>28</sup>

The Florida Department of Law Enforcement (FDLE), which controls all state-operated crime laboratories, is statutorily required to: (1) establish policies and procedures to be employed by the laboratories; (2) establish standards of education and experience for professional and technical personnel employed by the laboratories; and (3) adopt internal procedures for the review and evaluation of laboratory services.<sup>29</sup> Additionally, FDLE's seven regional crime laboratories, as well as all five of the unaffiliated local crime laboratories in Florida, have voluntarily obtained accreditation through the Crime Laboratory Accreditation Program of the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB).<sup>30</sup> ASCLD/LAB specifically requires laboratories to have a written or secure electronic chain of custody record with

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<sup>21</sup> The law enforcement candidate must successfully complete a commission-approved basic recruit training program for the applicable criminal justice discipline, unless exempted. FLA. STAT. § 943.13(9) (2006); FLA. ADMIN. CODE R. 11B-35.002 (2006) (administrative rule providing for the basic training course at a training academy authorized by the Criminal Justice Standards and Training Commission).

<sup>22</sup> FLA. STAT. §§ 943.11, 943.12 (2006).

<sup>23</sup> Telephone Interview with Dwight Floyd, Training Manager, Florida Department of Law Enforcement (Oct. 21, 2005).

<sup>24</sup> CRIMINAL JUSTICE STANDARDS AND TRAINING COMMISSION, LAW ENFORCEMENT BASIC RECRUIT CURRICULUM, module 7, units 2, 4 (2005) [hereinafter BASIC RECRUIT CURRICULUM] (on file with author). Law enforcement officers must also complete forty hours of re-training every four years of service. FLA. STAT. § 943.135 (2005); *see also* Criminal Justice Standards and Training Commission, Mandatory Retraining Requirement, at <http://www.fdle.state.fl.us/cjst/officerrequirements/mandatory.html> (last visited on Aug. 9, 2006).

<sup>25</sup> BASIC RECRUIT CURRICULUM, *supra* note 24, at module 7, unit 2, lesson 5.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at module 7, unit 2, lesson 6.

<sup>28</sup> *Id.* at module 7, unit 2, lesson 7.

<sup>29</sup> FLA. STAT. § 943.34(1)-(6) (2006).

<sup>30</sup> The following laboratories in Florida are currently accredited through the ASCLD/LAB program: (1) FDLE Fort Meyers Regional Crime Laboratory, (2) FDLE Jacksonville Regional Crime Laboratory, (3) FDLE Orlando Regional Crime Laboratory, (4) FDLE Pensacola Regional Crime Laboratory, (5) FDLE Tallahassee Regional Crime Laboratory, (6) FDLE Tampa Regional Crime Laboratory, (7) FDLE Daytona Beach Regional Crime Laboratory, (8) Broward County Sheriff's Office Crime Laboratory, (9) Miami-Dade Police Department, (10) Palm Beach County Sheriff's Office, (11) Pinellas County Forensic Laboratory, and (12) St. Lucie County's Indian River Regional Crime Laboratory. *See* Laboratories Accredited by ASCLD/LAB, American Society of Crime Laboratories Directors, at <http://www.ascld-lab.org/legacy/aslblegacylaboratories.html> (last visited on Aug. 9, 2006).

all necessary data and a secure area for overnight and/or long-term storage of evidence.<sup>31</sup> All evidence must also be marked for identification, stored under proper seal, meaning that the contents cannot readily escape, and be protected from loss, cross transfer, contamination and/or deleterious change.<sup>32</sup>

In order to comply with the statutory and ASCLD/LAB accreditation requirements, FDLE has, among other things:

- (1) created the Forensic Science Quality Manual which requires crime laboratory analysts to complete an approved training program in one or more of the forensic services<sup>33</sup> and attain certification prior to conducting independent casework.<sup>34</sup> (It similarly recommends that forensic science technicians complete an approved training program);<sup>35</sup>
- (2) instituted its own 13-month training program for serology/DNA technicians and support staff which instructs these officials on (a) the proper handling and screening of sexual assault kits and other evidence that may contain semen, saliva, blood, nail scrapings or hair samples; and (b) quality control training regarding sterilization of instruments and reagents;<sup>36</sup> and
- (3) published internal standard operating procedures which include numerous quality control procedures regarding proper storage and security for physical evidence<sup>37</sup> and are designed to avoid or reduce the risk of contamination of physical evidence during the performance of DNA services.<sup>38</sup>

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<sup>31</sup> ASCLD/LAB LABORATORY ACCREDITATION BOARD 2003 MANUAL 20-23 (on file with author) [hereinafter ASCLD/LAB 2003 MANUAL].

<sup>32</sup> *Id.*

<sup>33</sup> FLA. DEP'T OF LAW ENFORCEMENT, FORENSIC SCIENCE QUALITY MANUAL (2004) [hereinafter FSQM] (Standard 3.3) (including a detailed description of the training program); *see also* Florida Department of Law Enforcement, Crime Laboratory Analyst, at <http://www.fdle.state.fl.us/CrimeLab/CLA%20Position.htm> (last visited on Aug. 9, 2006); Career Service Class Specification, Crime Laboratory Analyst (Jan. 23, 2001) (on file with the author) (noting that crime laboratory analysts are required to satisfactorily complete the Florida Department of Law Enforcement Crime Laboratory Analyst Training Program or a comparable training program from another forensic laboratory).

<sup>34</sup> FSQM, *supra* note 33 (Standard 3.5) (noting that certified analysts may maintain certification in a forensic service area by independently completing a minimum of five service requests per major area per calendar year and/or one service request per minor area per calendar year in addition to the required proficiency test(s)).

<sup>35</sup> *Id.* (Standard 3.4).

<sup>36</sup> FLA. DEP'T OF LAW ENFORCEMENT, CONVENTIONAL SEROLOGY AND DNA TRAINING PROGRAM (2002) [hereinafter FDLE SEROLOGY/DNA TRAINING PROGRAM] (on file with author).

<sup>37</sup> FLA. DEP'T OF LAW ENFORCEMENT, BIOLOGY SECTION, DNA QUALITY ASSURANCE STANDARD OPERATING PROCEDURES 1.0, 6.0, 7.0, 8.1.4 (2005) [hereinafter FDLE DNA QUALITY ASSURANCE SOPs] (on file with author).

<sup>38</sup> FLA. DEP'T OF LAW ENFORCEMENT, BIOLOGY SECTION, GOOD LABORATORY/ANALYTICAL PRACTICE STANDARD OPERATING PROCEDURES 3.2, 3.5, 3.5.10, 3.5.24, 3.7.3, 3.7.5, 3.4.1 (2005) [hereinafter FDLE GOOD LABORATORY/ANALYTICAL PRACTICE SOPs] (on file with author).

The Miami-Dade Police Department Crime Laboratory, which is one of the five unaffiliated crime laboratories in Florida that has obtained ASCLD/LAB accreditation, also has internal standard operating procedures regarding the handling and testing of biological evidence.<sup>39</sup> Specifically, the Miami-Dade Police Department has formal procedures providing for the proper method of collecting blood, hair, and other fluids; the proper method of storing such items;<sup>40</sup> and the proper manner of maintaining the chain of custody and security of such evidence.<sup>41</sup> Additionally, the Miami-Dade Police Department Crime Laboratory also has written procedures for proper sterilization and calibration of instruments used during DNA testing,<sup>42</sup> as well as requirements for documenting all aspects of DNA analysis procedure.<sup>43</sup> The other four unaffiliated crime laboratories—Broward County Sheriff’s Office Crime Laboratory, Palm Beach County Sheriff’s Office, Pinellas County Forensic Laboratory, and St. Lucie County’s Indian River Regional Crime Laboratory—also have written policies and procedures on the preservation of biological evidence.<sup>44</sup>

## 2. Procedures for Preservation of Evidence During and After Trial

The clerk of the circuit court is required to keep all items of physical evidence entered into evidence during the trial until the defendant’s direct appeal is over and all collateral attacks are exhausted.<sup>45</sup> The clerk may only “dispose of items of physical evidence which have been held as exhibits in excess of 3 years in cases on which no appeal, or collateral attack, is pending or can be made.”<sup>46</sup>

### *B. Post-Conviction DNA Testing*

Pursuant to section 925.11 of the Florida Statutes, persons who have been “tried and found guilty of committing a felony, and . . . sentenced” by a Florida court may file a motion under Florida Rule of Criminal Procedure 3.853 requesting the testing of “physical evidence collected at the time of the investigation of the crime [] that may contain DNA [] and that would exonerate that person or mitigate the sentence that person received.”<sup>47</sup> Additionally, individuals who entered a plea of guilty or *nolo contendere* to

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<sup>39</sup> See Memorandum from Robert Parker, Director, Miami-Dade Police Department, to Israel Reyes, Circuit Court Judge, Eleventh Judicial Circuit (March 16, 2006) (on file with author).

<sup>40</sup> MIAMI-DADE POLICE DEPARTMENT, CRIME SCENE INVESTIGATIONS BUREAU, STANDARD OPERATING PROCEDURES 102-03, 112-14 (2005) [hereinafter CSIB SOP].

<sup>41</sup> *Id.* at 26-27.

<sup>42</sup> MIAMI-DADE POLICE DEPARTMENT CRIME LABORATORY, DNA QUALITY ASSURANCE 5-1(a) (2005) [hereinafter DNA QUALITY ASSURANCE].

<sup>43</sup> *Id.* at 4-1.

<sup>44</sup> E-mail from Stephanie L. Stoiloff, Bureau Commander, Miami-Dade Police Department Crime Laboratory, to Israel Reyes, Circuit Court Judge, Eleventh Judicial Circuit (Aug. 4, 2006) (on file with author).

<sup>45</sup> FLA. STAT. § 28.213 (2005); see also Telephone Interview with Beth Allman, Florida Association of Court Clerks (Oct. 24, 2005) (transcript of interview on file with author).

<sup>46</sup> FLA. STAT. § 28.213 (2006).

<sup>47</sup> FLA. STAT. § 925.11(1)(a)(1) (2006).

a felony prior to July 1, 2006 and were sentenced by a Florida court may also file a rule 3.853 motion seeking post-conviction DNA testing.<sup>48</sup>

Individuals who entered a plea of guilty or *nolo contendere* to a felony on or after July 1, 2006 may only seek post-conviction DNA testing if:

- (1) the facts on which the motion is predicated were unknown to the movant or his/her attorney at the time the plea was entered and could not have been ascertained by the exercise of due diligence; or
- (2) the physical evidence for which DNA testing is sought was not disclosed to the defense by the state prior to the entry of the plea by the movant.<sup>49</sup>

In section 925.12 of the Florida Statutes, the Florida Legislature expresses its intent that the Florida Supreme Court adopt rules of procedure to be used by trial courts, prior to the acceptance of a plea on or after July 1, 2006, to inquire into whether:

- (1) counsel for the defense has reviewed the discovery disclosed by the state and whether such discovery included a listing or description of physical items of evidence;
- (2) the nature of the evidence against the defendant disclosed through discovery has been reviewed with the defendant;
- (3) the defendant or counsel for the defendant is aware of any physical evidence disclosed by the state for which DNA testing may exonerate the defendant; and
- (4) the state is aware of any physical evidence for which DNA testing may exonerate the defendant.<sup>50</sup>

If no physical evidence containing DNA that could exonerate the defendant is known to exist, the court may proceed with consideration of accepting the plea.<sup>51</sup> However, if physical evidence containing DNA that could exonerate the defendant is known to exist, the court may postpone the proceeding on the defendant's behalf and order DNA testing upon motion of counsel specifying the physical evidence to be tested.<sup>52</sup>

## 1. Time Limitations on Seeking Post-Conviction DNA Testing in Florida

An individual may seek post-conviction DNA testing by filing a motion under Florida Rule of Criminal Procedure 3.853 "at any time following the date that the judgment and sentence in the case becomes final."<sup>53</sup>

## 2. Contents of a Rule 3.853 Motion

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<sup>48</sup> FLA. STAT. § 925.11(1)(a)(2) (2006).

<sup>49</sup> FLA. STAT. § 925.12(1)(a), (b) (2006).

<sup>50</sup> FLA. STAT. § 925.12(3)(a)-(d) (2006).

<sup>51</sup> FLA. STAT. § 925.12(2) (2006).

<sup>52</sup> *Id.* Such a postponement will be charged to the defendant for the purposes of the defendant's right to a speedy trial. FLA. STAT. § 925.12(4) (2006).

<sup>53</sup> FLA. STAT. § 925.11(1)(b) (2006).

A rule 3.853 motion for post-conviction DNA testing must be made under oath and contain the following six elements:

- (1) a statement of the facts relied on in support of the motion, including a description of the physical evidence containing DNA to be tested and, if known, the present location or last known location of the evidence and how it was originally obtained;<sup>54</sup>
- (2) a statement that the evidence was not tested previously for DNA, or a statement that the test results of previous DNA testing were inconclusive and that subsequent scientific developments in DNA testing techniques would likely produce a definitive result;<sup>55</sup>
- (3) a statement that the movant is innocent and how the DNA testing requested by the motion will exonerate the movant of the crime for which the movant was sentenced, or a statement on how the DNA testing will mitigate the sentence received by the movant for the crime;
- (4) a statement that identification of the movant is a genuinely disputed issue in the case and why it is an issue or an explanation of how the DNA evidence would either exonerate the movant or mitigate the sentence that the movant received;<sup>56</sup>

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<sup>54</sup> “Neither [rule 3.853] nor [section 925.11] require[] that the movant allege that the evidence is still available to be tested.” *Warren v. State*, 851 So. 2d 817, 818 (Fla. 2d DCA 2003) (noting that the fact of actual availability of DNA evidence at the time of the motion is likely to be beyond the knowledge of the movant, especially where s/he is serving a prison term). The *Warren* court indicated that, however, if the movant has no knowledge regarding the location of the evidence, s/he must say so in his/her motion. *Id.*

<sup>55</sup> Introduction of evidence at trial contrary to a prior conclusive DNA test does not render that DNA test inconclusive for the purposes of rule 3.853 and section 925.11. *See Newberry v. State*, 870 So. 2d 926, 927 (Fla. 4th DCA 2004) (holding that where a DNA test was performed on evidence before trial and the prosecution’s expert offered testimony that the DNA evidence conclusively matched the defendant’s, but the defense offered evidence attacking the reliability of the prosecution’s expert testimony, the previous test was merely contested, rather than inconclusive). Furthermore, a previous inconclusive test under a certain method of DNA testing will not satisfy this pleading requirement if the previous test was inconclusive as a result of insufficient quality or size of the evidence and the movant does not show good cause why the evidence should be retested. *See King v. State*, 808 So. 2d 1237, 1248-49 (Fla. 2002).

<sup>56</sup> The pleading requirements in rule 3.853 and section 925.11 are identical apart from this pleading requirement. Section 925.11(2)(a)(4) requires “a statement that identification of the movant is a genuinely disputed issue in the case and why it is an issue,” while rule 3.853(b)(4) allows the movant to plead *either* “a statement that identification of the movant is a genuinely disputed issue in the case and why it is an issue *or* an explanation of how the DNA evidence would either exonerate the movant or mitigate the sentence that the movant received.” *Compare* FLA. STAT. § 925.11(2)(a)(4) (2006), *with* FLA. R. CRIM. P. 3.853(b)(4) (emphasis added). Section 925.11 is, therefore, more restrictive than rule 3.853 and, based solely on its text, would exclude certain persons, such as one who admitted to committing the offense but asserted an affirmative defense to avoid liability, from being eligible for DNA testing because such a person could not provide a statement that “identification . . . is a genuinely disputed issue in the case,” despite the fact that DNA testing could prove their affirmative defense. *Crow v. State*, 866 So. 2d 1257, 1260-61 (Fla. 1st DCA 2004). In *Crow*, the Florida First District Court of Appeal held that a movant was required to plead the more expansive requirement in rule 3.853(b)(4)—a statement that identification of the movant is a genuinely disputed issue in the case and why it is an issue *or* an explanation of how the DNA evidence would either exonerate the movant or mitigate the sentence that the movant received. *Id.* The *Crow* court stated that the pleading requirement in rule 3.853(b)(4) supersedes that in section 925.11(2)(a)(4) because the courts, not the legislature, have the constitutional authority to “to decide what

- (5) a statement of any other relevant facts to the motion; and
- (6) a certification that a copy of the motion was served on the prosecuting authority.<sup>57</sup>

### 3. Disposition of a Rule 3.853 Motion

If the movant fails to properly plead any of the required contents, the motion is not sworn, or the motion is filed beyond the filing deadline, the judge can summarily deny the rule 3.853 motion for insufficiency.<sup>58</sup> Even if the motion is legally sufficient, the judge may also deny the motion if its allegations are conclusively refuted by the record on appeal.<sup>59</sup> After a denial of a rule 3.853 motion, a movant may move for a rehearing within fifteen days of the denial.<sup>60</sup> If the motion is deemed legally sufficient, then the prosecuting authority should be ordered to respond within thirty days to the rule 3.853 motion and the judge must either enter an order after reviewing the response or hold an evidentiary hearing<sup>61</sup> on the merits of the motion.<sup>62</sup>

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evidence is to be produced and admitted at the hearing” on the motion. *Id.* (noting that because the legislature cannot constitutionally regulate procedural restrictions on the right to file a petition for writ of habeas corpus, it also is not authorized to levy procedural restrictions on obtaining post-conviction DNA testing because rule 3.853 affords the same kind of remedy that would have been available by the habeas corpus court); *cf.* *Allen v. Butterworth*, 756 So. 2d 52 (Fla. 2000).

To the extent a movant chooses to plead that identity is a “genuinely disputed issue in the case,” identity may still be at issue even if the victim identified the movant at trial. *See Saffold v. State*, 850 So. 2d 574, 577 (Fla. 2d DCA 2003). Furthermore, identity will be a genuinely disputed issue where the victim originally identified a different perpetrator or where the movant’s sole defense at trial was misidentification. *See Knighten v. State*, 829 So. 2d 249, 250-51 (Fla. 2d DCA 2002) (noting that the victims offered contradictory testimony regarding identification of their assailant and picked persons other than the movant out of the photo array); *Zollman v. State*, 820 So. 2d 1059, 1062 (Fla. 2d DCA 2002) (noting that the victim described her assailant as having different features than the movant and his sole defense at trial was misidentification).

<sup>57</sup> FLA. R. CRIM. P. 3.853(b)(1)-(6).

<sup>58</sup> FLA. STAT. § 925.11(2)(c) (2006); FLA. R. CRIM. P. 3.853(c)(2).

<sup>59</sup> *See Collins v. State*, 869 So. 2d 723, 724 (Fla. 4th DCA 2004) (holding that the movant was entitled to an evidentiary hearing on the merits because the motion was facially sufficient and not conclusively refuted by the record).

<sup>60</sup> FLA. R. CRIM. P. 3.853(e) (“The movant may file a motion for rehearing of any order denying relief within 15 days after service of the order denying relief,” and this motion tolls the time for filing a notice of appeal).

<sup>61</sup> An evidentiary hearing on the merits is required where the rule 3.853 motion is facially sufficient and not conclusively refuted by the record. *See Collins*, 869 So. 2d at 724.

<sup>62</sup> FLA. STAT. § 925.11(2)(c), (d) (2006); FLA. R. CRIM. P. 3.853(c)(3); *see also Cheshire v. State*, 872 So. 2d 427, 428 (Fla. 5th DCA 2004) (noting that once a rule 3.853 motion is deemed legally sufficient, the proper procedure is to request a response from the state and, after reviewing the response, either summarily deny the motion on the merits or order an evidentiary hearing). If a factual dispute is created by the state’s response to a legally sufficient rule 3.853 motion, the judge may not summarily deny the motion and must order an evidentiary hearing. *See Marsh v. State*, 852 So. 2d 945, 946 (Fla. 2d DCA 2003) (holding that where the movant claimed in his legally sufficient motion that DNA evidence existed and the state responded that it did not have any such DNA evidence in its custody, a factual dispute is created and an evidentiary hearing must be held to resolve this dispute); *see also Borland v. State*, 848 So. 2d 1288, 1289-90 (Fla. 2d DCA 2003).

When considering the merits of the rule 3.853 motion, the court must assess whether (1) the movant demonstrated that physical evidence exists that may contain DNA,<sup>63</sup> (2) the results of the requested DNA testing would be admissible at trial,<sup>64</sup> and (3) the movant has sufficiently demonstrated that there is a reasonable probability that s/he would have been acquitted or received a lesser sentence if the DNA evidence was admitted at trial.<sup>65</sup> If the court grants the rule 3.853 motion, then the DNA testing is ordered.<sup>66</sup> If the post-conviction judge denies the motion, the movant may appeal as a matter of right to the District Court of Appeal within thirty days of the filing of the order.<sup>67</sup>

#### 4. Limitations on Multiple Petitions

Rule 3.853 does not contain an explicit bar against the filing of successive motions.<sup>68</sup> Although this issue has not been specifically litigated since the inception of rule 3.853, the Fifth District Court of Appeal in Florida pointed to the Florida Supreme Court's treatment of multiple filings in another post-conviction arena in order to indicate that the Florida Supreme Court may bar additional rule 3.853 motions. In *State v. McBride*,<sup>69</sup> the Florida Supreme Court held that although Florida Rule of Criminal Procedure 3.800(a)—

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<sup>63</sup> FLA. STAT. § 925.11(2)(f)(1) (2006); FLA. R. CRIM. P. 3.853(c)(5)(a). The trial court may not deny the motion merely on the basis of the state's unsworn response that the requested DNA evidence does not exist. *See Borland*, 848 So. 2d at 1289-90. Even if the state's affidavit that such evidence does not exist is in fact sworn, it would create a factual dispute that must be resolved in an evidentiary hearing. *Id.*

<sup>64</sup> FLA. STAT. § 925.11(2)(f)(2) (2006); FLA. R. CRIM. P. 3.853(c)(5)(b).

<sup>65</sup> FLA. STAT. § 925.11(2)(f)(3) (2006); FLA. R. CRIM. P. 3.853(c)(5)(c). Courts have found a reasonable probability of acquittal at retrial where results of testing would eliminate the movant as the perpetrator. *See Riley v. State*, 851 So. 2d 811, 812 (Fla. 2d DCA 2003) (finding a reasonable probability that a third party committed the crime where the movant alleged that the testing of blood found at the scene of the crime would be neither his nor that of the victim); *Manual v. State*, 855 So. 2d 97, 99 (Fla. 2d DCA 2003) (finding a reasonable probability of acquittal where the victim claimed that she was raped by only one perpetrator who ejaculated and where the movant claimed that testing of the rape kit would show that the semen collected was from a third party); *Huffman v. State*, 837 So. 2d 1147, 1149 (Fla. 1st DCA 2003).

Courts have found that no reasonable probability of acquittal exists where the movant seeks testing of DNA evidence from a rape kit after admitting to having sexual intercourse with the victim. *See Cole v. State*, 895 So. 2d 398, 401-03 (Fla. 2004); *Robinson v. State*, 865 So. 2d 1259, 1265 (Fla. 2004) (holding that the movant's rule 3.853 motion lacked merit where he asked for testing of a rape kit, but never disputed having sex with the victim and, in fact, argued it was consensual); *Hartline v. State*, 806 So. 2d 595, 595-96 (Fla. 5th DCA 2002). Furthermore, no reasonable probability exists for acquittal at retrial where the movant makes only general references to the evidence to be tested rather than explaining how this evidence would lead to an acquittal or mitigation of his/her sentence. *See Hitchcock v. State*, 866 So. 2d 23, 27-28 (Fla. 2004) (noting that rule 3.853 is not intended to be a fishing expedition and it is the movant's burden to explain, with reference to specific facts about the crime and the items to be tested, how the DNA evidence will exonerate him/her or mitigate his/her sentence). Additionally, there is no reasonable probability of mitigation of a sentence where favorable results from the requested evidence would exonerate the movant of a collateral crime or action not considered by the sentencing court as an aggravating factor in imposing a death sentence. *See Van Poyck v. State*, 908 So. 2d 326, 329-30 (Fla. 2005) (noting that there was no reasonable probability that results of testing of evidence which show that the movant was not the triggerman during the commission of the crime would mitigate his death sentence because his triggerman status was not relied on by the prosecution, court or jury as an aggravating factor).

<sup>66</sup> FLA. STAT. § 925.11(2)(h) (2006); FLA. R. CRIM. P. 3.853(c)(7).

<sup>67</sup> FLA. R. CRIM. P. 3.853(f).

<sup>68</sup> *See* FLA. R. CRIM. P. 3.853.

<sup>69</sup> 848 So. 2d 287 (Fla. 2003).

which allows a post-conviction attack on an illegal sentence “at any time”—does not have an explicit bar against the filing of successive motions, the rules of res judicata and collateral estoppel still apply.<sup>70</sup>

Thus, a successive rule 3.800(a) motion that does not allege a sufficient reason for not raising a claim that could have been ascertained by the movant upon the exercise of due diligence at the time of the first motion will be barred by res judicata, and a claim raised in the successive motion that has already been litigated in the first motion will be barred by the doctrine of collateral estoppel.<sup>71</sup> The Fifth District Court of Appeal of Florida, in *Olvera v. State*,<sup>72</sup> posited in dicta that, based on the holding of *McBride*, because rule 3.853 also lacks an explicit bar to successive motions, the Florida Supreme Court would likely also apply the doctrines of res judicata and collateral estoppel to successive rule 3.853 motions.<sup>73</sup> Therefore, a movant who (1) does not allege that the claims in his/her successive motion could not have been raised in the earlier motion, or (2) attempts to relitigate claims previously raised and reviewed on the merits in an earlier rule 3.853 motion, may likely be barred from having such successive claims reviewed despite the lack of an explicit bar to successive motions in rule 3.853.<sup>74</sup>

### C. Location of DNA Testing

If the court grants a rule 3.853 motion, then the DNA testing is ordered and must be carried out by the Florida Department of Law Enforcement (FDLE),<sup>75</sup> or, on a showing of good cause, testing may be performed by another laboratory or agency “certified by the American Society of Crime Laboratory Directors or the National Forensic Science [Technology] Center when requested by a movant who can bear the cost of such testing.”<sup>76</sup> Tests performed by FDLE will be completed at the particular FDLE regional crime laboratory that has jurisdiction over the geographic area where the court which ordered the testing sits.<sup>77</sup> Testing may be moved to a different regional laboratory at the discretion of the FDLE Director of Laboratory Systems to avoid backlogs at a regional laboratory.<sup>78</sup>

### D. Costs of DNA Testing

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<sup>70</sup> See *id.* at 290-92.

<sup>71</sup> See *id.*

<sup>72</sup> 870 So. 2d 927 (Fla. 5th DCA 2004).

<sup>73</sup> See *id.* at 930 (denying the rule 3.853 motion on other grounds and citing *State v. McBride*, 848 So. 2d 287 (Fla. 2003)).

<sup>74</sup> See *id.*

<sup>75</sup> FLA. STAT. § 925.11(2)(h) (2006); FLA. STAT. § 943.3251(1) (2006).

<sup>76</sup> FLA. R. CRIM. P. 3.853(c)(7).

<sup>77</sup> Telephone Interview with Sue Livingston, Director of Laboratory Systems, Florida Department of Law Enforcement (Oct. 24, 2005) (on file with author).

<sup>78</sup> *Id.* A map of the geographic area covered by each regional crime laboratory and the affiliated crime laboratories can be located at <http://www.fdle.state.fl.us/crimelab/> (last visited on Aug. 9, 2006).

Upon a motion by the defendant showing “good cause” and an order of the trial court, the defendant may obtain laboratory services, such as DNA testing, before trial from a state-operated laboratory.<sup>79</sup> “Good cause” requires a finding by the court that:

- (1) the laboratory service being sought by the defendant is anticipated to produce evidence that is relevant and material to the defense;
- (2) the service sought is one which is reasonably within the capacity of the state-operated laboratory and will not be unduly burdensome upon the laboratory; and
- (3) the service cannot be obtained from any qualified private or non-state operated laboratory within the state or otherwise reasonably available to the defense.<sup>80</sup>

The costs for these services are billed to the defendant or the public defender representing the defendant, if s/he is indigent.<sup>81</sup>

In terms of post-conviction DNA testing ordered by the court, however, if the inmate is indigent, the state is responsible for paying for the testing.<sup>82</sup> Otherwise, the inmate bears the burden of paying for the testing, regardless of whether the post-conviction testing is performed by the FDLE or an outside laboratory.<sup>83</sup> The results of testing ordered by the court must be provided to the court, the movant, and the prosecuting authority.<sup>84</sup>

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<sup>79</sup> FLA. STAT. § 943.33 (2006).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> FLA. STAT. §§ 943.3251(2), 925.11(2)(g) (2006).

<sup>83</sup> FLA. STAT. §§ 943.3251(2), 925.11(2)(g) (2006).

<sup>84</sup> FLA. STAT. § 925.11(2)(i) (2006).

## II. ANALYSIS

### A. Recommendation #1

**Preserve all biological evidence<sup>85</sup> for as long as the defendant remains incarcerated.**

The State of Florida requires all government entities to preserve physical evidence in death penalty cases for “60 days after execution of the sentence.”<sup>86</sup> The State of Florida, therefore, is in compliance with Recommendation #1.

It should be noted, however, that the State of Florida did not require the preservation of physical evidence in death penalty cases until October 1, 2001,<sup>87</sup> and prior to that time, there was no uniform rule among evidence-holding agencies on the proper amount of time to preserve physical evidence after an individual’s conviction and sentence became final.

### B. Recommendation #2

**All biological evidence should be made available to defendants and convicted persons upon request and, in regard to such evidence, such defendants and convicted persons may seek appropriate relief notwithstanding any other provision of the law.**

The State of Florida provides three potential opportunities for individuals to obtain DNA testing of biological evidence in their case: (1) defendants may obtain physical evidence for DNA testing during pre-trial discovery; (2) defendants may obtain DNA testing before entering a plea of guilty or *nolo contendere*; and (3) inmates may seek post-conviction DNA testing.

#### DNA Testing During Pre-Trial Discovery

Florida law provides that after the filing of the charging document, the defendant may elect to participate in discovery by filing with the court and serving on the prosecution a “notice of discovery,” which binds both the prosecution and the defense to reciprocal discovery obligations.<sup>88</sup> The prosecuting attorney must provide the defendant, no later than fifteen days after the notice of discovery is served, with a “discovery exhibit” and permit the defendant to “inspect, copy, test and photograph,”<sup>89</sup> amongst other required items: (1) any tangible papers or objects that were obtained from or belonged to the

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<sup>85</sup> “Biological evidence” includes: (1) the contents of a sexual assault examination kit; and/or (2) any item that contains blood, semen, hair, saliva, skin tissue, or other identifiable biological material, whether that material is catalogued separately or is present on other evidence. *See* INNOCENCE PROJECT, MODEL STATUTE FOR OBTAINING POST-CONVICTION DNA TESTING, *available at* [http://www.innocenceproject.org/docs/Model\\_Statute.html](http://www.innocenceproject.org/docs/Model_Statute.html) (last visited on Aug. 9, 2006).

<sup>86</sup> FLA. STAT. § 925.11(4)(b) (2006).

<sup>87</sup> *See* FLA. STAT. § 925.11 (2006).

<sup>88</sup> FLA. R. CRIM. P. 3.220(a).

<sup>89</sup> FLA. R. CRIM. P. 3.220(b)(1).

defendant,<sup>90</sup> and (2) any tangible papers or objects that the prosecuting attorney intends to use at the hearing or trial that were not obtained from or that did not belong to the defendant.<sup>91</sup> Based on this law, it appears that a defendant, who elects to participate in reciprocal discovery, has the right to inspect and test certain evidence that is in the possession of the prosecution, including: (1) biological evidence collected from the defendant, and (2) biological evidence collected from co-defendants and victims that the prosecution intends to use, which could be subject to DNA testing.<sup>92</sup> If the defendant believes that evidence that could be subject to DNA testing is in the possession of the prosecution but was not disclosed, s/he may file a motion to compel discovery, stating with particularity the evidence to be disclosed for testing or other inspection.<sup>93</sup>

### DNA Testing Before Entering a Plea

Section 925.12 of the Florida Statutes requires trial judges, before accepting a plea of guilty or *nolo contendere*, to inquire into whether physical evidence containing DNA exists and if so, allows for the proceedings to be suspended in order for DNA testing to be performed.<sup>94</sup>

### Post-Conviction DNA Testing

Florida law, pursuant to section 925.11 of the Florida Statutes and Florida Rule of Criminal Procedure 3.853, authorizes certain inmates to move the court for and/or obtain post-conviction DNA testing. Section 925.11(1)(a) allows for the filing of post-conviction DNA testing motions by all inmates who (1) were tried and found guilty; (2) pled guilty or *nolo contendere* before July 1, 2006; and (3) pled guilty or *nolo contendere* on or after July 1, 2006, but the evidence to be tested was not known to the defense or was not disclosed to the defense at the time of the plea.<sup>95</sup>

Rule 3.853 and section 925.11 of the Florida Statutes require movants to comply with stringent pleading requirements in order to successfully file and obtain a hearing on a motion requesting post-conviction DNA testing and receive DNA testing.<sup>96</sup> For example, judges are not required to hold hearings on inmates' motions requesting post-conviction DNA testing. Rather, in order to obtain an evidentiary hearing on the merits of a Rule 3.853 motion, the motion must be sworn and the movant must sufficiently allege all six of the pleading requirements contained in Rule 3.853.<sup>97</sup> If the movant fails to meet either of these procedural requirements, it will result in the summary dismissal of

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<sup>90</sup> FLA. R. CRIM. P. 3.220(b)(1)(F).

<sup>91</sup> FLA. R. CRIM. P. 3.220(b)(1)(K).

<sup>92</sup> FLA. R. CRIM. P. 3.220(b)(1)(F), (K); *cf.* *Shibble v. State*, 865 So. 2d 665, 668-69 (Fla. 4th DCA 2004) (holding that anything that the prosecution will use during trial, even if the item itself will not be introduced in evidence, is subject to disclosure under Florida Rule of Criminal Procedure 3.220(b)(1)(K)).

<sup>93</sup> E-mail Interview with John Yetter, Professor of Criminal Procedure and Florida Criminal Practice, Florida State University College of Law (October 26, 2005) (on file with author).

<sup>94</sup> FLA. STAT. § 925.12(2) (2006).

<sup>95</sup> FLA. STAT. §§ 925.11(1)(a)(2), 925.12(1)(a), (b) (2006).

<sup>96</sup> FLA. R. CRIM. P. 3.853(b)(1)-(6), (d)(1)(A).

<sup>97</sup> FLA. STAT. § 925.11(2)(c) (2006); FLA. R. CRIM. P. 3.853(c)(2).

his/her motion without an evidentiary hearing. Even if the motion is legally sufficient, the judge may also deny the motion if its allegations are conclusively refuted by the record on appeal.<sup>98</sup>

Rule 3.853 and sections 925.11 and 925.12 also contain certain procedural restrictions that could potentially preclude a movant from receiving a review of the merits of his/her motion. For example, although rule 3.853 contains no explicit bar on successive motions, one Florida court has indicated that a movant that (1) does not allege that the claims in his/her successive motion could not have been raised in the earlier motion, or (2) attempts to relitigate claims previously raised and reviewed on the merits in an earlier rule 3.853 motion, would likely have his/her motion dismissed without review.<sup>99</sup> However, the movant would not be barred from filing a successive request as long as the prior was not denied on the merits.<sup>100</sup>

Similarly, it appears that defendants who, on or after July 1, 2006, knew of possibly exonerative physical evidence containing DNA at the time of trial but still entered a plea, would be barred from later raising a post-conviction claim seeking DNA testing of that evidence. In fact, the pre-plea inquiry required by section 925.12 seems to be designed to create such a procedural bar by allowing for the discovery of physical evidence and then giving the defendant an opportunity to conduct DNA testing before s/he enters a plea, rather than during post-conviction proceedings. However, this issue has not been addressed by any Florida court. Thus, it is unclear whether this is the case.

Even after holding an evidentiary hearing, the court may still deny the request for DNA testing if it finds that (1) the movant did not sufficiently demonstrate that physical evidence exists that may contain DNA;<sup>101</sup> (2) the results of the requested DNA testing would not be admissible at trial;<sup>102</sup> or (3) the movant has not sufficiently demonstrated that there is a reasonable probability that s/he would have been acquitted or would have received a lesser sentence if the DNA evidence was admitted at trial.<sup>103</sup>

Although defendants in Florida appear to have the ability to inspect and test certain evidence in the possession of the prosecution through the “reciprocal discovery” procedure and obtain pre-trial DNA testing before entering a plea, Florida inmates, before obtaining post-conviction DNA testing, must file a rule 3.853 motion complying with stringent pleading requirements and avoiding certain procedural hurdles in order to receive review on the merits of such claims. The State of Florida, therefore, is only in partial compliance with Recommendation #2.

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<sup>98</sup> See *Collins v. State*, 869 So. 2d 723, 724 (Fla. 4th DCA 2004) (holding that the defendant was entitled to an evidentiary hearing on the merits because the rule 3.853 motion was facially sufficient and not conclusively refuted by the record).

<sup>99</sup> See *Olvera v. State*, 870 So. 2d 927, 930 (Fla. 5th DCA 2004) (denying the rule 3.853 motion on other grounds and citing *State v. McBride*, 848 So. 2d 287 (Fla. 2003)).

<sup>100</sup> See *supra* notes 68-74 and accompanying text.

<sup>101</sup> See *supra* notes 62-63 and accompanying text.

<sup>102</sup> FLA. STAT. § 925.11(2)(f)(2) (2006); FLA. R. CRIM. P. 3.853(c)(5)(b).

<sup>103</sup> See *supra* note 65 and accompanying text.

### C. Recommendation #3

**Every law enforcement agency should establish and enforce written procedures and policies governing the preservation of biological evidence.**

Both the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA) and the Commission for Florida Law Enforcement Accreditation (CFLEA) require accredited law enforcement agencies to adopt a written directive establishing procedures to be used in criminal investigations, including procedures regarding collecting, preserving, processing and avoiding contamination of physical evidence.<sup>104</sup> Fifty-eight law enforcement agencies in Florida have obtained accreditation or are in the process of obtaining accreditation by CALEA,<sup>105</sup> and 129 law enforcement agencies have obtained CFLEA accreditation.<sup>106</sup> All Florida accredited agencies, therefore, should have a written directive establishing procedures governing the preservation of biological evidence, but the extent to which these procedures comply with Recommendation #3 is unknown.

Additionally, Florida law requires the Florida Department of Law Enforcement (FDLE) to: (1) establish policies and procedures to be employed by FDLE crime laboratories; (2) establish standards of education and experience for professional and technical personnel employed by such laboratories; and (3) adopt internal procedures for the review and evaluation of laboratory services.<sup>107</sup> Similarly, all FDLE regional crime laboratories and all five of the unaffiliated crime laboratories accredited by the ASCLD/LAB are required, as a prerequisite to accreditation, to adopt specific procedures relating to the preservation of evidence.<sup>108</sup> In light of these statutory and accreditation requirements, the FDLE has established the following: a Forensic Science Quality Manual;<sup>109</sup> standard operating procedures regarding quality control, the proper storage and security of physical evidence, and the avoidance or reduction of the risk of contamination of physical evidence during the performance of DNA services;<sup>110</sup> minimum qualification requirements for laboratory staff;<sup>111</sup> and training and certification programs for at least some of the laboratory staff.<sup>112</sup> The Miami-Dade Police Department Crime Laboratory

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<sup>104</sup> CALEA STANDARDS, *supra* note 18, at 42-2, 83-1 (Standards 42.2.1 and 83.2.1); CFLEA STANDARDS, *supra* note 17, at 35:2 (Standard 35.01).

<sup>105</sup> *See supra* note 16.

<sup>106</sup> *See supra* note 17.

<sup>107</sup> FLA. STAT. § 943.34(1)-(6) (2006).

<sup>108</sup> ASCLD/LAB 2003 MANUAL, *supra* note 31, at 20-23; General Requirements for Accreditation (5.8.1), at [http://www.forquality.org/FQS-I%20Acc%20Docs/GRA\\_07\\_06.pdf](http://www.forquality.org/FQS-I%20Acc%20Docs/GRA_07_06.pdf) (last visited on Aug. 9, 2006).

<sup>109</sup> FSQM, *supra* note 33 (Standard 1.2).

<sup>110</sup> FDLE DNA QUALITY ASSURANCE SOPS, *supra* note 37; FDLE GOOD LABORATORY/ANALYTICAL PRACTICE SOPS, *supra* note 38, at 3.2, 3.5, 3.5.10, 3.5.24, 3.7.3, 3.7.5, 3.4.1.

<sup>111</sup> FSQM, *supra* note 33 (Standard 4.8). *See, e.g.*, Florida Department of Law Enforcement, Crime Laboratory Analyst, Minimum Qualifications, at <http://www.fdle.state.fl.us/CrimeLab/CLA%20Position.htm> (last visited on Aug. 9, 2006); Florida Department of Law Enforcement, Forensic Technologist, Minimum Qualifications, at <http://www.fdle.state.fl.us/CrimeLab/FT%20Position.htm> (last visited on Aug. 9, 2006).

<sup>112</sup> *See* FSQM, *supra* note 33 (Standards 3.3, 3.4, 3.5); FDLE SEROLOGY/DNA TRAINING PROGRAM, *supra* note 36 (on file with author).

also has internal standard operating procedures purportedly similar to those adopted by the FDLE,<sup>113</sup> which are designed to require the proper methods for collection, storage and testing of physical evidence in order to prevent contamination of such evidence.<sup>114</sup> Similarly, the four other unaffiliated crime laboratories—Broward County Sheriff’s Office Crime Laboratory, Palm Beach County Sheriff’s Office, Pinellas County Forensic Laboratory, and St. Lucie County’s Indian River Regional Crime Laboratory—also have written procedures and policies on the preservation of biological evidence.<sup>115</sup>

In conclusion, although all FDLE and unaffiliated crime laboratories have written procedures and policies which govern the preservation of biological evidence, it is unclear how many Florida law enforcement agencies, certified or otherwise, have adopted such procedures. Therefore, the State of Florida is only in partial compliance with Recommendation #3. We also note that even though all FDLE and unaffiliated crime laboratories have procedures and policies on the preservation of biological evidence, the ability of these laboratories to properly preserve and test such evidence is questionable. For a discussion on the validity and reliability of the work completed by these crime laboratories, see Chapter 4: Crime Laboratories and Medical Examiner Offices.<sup>116</sup>

#### *D. Recommendation #4*

**Every law enforcement agency should provide training programs and disciplinary procedures to ensure that investigative personnel are prepared and accountable for their performance.**

Florida statutory law mandates that every law enforcement officer complete a basic training course offered at a training academy certified by the Criminal Justice Standards and Training Commission.<sup>117</sup> The course must include instruction on: (1) protection and preservation of the crime scene to prevent contamination of evidence;<sup>118</sup> (2) the proper methods for identifying, collecting, packaging, labeling, and preserving fibers, hair, dental evidence, skeletal remains, and other bodily fluids, such as blood, saliva, urine, semen, perspiration, vaginal secretions, feces, and vomit, in order to prevent contamination and misidentification;<sup>119</sup> (3) proper procedures for documenting evidence

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<sup>113</sup> See Memorandum from Robert Parker, Director, Miami-Dade Police Department, to Israel Reyes, Circuit Court Judge, Eleventh Judicial Circuit (March 16, 2006) (on file with author).

<sup>114</sup> See *supra* notes 40-43.

<sup>115</sup> E-mail from Stephanie L. Stoiloff, Bureau Commander, Miami-Dade Police Department Crime Laboratory, to Israel Reyes, Circuit Court Judge, Eleventh Judicial Circuit (Aug. 4, 2006) (on file with author).

<sup>116</sup> See *infra* pp. 83-105.

<sup>117</sup> The law enforcement candidate must successfully complete a commission-approved basic recruit training program for the applicable criminal justice discipline unless exempted. FLA. STAT. § 943.13(9) (2006); FLA. ADMIN. CODE R. 11B-35.002 (2006) (administrative rule providing for a basic training course at a training academy authorized by the Criminal Justice Standards and Training Commission).

<sup>118</sup> BASIC RECRUIT CURRICULUM, *supra* note 13, module 7, unit 2, lesson 5.

<sup>119</sup> *Id.*

collection and chain of custody;<sup>120</sup> and (4) the transportation of evidence to laboratories from evidence-holding facilities.<sup>121</sup>

Additionally, law enforcement agencies in Florida certified under CALEA and/or CFLEA are required to establish written directives requiring a training program<sup>122</sup> and an annual, documented performance evaluation of each employee.<sup>123</sup> The FDLE has established its own thirteen-month training program for serology/DNA technicians and support staff, which instructs these officials on, among other things: (1) the proper handling and screening of sexual assault kits and other evidence that may contain semen, saliva, blood, nail scrapings, or hair samples; and (2) quality control training regarding sterilization of instruments and reagents.<sup>124</sup> The FDLE also has adopted quality assurance procedures; for example, it has a standard operating procedure that provides, upon completion of services and filing of a written report, a technical and administrative “review of all cases . . . to ensure that documentation within the file complies with current written . . . procedures.”<sup>125</sup> Additionally, both the Miami-Dade Police Department and its crime laboratory utilize similar practices to provide technical and administrative review of all case reports.<sup>126</sup>

In conclusion, all law enforcement investigative personnel receive mandatory basic training on proper techniques for the collection, packaging, and identification of different types of evidence, as well as proper methods to avoid contamination or destruction of physical evidence. Additionally, FDLE crime laboratories and the Miami-Dade Police Department and its crime laboratory each have standard operating procedures, which outline methods for administrative and technical review of all crime laboratory analysts’ work product. However, the adopted procedures on administrative and technical review only apply to FDLE crime laboratories and to the Miami-Dade Police Department and its crime laboratory. It is unclear whether other Florida law enforcement agencies and crime laboratories have established similar procedures. Therefore, the State of Florida is only in partial compliance with Recommendation #4.

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<sup>120</sup> *Id.* at module 7, unit 2, lesson 6.

<sup>121</sup> *Id.* at module 7, unit 2, lesson 7.

<sup>122</sup> CALEA STANDARDS, *supra* note 18, at 33-3 to 33-4 (Standards 33.4.1, 33.4.2); CFLEA STANDARDS, *supra* note 17, at 4:3, 14:5 (Standards 4.03 and 14.08).

<sup>123</sup> CALEA STANDARDS, *supra* note 18, at 35-1 (Standard 35.1.2); CFLEA STANDARDS, *supra* note 17, at 16:2 (Standard 16.02).

<sup>124</sup> FDLE SEROLOGY/DNA TRAINING PROGRAM, *supra* note 36.

<sup>125</sup> FLA. DEP’T OF LAW ENFORCEMENT, BIOLOGY SECTION, TECHNICAL AND ADMINISTRATIVE REVIEW OF CASE FILES STANDARD OPERATING PROCEDURE 1.0 (2005) (on file with author). The administrative review verifies documentation of non-analytical aspects of the written report while the technical review verifies that the analytical procedures performed agree with internal procedures and the results of the DNA testing performed are scientifically valid and consistent with the tests and procedures performed. *Id.*

<sup>126</sup> *See* Memorandum from Robert Parker, Director, Miami-Dade Police Department, to Israel Reyes, Circuit Court Judge, Eleventh Judicial Circuit (March 16, 2006) (on file with author).

*E. Recommendation #5*

**Ensure that there is adequate opportunity for citizens and investigative personnel to report misconduct in investigations.**

Law enforcement agencies in Florida certified under CALEA and/or CFLEA are required to establish written directives requiring written investigative procedures for all complaints against the agency and/or its employees.<sup>127</sup> It appears, therefore, that certified law enforcement agencies should have adopted written directives governing complaints against the agency and/or its employees, but the extent to which these procedures comply with Recommendation #5 is unknown.

*F. Recommendation # 6*

**Provide adequate funding to ensure the proper preservation and testing of biological evidence.**

The amount of funding specifically dedicated to the preservation of biological evidence is unknown. However, it appears that the costs associated with preserving and storing evidence are absorbed by the evidence-holding agency.<sup>128</sup>

In terms of funding for testing, we were able to obtain the total amount of funding provided to Florida for *all* crime laboratory services. For Fiscal Year 2005-06, the Florida Legislature appropriated \$37,287,156 for these services.<sup>129</sup> In addition to the state funding, in 2004, the Department of Justice awarded \$8.7 million to Florida DNA testing agencies, including the Florida Department of Law Enforcement (FDLE), the Miami-Dade Police Department, and the Broward County and Palm Beach County crime laboratories.<sup>130</sup>

Even with this funding, however, it appears that Florida's crime laboratories are all overburdened with an increasing caseload, adding to a pre-existing backlog of cases.<sup>131</sup>

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<sup>127</sup> CALEA STANDARDS, *supra* note 18, at 52-1 (Standard 52.1.1); CFLEA STANDARDS, *supra* note 17, at 27:2 (Standard 27.01).

<sup>128</sup> Fla. House of Representatives, Government Operations Committee, Video Recording of Hearing on H.B. 61 and H.B. 71 (August 19, 2005). Although the Association of Court Clerks did not register any objection to holding evidence until the completion of an inmate's sentence, Sue Livingston, Director of Laboratory Systems at the FDLE, did testify that law enforcement agencies that hold evidence may incur additional administrative burden because there is currently no mechanism in place to notify an evidence-holding agency when an inmate's sentence is completed, triggering the ability for the agency to go forward with destruction of remaining physical evidence. *Id.*

<sup>129</sup> Florida Legislature, Office of Program Policy Analysis and Government Accountability, Department of Law Enforcement, Criminal Investigations and Forensic Science, at <http://www.oppaga.state.fl.us/profiles/1061/> (last visited on Aug. 3, 2006).

<sup>130</sup> See U.S. Dep't of Justice, Office of Justice Programs, Press Release, at [http://www.ojp.usdoj.gov/pressreleases/DNA\\_FL.htm](http://www.ojp.usdoj.gov/pressreleases/DNA_FL.htm) (last visited on Aug. 3, 2006). For a description of the DNA Initiative, see U.S. Dep't of Justice, The President's DNA Initiative, at <http://www.dna.gov/info/> (last visited on Aug. 3, 2006).

<sup>131</sup> Florida Legislature, Office of Program Policy Analysis and Government Accountability, Department of Law Enforcement, Criminal Investigations and Forensic Science, at

Within the last three years, the FDLE's DNA lab services have had a 27 percent increase in requests for DNA analysis.<sup>132</sup> Given the increase in requests for services and the growing backlog, FDLE has had to "outsource backlogged cases and has transferred incoming serology/DNA cases among different labs."<sup>133</sup> In light of this information, it is questionable whether the FDLE is provided with adequate funding to ensure the proper preservation and testing of biological evidence.

Additionally, even apart from the backlog, the services provided by FDLE laboratories appear to be somewhat limited. Specifically, FDLE laboratories do not perform Mitochondrial or Y-STR testing, which is necessary for most old, degraded evidence.<sup>134</sup>

Based on this information, it is questionable whether the State of Florida provides adequate funding to ensure the proper preservation and testing of biological evidence. Still, we were unable to gather sufficient information to appropriately assess whether the State of Florida is in compliance with Recommendation #6.

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<http://www.oppaga.state.fl.us/profiles/1061/> (last visited on Aug. 3, 2006); *see also* E-mail from Stephanie L. Stoiloff, Bureau Commander, Miami-Dade Police Department Crime Laboratory, to Israel Reyes, Circuit Court Judge, Eleventh Judicial Circuit (Aug. 4, 2006) (on file with author).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Memorandum from Jenny Greenberg to Mark Schlakman (Aug. 21, 2006) (on file with author).



## CHAPTER THREE

### LAW ENFORCEMENT IDENTIFICATIONS AND INTERROGATIONS

#### INTRODUCTION TO THE ISSUE

Eyewitness misidentification and false confessions are two of the leading causes of wrongful convictions. Between 1983 and 2003, approximately 199 previously convicted “murderers” were exonerated nationwide.<sup>1</sup> In about 50 percent of these cases, there was at least one eyewitness misidentification, and 21 percent involved false confessions.<sup>2</sup>

#### Lineups and Showups

Numerous studies have shown that the manner in which lineups and showups are conducted affects the accuracy of eyewitness identification. To avoid misidentification, the group should include foils chosen for their similarity to the witness’ description,<sup>3</sup> and the administering officer should be unaware of the suspect’s identity and should tell the witness that the perpetrator may not be in the lineup. Caution in administering lineups and show-ups is especially important because flaws may easily taint later lineup and at-trial identifications.<sup>4</sup>

Law enforcement agencies should consider using a sequential lineup or photospread, rather than presenting everyone to the witness simultaneously.<sup>5</sup> In the sequential approach, the witness views one person at a time and is not told how many persons s/he will see.<sup>6</sup> As each person is presented, the eyewitness states whether or not it is the perpetrator.<sup>7</sup> Once an identification is made in a sequential procedure, the procedure stops.<sup>8</sup> The witness thus is encouraged to compare the features of each person viewed to the witness’ recollection of the perpetrator rather than comparing the faces of the various people in the lineup or photospread to one another in a quest for the “best match.”

Law enforcement agencies also should videotape or digitally record identification procedures, including the witness’ statement regarding his/her degree of confidence in the identification. In the absence of a videotape or digital recorder, law enforcement agencies should photograph and prepare a detailed report of the identification procedure.

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<sup>1</sup> See Samuel R. Gross et al., *Exonerations in the United States, 1989 through 2003* (2004), available at <http://www.law.umich.edu/NewsAndInfo/exonerations-in-us.pdf> (last visited on Jan. 6, 2006).

<sup>2</sup> See *id.*

<sup>3</sup> See C.E. Luus and G.L. Wells, *Eyewitness Identification and the Selection of Distracters for Lineups*, 15 L. & Hum. Behavior 43-57 (1991).

<sup>4</sup> See BRYAN CUTLER, *EYEWITNESS TESTIMONY: CHALLENGING YOUR OPPONENT’S WITNESSES* 13-17, 42-44 (2002).

<sup>5</sup> *Id.* at 39; see also THE REPORT TO THE LEGISLATURE OF THE STATE OF ILLINOIS: THE ILLINOIS PILOT PROGRAM ON SEQUENTIAL DOUBLE-BLIND IDENTIFICATION PROCEDURES (March 17, 2006), available at <http://www.chicagopolice.org/IL%20Pilot%20on%20Eyewitness%20ID.pdf> (last visited on Aug. 21, 2006) (calling into some doubt the benefits of sequential lineups over simultaneous lineups).

<sup>6</sup> See CUTLER, *supra* note 4, at 39.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

### Audio or Videotaping of Custodial Interrogations

Electronically recording interrogations from their outset—not just from when the suspect has agreed to confess—can help avoid erroneous convictions. Complete recording is on the increase in this country and around the world. Those law enforcement agencies that make complete recordings have found the practice beneficial to law enforcement.<sup>9</sup> Complete recording may avert controversies about what occurred during an interrogation, deter law enforcement officers from using dangerous and/or prohibited interrogation tactics, and provide courts with the ability to review the interrogation and the confession.

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<sup>9</sup> See Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127 (2005).

## I. FACTUAL DISCUSSION

The State of Florida does not require law enforcement agencies to adopt special procedures on identifications and interrogations. However, it does require all law enforcement officials to take a basic training course, regulated by the Criminal Justice Standards and Training Commission. Also, a number of law enforcement agencies have voluntarily obtained national accreditation through the Commission on Accreditation for Law Enforcement Agencies, Inc., and local accreditation through the Commission for Florida Law Enforcement Accreditation, Inc., which both require these agencies to develop procedures for identifying suspects during investigations. Lastly, Florida case law governs all pre-trial identifications and interrogations conducted by law enforcement officers.

### A. *Florida Criminal Justice Standards and Training Commission*

The Florida Criminal Justice Standards and Training Commission (CJSTC) is the regulatory body that oversees the training of law enforcement candidates.<sup>10</sup> It offers a mandatory course consisting of 756 hours of training,<sup>11</sup> including instruction in such relevant areas as constitutional law,<sup>12</sup> interviewing,<sup>13</sup> and taking statements,<sup>14</sup> but does not appear to include any specific training on how to conduct identification procedures. However, the training course does discuss the advantages of video recording interviews and interrogations.<sup>15</sup> In addition to the training course, law enforcement candidates must meet certain criteria<sup>16</sup> and pass an examination.<sup>17</sup>

### B. *Law Enforcement Accreditation Programs*

#### 1. Commission on Accreditation for Law Enforcement Agencies, Inc.

Fifty-eight<sup>18</sup> police departments, sheriff's departments, state law enforcement agencies, transportation police departments, and university police departments in Florida have been

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<sup>10</sup> FLA. STAT. §§ 943.11, 943.12 (2006)

<sup>11</sup> Telephone Interview with Dwight Floyd, Training Manager, Florida Department of Law Enforcement (Oct. 21, 2005).

<sup>12</sup> CRIMINAL JUSTICE STANDARDS AND TRAINING COMMISSION, LAW ENFORCEMENT BASIC RECRUIT CURRICULUM, module 1, unit 3 (2005) [hereinafter BASIC RECRUIT CURRICULUM] (on file with author).

<sup>13</sup> *Id.* at module 1, unit 15.

<sup>14</sup> *Id.* at module 1, unit 16.

<sup>15</sup> *Id.* at module 1, unit 3, lesson 1.

<sup>16</sup> FLA. STAT. § 943.13 (2006). One must (1) be at least nineteen years of age; (2) be a citizen of the United States; (3) have obtained a high school diploma or the recognized equivalent; (4) not have been convicted of a felony or misdemeanor involving perjury or false statements; (5) be fingerprinted for a background check; (6) have passed a physical examination; and (7) possess good moral character. *Id.*

<sup>17</sup> FLA. STAT. § 943.13(10) (2006). The law enforcement candidate must obtain an acceptable score on the officer certification examination for the applicable criminal justice discipline. *Id.*

<sup>18</sup> CALEA Online, Agency Search, at <http://www.calea.org/agcysearch/agencysearch.cfm> (last visited on Aug. 3, 2006) (using second search function and designating "U.S." and "Florida" as search criteria to determine the number of agencies that have earned or are in the process of earning accreditation from CALEA's Law Enforcement Accreditation Program).

accredited or are in the process of obtaining accreditation by the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA), which is an independent accrediting authority established by the four major law enforcement membership associations in the United States.<sup>19</sup>

To obtain accreditation, a law enforcement agency must complete a comprehensive process consisting of (1) purchasing an application; (2) executing an Accreditation Agreement and submitting a completed application; (3) completing an Agency Profile Questionnaire; (4) completing a thorough self-assessment to determine whether the law enforcement agency complies with the accreditation standards and developing a plan to come into compliance; and (5) participating in an on-site assessment by a team selected by the Commission to determine compliance who, in turn, will submit a compliance report to the Commission.<sup>20</sup> After completion of these steps, a hearing is held to render a final decision on accreditation.<sup>21</sup> The CALEA standards are used to “certify various functional components within a law enforcement agency—Communications, Court Security, Internal Affairs, Office Administration, Property and Evidence, and Training.”<sup>22</sup> Specifically, CALEA Standard 42.2.3 requires the creation of a written directive that “establishes steps to be followed in conducting follow-up investigations . . . [including] identifying and apprehending suspects.”<sup>23</sup>

## 2. Commission for Florida Law Enforcement Accreditation, Inc.

In 1993, the Florida Legislature directed the Florida Sheriffs Association and the Florida Police Chiefs Association to create a voluntary law enforcement accreditation program.<sup>24</sup> Representatives of these organizations developed the Commission for Florida Law Enforcement Accreditation, Inc. (CFLEA).<sup>25</sup> Obtaining accreditation by CFLEA is a five-step process consisting of (1) an application; (2) compliance with at least 80 percent of the non-mandatory standards; (3) an assessment by a CFLEA assessment team of the agency’s compliance with all of the mandatory standards; and (4) assistance from CFLEA and/or other law enforcement agencies to come into compliance with the mandatory standards, if necessary.<sup>26</sup> Once accredited, such accreditation lasts for three

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<sup>19</sup> CALEA Online, About CALEA, at <http://www.calea.org/newweb/AboutUs/Aboutus.htm> (last visited on Nov. 3, 2005) (noting that the Commission was established by the International Association of Chiefs of Police (IACP), National Organization of Black Law Enforcement Executives (NOBLE), National Sheriffs’ Association (NSA), and Police Executive Research Forum (PERF)).

<sup>20</sup> CALEA Online, The Accreditation Process, at <http://www.calea.org/newweb/accreditation%20Info/process1.htm> (last visited on Aug. 3, 2005).

<sup>21</sup> *Id.*

<sup>22</sup> COMM’N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, INC., STANDARDS FOR LAW ENFORCEMENT AGENCIES, THE STANDARDS MANUAL OF THE LAW ENFORCEMENT AGENCY ACCREDITATION PROGRAM, at v (4<sup>th</sup> ed. 2001) [hereinafter CALEA STANDARDS].

<sup>23</sup> *Id.* at 42-3 (Standard 42.2.3).

<sup>24</sup> FLA. STAT. § 943.125 (1993).

<sup>25</sup> Commission for Florida Law Enforcement Accreditation, Inc., Introduction to Florida Law Enforcement Accreditation, at [http://www.flaccreditation.org/index\\_CFA.html](http://www.flaccreditation.org/index_CFA.html) (last visited on Aug. 3, 2006).

<sup>26</sup> Commission for Florida Law Enforcement Accreditation, Inc., Program Requirements and Assessors, at <http://www.flaccreditation.org/requirements.htm> (last visited on Aug. 3, 2006).

years.<sup>27</sup> One hundred twenty-nine police departments, sheriff's departments, state law enforcement agencies, state highway patrols, transportation police departments, training academies, and university police departments in Florida have obtained accreditation under the CFLEA standards.<sup>28</sup>

The CFLEA standards, mirroring one of the CALEA standards related to identifications and interrogations, include requirements that law enforcement agencies establish written directives addressing: (1) interviews with witnesses during preliminary investigations,<sup>29</sup> and (2) identifications of suspects during follow-up investigations.<sup>30</sup>

### *C. Law Enforcement Agency Policies and Procedures*

At least three local law enforcement agencies have adopted policies and procedures regarding identifications and interrogations.

#### 1. Jacksonville Sheriff's Office

Jacksonville Sheriff's Office has a policy requiring that a photospread contain at least six photographs, in color if possible, and that all participants in a lineup procedure should match "as closely as possible to the physical characteristics of the known or suspected subject."<sup>31</sup> Furthermore, the procedure should be "prepared and presented in such a way as not to influence the person viewing the photospread."<sup>32</sup>

#### 2. Orlando Police Department

An Orlando Police Department training procedure states that participants in a lineup "should share general physical characteristics with the suspect, and all care should be exercised to eliminate the chance that the suspect may be singled out by a witness/victim for some reason other than his/her identity."<sup>33</sup> The procedure also states that the officer should explain to the witness "that language such as 'I think' or 'It looks like' should not appear in any written statement if the witness is certain of the identity."<sup>34</sup>

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<sup>27</sup> *Id.*

<sup>28</sup> Commission for Florida Law Enforcement Accreditation, Inc., CFA Accredited Agencies, at <http://www.flaccreditation.org/CFA%20Accredited%20Agencies.htm> (last visited on Aug. 3, 2006); *see also* COMMISSION FOR FLA. LAW ENFORCEMENT ACCREDITATION: STANDARDS MANUAL (4<sup>th</sup> ed. 2004) [hereinafter CFLEA STANDARDS], available at <http://www.flaccreditation.org/standards.htm> (last visited on July 25, 2006) (click on "4th Edition Standards Manual").

<sup>29</sup> CFLEA STANDARDS, *supra* note 28, at 18:4 (Standard 18.04).

<sup>30</sup> *Id.* at 18:5 (Standard 18.05).

<sup>31</sup> JACKSONVILLE SHERIFF'S OFFICE, DETECTIVE DIVISION PROCEDURES OPERATIONAL ORDER 18.1.12.II(K)-(L) (2003) [hereinafter JACKSONVILLE PROCEDURES].

<sup>32</sup> *Id.*

<sup>33</sup> ORLANDO POLICE DEPARTMENT TRAINING BULLETIN, TB 93-5 (1993) [hereinafter ORLANDO TRAINING BULLETIN].

<sup>34</sup> *Id.*

### 3. Miami-Dade Police Department

The Miami-Dade Police Department requires that officers conducting identification procedures should note the conditions of the crime scene when the witness viewed the perpetrator, avoid saying or doing anything that might indicate who the suspect is, and keep witnesses separate from one another.<sup>35</sup> While “there is no mandatory minimum number of photos to be used in a display . . . at least six should be considered,” all of which are of “similar appearing subjects.”<sup>36</sup> This procedure also states that officers should photograph lineups or, if feasible, videotape them.<sup>37</sup>

#### *D. Constitutional Standards Relevant to Identifications and Interrogations*

Pre-trial witness identifications, such as those taking place during lineups, showups, and photo arrays, are governed by the constitutional due process guarantee of a fair trial.<sup>38</sup> A due process violation occurs and suppression of an out-of-court pre-trial identification is required where (1) the identification procedure employed by law enforcement was unnecessarily suggestive,<sup>39</sup> and (2) considering the totality of the circumstances, the suggestive procedure gave rise to a substantial likelihood of irreparable misidentification.<sup>40</sup> A court need only consider whether there was a substantial likelihood of irreparable misidentification if it first determines that the pre-trial identification procedures used by law enforcement were unnecessarily suggestive.<sup>41</sup>

In making the determination of whether, considering the totality of the circumstances, the use of an unnecessarily suggestive pre-trial identification procedure would lead to a substantial likelihood of irreparable misidentification and make the identification unreliable, the court should consider the following factors: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness’ degree of attention, (3) the accuracy of the witness’ prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation.<sup>42</sup>

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<sup>35</sup> MIAMI-DADE POLICE DEPARTMENT LEGAL GUIDELINES (2005) [hereinafter MIAMI-DADE GUIDELINES]

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *See Neil v. Biggers*, 409 U.S. 188, 196-99 (1972).

<sup>39</sup> *Id.*; *Rimmer v. State*, 825 So. 2d 304, 316 (Fla. 2002).

<sup>40</sup> *Neil*, 409 U.S. at 196-97; *Rimmer*, 825 So. 2d at 316.

<sup>41</sup> *Thomas v. State*, 748 So. 2d 970, 981 (Fla. 1999).

<sup>42</sup> *Neil*, 409 U.S. at 199; *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977). *Compare Harris v. State*, 857 So. 2d 317, 319 (Fla. 2d DCA 2003) (noting that because the only facts presented to bolster the reliability of the identification were that (1) a short amount of time had elapsed between the incident and the initial identification, and (2) the witness testified that the suspect had an indentation on his forehead, but that this indentation was not visible in the suspect’s picture in the photo array, the court held that the unnecessarily suggestive identification procedure created a “substantial likelihood of misidentification” and testimony regarding it was inadmissible) *with Rimmer*, 825 So. 2d at 316 (noting that the identification procedure was not unnecessarily suggestive and, even if it was, it had other indicia of reliability based on the facts that (1) three surviving witnesses stated that the identifying witness had the best opportunity to view the assailant; (2) the witness’s degree of attention was greater than the other witnesses because s/he was not told to lie face down on the floor and, instead, viewed the defendant for approximately twenty minutes; (3) the witness’s description appears to be an accurate depiction of the defendant, despite the fact that she

To determine the admissibility of an in-court identification, the court also will use these same factors to establish whether an in-court identification by a witness has a sufficient independent basis for reliability or whether it purely relies on the unnecessarily suggestive pre-trial procedure.<sup>43</sup> The prosecution must demonstrate this independent basis of reliability by clear and convincing evidence.<sup>44</sup>

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described the assailant as being much shorter than the defendant's actual height; (4) although she also chose another photo in addition to the defendant's, it does not affect her level of certainty because she claimed that the two photos looked alike; and (5) she viewed the photo-spread just six days after the robbery).

<sup>43</sup> See *Sepulveda v. State*, 362 So. 2d 324, 327 (Fla. 2d DCA 1978); see also *Edwards v. State*, 538 So. 2d 440, 442-43 (Fla. 1989).

<sup>44</sup> *Johnson v. State*, 717 So. 2d 1057, 1062-63 (Fla. 1st DCA 1998).

## II. ANALYSIS

### A. Recommendation #1

**Law enforcement agencies should adopt guidelines for conducting lineups and photospreads in a manner that maximizes their likely accuracy. Every set of guidelines should address at least the subjects, and should incorporate at least the social scientific teachings and best practices, set forth in the American Bar Association Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures (which has been reproduced below, in relevant part and with slight modifications).**

A number of law enforcement agencies in Florida have obtained certification by either or both CALEA and CFLEA. These programs, however, do not require the certified agencies to adopt specific guidelines for conducting lineups and photospreads in a manner that maximizes their likely accuracy. In fact, these standards merely provide a description of what must be accomplished by the agency and allow the agency latitude in determining how it will achieve compliance with each applicable standard. For example, Standard 18.05 of the CFLEA and Standard 42.2.3 of CALEA require law enforcement agencies to create a written directive that “establishes steps to be followed in conducting follow-up investigations,” including identifying suspects.<sup>45</sup>

While an individual law enforcement agency could create specific guidelines that mirror the requirements of the American Bar Association’s Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures (ABA Best Practices) in order to comply with Standard 18.05 of the CFLEA or Standard 42.2.3 of CALEA, we were unable to obtain sufficient information to ascertain whether Florida law enforcement agencies, certified or otherwise, are in compliance with the ABA Best Practices.

Regardless of whether the law enforcement agency has obtained certification, all pre-trial identification procedures administered by law enforcement agencies are ultimately subject to constitutional due process limitations. Thus, in assessing compliance with each ABA Best Practice, it is also necessary to discuss the Florida courts’ treatment of certain actions by law enforcement officials in administering pre-trial identification procedures.

#### 1. General Guidelines for Administering Lineups and Photospreads

- a. **The guidelines should require, whenever practicable, the person who conducts a lineup or photospread and all others present (except for defense counsel, when his or her presence is constitutionally required) should be unaware of which of the participants is the suspect.**

Numerous law enforcement agencies in Florida are certified by CFLEA and/or CALEA, which require these agencies to create a written directive that “establishes steps to be

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<sup>45</sup> CFLEA STANDARDS, *supra* note 28, at 18:5 (Standard 18.05); CALEA STANDARDS, *supra* note 22, at 42-3 (Standard 42.2.3).

followed in conducting follow-up investigations,” including identifying suspects.<sup>46</sup> Although the CFLEA and CALEA standards do not specifically require that officers present at a pre-trial identification be unaware of which participant is the suspect, a law enforcement agency complying with the CFLEA and CALEA standards could create such a guideline. However, none of the policies of local law enforcement agencies we were able to obtain (Jacksonville Sheriff’s Office, and the Orlando and Miami-Dade Police Departments)<sup>47</sup> recommend that the officer conducting the identification procedure be unaware of which of the participants is the suspect. Ultimately, we were unable to ascertain whether most law enforcement agencies, certified or otherwise, are complying with this particular ABA Best Practice.

- b. The guidelines should require that eyewitnesses should be instructed that the perpetrator may or may not be in the lineup; that they should not assume that the person administering the lineup knows who is the suspect; and that they need not identify anyone, but, if they do so, they will be expected to state in their own words how certain they are of any identification they make.**

The CFLEA and CALEA standards do not specifically require that certified agencies conducting pre-trial identification procedures instruct eyewitnesses that the perpetrator may or may not be in the lineup, that they should not assume the official administering the lineup knows who is the suspect, or that, although they need not identify anyone, any identification must be in their own words. A law enforcement agency complying with the CFLEA and CALEA standards, requiring the agency to establish steps for identifying suspects, could create a guideline that complies with this ABA Best Practice.

On the first and second issues, Florida courts have held that a statement by police to the identifying witness that the suspect is in the lineup or photospread does not, by itself, render the procedure impermissibly suggestive.<sup>48</sup> Additionally, the local law enforcement policies we obtained do not recommend against making this statement. On the third issue, cases in Florida illustrate witnesses stating either a percentage or general level of certainty in their identification,<sup>49</sup> but the local law enforcement policies we obtained are silent on this issue, except the Orlando Police Department’s, which cautions police to tell witnesses to avoid saying “I think” or “It looks like” when they are certain of their identification.<sup>50</sup>

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<sup>46</sup> CFLEA STANDARDS, *supra* note 28, at 18:5 (Standard 18.05); CALEA STANDARDS, *supra* note 22, at 42-3 (Standard 42.2.3).

<sup>47</sup> JACKSONVILLE PROCEDURES, *supra* note 31; ORLANDO TRAINING BULLETIN, *supra* note 33; MIAMI-DADE GUIDELINES, *supra* note 35.

<sup>48</sup> Rimmer v. State, 825 So. 2d 304, 317 (Fla. 2002); Green v. State, 641 So. 2d 391, 394-95 (Fla. 1994).

<sup>49</sup> See, e.g., Johnson v. State, 717 So. 2d 1057, 1061 (Fla. 1st DCA 1998) (noting that the witness stated that when she identified the defendant, she “just knew it was him, there wasn’t a doubt”); State v. Walker, 429 So. 2d 1301, 1304 (Fla. 4th DCA 1983) (noting that the witness, when identifying the defendant, answered in the affirmative to the question, “What level of certainty were you? In other words, were you absolutely a hundred percent positive?”)

<sup>50</sup> ORLANDO TRAINING BULLETIN, *supra* note 47.

Thus, it appears that Florida law enforcement agencies attempting to comply with the relevant CFLEA and CALEA standards or otherwise are not creating procedures that comply with all aspects of this ABA Best Practice.

## 2. Foil Selection, Number, and Presentation Methods

- a. **The guidelines should require that lineups and photospreads should use a sufficient number of foils to reasonably reduce the risk of an eyewitness selecting a suspect by guessing rather than by recognition.**
- b. **The guidelines should require that foils should be chosen for their similarity to the witness's description of the perpetrator, without the suspect standing out in any way from the foils and without other factors drawing undue attention to the suspect.**

A law enforcement agency complying with the CFLEA and CALEA standards, requiring the agency to establish steps for identifying suspects, could create a guideline that complies with this ABA Best Practice, and some appear to have done so.<sup>51</sup> Similarly, a review of relevant case law demonstrates that law enforcement officials generally prepare lineups or photospreads containing six people<sup>52</sup> and attempt to include a number of foils—participants who match the physical description of the perpetrator—in the lineup or photospread.<sup>53</sup>

Consistent with United States Supreme Court precedent, Florida courts have noted that showups are “inherently suggestive in that a witness is presented with only one suspect for identification.”<sup>54</sup> Florida courts have also held, however, that mere suggestiveness does not make testimony regarding a showup identification inadmissible without evidence that the identification was not based upon the independent recollection of the witness<sup>55</sup> or evidence that the procedure gave “rise to a substantial likelihood of irreparable misidentification under the totality of the circumstances.”<sup>56</sup> Indeed, Florida

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<sup>51</sup> See, e.g., JACKSONVILLE PROCEDURES, *supra* note 31 (noting that participants in the procedure should match “as closely as possible to the physical characteristics of the known or suspected subject,” and should be “prepared and presented in such a way as to not influence the person viewing the photospread”); ORLANDO TRAINING BULLETIN, *supra* note 33 (noting that participants in a lineup “should share general physical characteristics with the suspect, and all care should be exercised to eliminate the chance that the suspect may be singled out by a witness/victim for some reason other than his/her identity”).

<sup>52</sup> See, e.g., *Fitzpatrick v. State*, 900 So. 2d 495, 518-19 (Fla. 2005) (noting a six-man photographic lineup); *Green*, 641 So. 2d at 394-95 (noting that the defendant was chosen from a six-man photographic lineup).

<sup>53</sup> See, e.g., *Fitzpatrick*, 900 So. 2d at 518-19 (noting that the photospread contained men all with beards similar to that of the defendant); *Green*, 641 So. 2d at 394-95 (noting that all six men in the lineup had similar characteristics); *Rose v. State*, 472 So. 2d 1155, 1157 (Fla. 1985) (noting that the other participants in the photospread, like the defendant, all had long hair, a beard, and a mustache).

<sup>54</sup> *Blanco v. State*, 452 So. 2d 520, 524 (Fla. 1984).

<sup>55</sup> *Lassiter v. State*, 858 So. 2d 1134, 1135 (Fla. 5th DCA 2003).

<sup>56</sup> *Blanco*, 452 So. 2d at 524. The court will evaluate the same factors from *Neil* to determine whether the showup leads to a substantial likelihood of irreparable misidentification. *State v. Hernandez*, 841 So. 2d 469, 472 (Fla. 3d DCA 2002). The factors are: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness’ degree of attention, (3) the accuracy of the witness’ prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the

courts have routinely found one-person showups or one-person voice identifications to be reasonable, holding that despite their inherent suggestiveness, they presented no likelihood of irreparable misidentification under the totality of the circumstances.<sup>57</sup> Florida courts have failed to find lineup and photo array procedures impermissibly suggestive even where the suspect/defendant was the only participant appearing with a certain complexion,<sup>58</sup> hair style,<sup>59</sup> hair color,<sup>60</sup> or the defendant was the only participant appearing with a certain color prison suit.<sup>61</sup> Similarly, the simple fact that the defendant was the only participant in both a photospread and an in-person lineup does not render the pre-trial identification procedures impermissibly suggestive.<sup>62</sup>

Thus, it appears that, while some Florida law enforcement agencies are attempting to comply with this ABA Best Practice, we were unable to ascertain whether all Florida law enforcement agencies are complying with this ABA Best Practice.

### 3. Recording Procedures

- a. **The guidelines should require that, whenever practicable, the police should videotape or digitally video record lineup procedures, including the witness confidence statements and any statements made to the witness by the police.**
- b. **The guidelines should require that, absent videotaping or digital video recording, a photograph should be taken of each lineup and a detailed record made describing with specificity how the entire procedure (from start to finish) was administered, also noting the**

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length of time between the crime and the confrontation. *Id.* (concluding that, based on the *Neil* factors, the suggestive showup did not lead to a substantial likelihood of irreparable misidentification).

<sup>57</sup> See, e.g., *Blanco*, 452 So. 2d at 524 (holding that the showup was valid because it was done at the scene of the crime and the witness only identified the defendant as wearing the same clothes as the perpetrator); *Hernandez*, 841 So. 2d at 472 (holding that the showup was valid because the witness had a “reasonable opportunity to view the defendant” and made the identification only minutes after the incident and viewed the perpetrator most of the incident); *Lassiter*, 858 So. 2d at 1136 (holding that the showup was valid because it was done within three hours of the incident and the witness identified the defendant immediately).

<sup>58</sup> See *Johnson v. State*, 438 So. 2d 774, 777 (Fla. 1983) (holding that the fact that only the defendant had a suntan in the lineup did not render the procedure impermissibly suggestive).

<sup>59</sup> See *Gonzalez v. State*, 713 So. 2d 1065, 1066 (Fla. 2d DCA 1998) (holding that, although the procedure could have included more participants with receding hairlines similar to that of the defendant, the procedure was nonetheless not impermissibly suggestive). *But see Judd v. State*, 402 So. 2d 1279, 1281 (Fla. 4th DCA 1981) (holding that the fact that the defendant was the only participant in the lineup to appear with braided hair was impermissibly suggestive, but that this suggestiveness did not lead to a substantial likelihood of irreparable misidentification under the totality of the circumstances).

<sup>60</sup> See *Johnson*, 438 So. 2d at 777 (holding that the fact that the defendant was the only participant in the lineup with blonde hair did not render the procedure impermissibly suggestive).

<sup>61</sup> See *id.* (holding that the fact that the defendant was the only participant in the lineup with a lighter blue prison suit did not render the procedure impermissibly suggestive). However, at least one court has found that where the defendant was the only participant in the procedure appearing with a bare chest, such a procedure was impermissibly suggestive. *Judd*, 402 So. 2d at 1281 (holding, however, that this suggestiveness did not lead to a substantial likelihood of irreparable misidentification under the circumstances).

<sup>62</sup> See *Rimmer v. State*, 825 So. 2d 304, 317 (Fla. 2002).

**appearance of the foils and of the suspect and the identities of all persons present.**

The CFLEA and CALEA standards do not specifically require that certified agencies conducting pre-trial identification procedures video or digitally record the witness' confidence statement and any law enforcement statements made to witnesses or, in the absence of video recording, that law enforcement officials should photograph the lineup. A law enforcement agency complying with the CFLEA and CALEA standards, requiring the agency to establish steps for identifying suspects, could create a guideline that complies with this ABA Best Practice. At least one agency, the Miami-Dade Police Department, requires the conducting officer to photograph the procedure and, where feasible, videotape it.<sup>63</sup>

Thus, it appears that, while at least one Florida law enforcement agency is attempting to comply with this ABA Best Practice, we were unable to ascertain whether all Florida law enforcement agencies are complying with this ABA Best Practice.

- c. The guidelines should require that, regardless of the fashion in which a lineup is memorialized, and for all other identification procedures, including photospreads, the police shall, immediately after completing the identification procedure and in a non-suggestive manner, request witnesses to indicate their level of confidence in any identification and ensure that the response is accurately documented.**

The CFLEA and CALEA standards do not specifically require that certified agencies conducting pre-trial identification procedures request, in a non-suggestive manner, that the witness indicate his/her level of confidence in any identification and document that statement accurately. A law enforcement agency complying with the CFLEA and CALEA standards, requiring the agency to establish steps for identifying suspects, could create a guideline that complies with this ABA Best Practice.

A review of Florida case law indicates at least one instance of a witness being instructed by the attending police officer that she should only make an identification from a photospread if she was “a hundred percent sure that that was the person who had” committed the crime.<sup>64</sup> Additionally, numerous cases demonstrate witnesses indicating a percentage or general level of confidence in their identification.<sup>65</sup> At least one local law enforcement agency also cautions police to tell witnesses to avoid saying “I think” or “It looks like” when they are certain of their identification.<sup>66</sup>

Despite this information, we were unable to ascertain whether Florida law enforcement agencies attempting to comply with the relevant CFLEA and CALEA standards are creating procedures that comply with this ABA Best Practice.

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<sup>63</sup> MIAMI-DADE GUIDELINES, *supra* note 35.

<sup>64</sup> *See Johnson v. State*, 717 So. 2d 1057, 1060 (Fla. 1st DCA 1998).

<sup>65</sup> *See supra* note 49 and accompanying text.

<sup>66</sup> ORLANDO TRAINING BULLETIN, *supra* note 33.

#### 4. Immediate Post-Lineup or Photospread Procedures

- a. **The guidelines should require that police and prosecutors should avoid at any time giving the witness feedback on whether he or she selected the “right man”—the person believed by law enforcement to be the culprit.**

The CFLEA and CALEA standards do not specifically require that certified agencies conducting pre-trial identification procedures avoid giving the witness feedback on whether s/he selected the proper suspect. A law enforcement agency complying with the CFLEA and CALEA standards, requiring the agency to establish steps for identifying suspects, could create a guideline that complies with this ABA Best Practice. However, none of the policies we obtained address this issue.

In at least one Florida case, the Florida Supreme Court did identify improper feedback given to the witness. Specifically, in *Rimmer v. State*,<sup>67</sup> the witness chose two pictures from the photospread, one of which was the defendant.<sup>68</sup> After choosing the two pictures, the attending detective told the witness that another witness also chose the picture of the defendant.<sup>69</sup> The Court found that although the comment was improper, it did not taint the identification of the defendant, which was made prior to the comment.<sup>70</sup>

#### Conclusion

In conclusion, even though numerous law enforcement agencies should have adopted written directives to be in compliance with CFLEA and/or CALEA, the CFLEA and CALEA standards do not require agencies to adopt written directives as specific as the ABA Best Practices contained in Recommendation #1. Moreover, the written directives we obtained, from three major metropolitan law enforcement agencies, do not comply with each aspect of Recommendation #1. Additionally, Florida case law reveals a number of law enforcement practices related to pre-trial identifications that fail to comply with certain aspects of Recommendation #1. We were unable, however, to obtain sufficient information regarding these and other Florida law enforcement policies and practices to ascertain whether the State of Florida is in compliance with the requirements of Recommendation #1.

#### *B. Recommendation #2*

**Law enforcement officers and prosecutors should receive periodic training on how to implement the guidelines for conducting lineups and photospreads, as well as training on non-suggestive techniques for interviewing witnesses.**

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<sup>67</sup> 825 So. 2d 304 (2002).

<sup>68</sup> *Id.* at 317-18.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

The Florida Criminal Justice Standards and Training Commission's (CJSTC) basic training course curriculum clearly provides for instruction on avoiding suggestive methods of interviewing witnesses such as leading, specific, or threatening questions.<sup>71</sup> However, the basic training course does not appear to include any instruction on conducting pre-trial identification procedures.

The CFLEA and CALEA standards do not specifically require that certified agencies conducting pre-trial identification procedures receive periodic training on how to implement guidelines for such procedures, including training on non-suggestive techniques for interviewing witnesses. A law enforcement agency complying with the CFLEA and CALEA standards, requiring the agency to establish "a written directive that requires each sworn officer [to] receive annual training on legal updates,"<sup>72</sup> could create a training program that complies with Recommendation #2. We were, however, unable to sufficiently ascertain whether law enforcement agencies, certified or otherwise, are complying with this particular Recommendation.

Similar to the training offered to law enforcement officers, the Florida Prosecuting Attorneys Association, as well as a number of national organizations, offer numerous voluntary seminars each year, but we were unable to ascertain the extent to which any of these seminars provide training on implementing guidelines for conducting pre-trial identification procedures and non-suggestive methods for interviewing witnesses.<sup>73</sup>

Although law enforcement officials are required to receive basic training on non-suggestive interviewing techniques, we do not know whether prosecutors are required to receive similar training. Therefore, the State of Florida is only in partial compliance with Recommendation #2.

### *C. Recommendation #3*

**Law enforcement agencies and prosecutors offices should periodically update the guidelines for conducting lineups and photospreads to incorporate advances in social scientific research and in the continuing lessons of practical experience.**

As discussed under Recommendation #1, we were able to obtain procedures for conducting lineups and photospreads from three local law enforcement agencies. However, we were unable to ascertain whether these or other law enforcement agencies periodically update their guidelines. Similarly, we were unable to ascertain whether prosecutors offices have established such guidelines and whether they periodically update the guidelines. Therefore, we were unable to conclude with whether the State of Florida is in compliance with the requirements of Recommendation #3.

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<sup>71</sup> See BASIC RECRUIT CURRICULUM, *supra* note 12, at module 1, unit 15, lesson 2, p. 6-10; lesson 3, p. 10.

<sup>72</sup> CALEA STANDARDS, *supra* note 22, at 33-4 (Standard 33.5.1); see also CFLEA STANDARDS, *supra* note 28, at 14:6 (Standard 14.11M).

<sup>73</sup> Florida Prosecuting Attorneys Association, About the FPAA, at [http://www.fpaa.state.fl.us/updates/About\\_US.htm](http://www.fpaa.state.fl.us/updates/About_US.htm) (last visited on Aug. 3, 2006).

#### D. Recommendation #4

**Videotape the entirety of custodial interrogations of crime suspects at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical, audiotape the entirety of such custodial interrogations.**

As of July 18, 2005, twenty-three law enforcement agencies in Florida regularly record the entirety of all custodial interrogations.<sup>74</sup> These agencies use either audio or video recording equipment to record interviews of persons under arrest in an agency facility from the moment *Miranda*<sup>75</sup> warnings are given until the interview ends.<sup>76</sup> Additionally, the Jacksonville Sheriff's Office requires that "all homicide and serious life threatening assault suspect interviews" be audio or videotaped "unless extenuating circumstances exist."<sup>77</sup> While we commend these law enforcement agencies, the number of agencies that do memorialize custodial interrogations either through audio or videotape is far outweighed by the number of agencies that do not tape at all or only tape a portion of the custodial interrogation.

Additionally, the CJSTC basic training course, a requirement for all law enforcement officials in Florida, only states the relative advantages of video or audiotaping of the entire interview,<sup>78</sup> and does not require or even express a preference for video or audio recording of the interviews or interrogations.

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<sup>74</sup> E-mail from Thomas P. Sullivan, Esq., to Seth E. Miller, Project Attorney, ABA Death Penalty Moratorium Implementation Project (July 19, 2006). These law enforcement agencies are the Broward County Sheriff, the Cape Coral Police Department, the Collier County Sheriff, the Coral Springs Police Department, the Daytona Beach Police Department, the Ft. Lauderdale Police Department, the Ft. Myers Police Department, the Hallandale Beach Police Department, the Hialeah Police Department, the Hollywood Police Department, the Kissimmee Police Department, the Lee County Sheriff, the Manatee County Sheriff, the Margate Police Department, the Miami-Dade Police Department, the Mount Dora Police Department, the Orange County Sheriff, the Osceola County Sheriff, the Palatka Police Department, Pembroke Pines Police Department, the Pinellas County Sheriff, the Port Orange Police Department, and the St. Petersburg Police Department. *Id.*; see also Thomas P. Sullivan, *Police Experiences with Recording Custodial Interrogations*, 1 CENTER ON WRONGFUL CONVICTIONS SPEC. REP., at A5 (2004), available at <http://www.law.northwestern.edu/depts/clinic/wrongful/documents/SullivanReport.pdf> (last visited on July 28, 2006).

<sup>75</sup> *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (holding that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination).

<sup>76</sup> See Sullivan, *supra* note 74, at 5. This report, however, does not include departments that conduct unrecorded interviews followed by recorded confessions or recordings made outside a police station or lockup, such as at crime scenes or in squad cars. *Id.*

<sup>77</sup> JACKSONVILLE PROCEDURES, *supra* note 31. The procedure specifically prohibits taping the entire interview and states instead that only "a summary/recap of the interview" should be taped. *Id.* During this summary, the detective is required to ask the suspect whether any promises have been made, whether s/he was threatened or coerced in any manner, and whether s/he has been advised of *Miranda* rights, which also is to be a part of the taped "summary." *Id.* Once started, the tape is to run without interruption "until completion." *Id.*

<sup>78</sup> BASIC RECRUIT CURRICULUM, *supra* note 12, at module 1, unit 15, lesson 4, p. 3.

Based on this information, the State of Florida is only in partial compliance with Recommendation #4.

*E. Recommendation #5*

**Ensure adequate funding to ensure proper development, implementation, and updating of policies and procedures relating to identifications and interrogations.**

We were unable to ascertain whether the State of Florida provides adequate funding to ensure the proper development, implementation and updating of procedures for identifications and interrogations. Therefore, we cannot determine whether the State of Florida is in compliance with Recommendation #5.

*F. Recommendation #6*

**Courts should have the discretion to allow a properly qualified expert to testify both pre-trial and at trial on the factors affecting eyewitness accuracy.**

The Florida Supreme Court has adopted the majority position among both federal and state courts that the “admissibility of expert testimony regarding the reliability of eyewitness testimony is left to the sound discretion of the trial judge.”<sup>79</sup> The State of Florida, therefore, is in compliance with Recommendation #6.

*G. Recommendation #7*

**Whenever there has been an identification of the defendant prior to trial, and identity is a central issue in a case tried before a jury, courts should use a specific instruction, tailored to the needs of the individual case, explaining the factors to be considered in gauging lineup accuracy.**

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<sup>79</sup> *McMullen v. State*, 714 So. 2d 368, 372 (Fla. 1998). *McMullen* clarified previous case law which stated:

Expert testimony should be excluded when the facts testified to are of such nature as not to require any special knowledge or experience in order for the jury to form its conclusions. We hold that a jury is fully capable of assessing a witness' ability to perceive and remember, given the assistance of cross-examination and cautionary instructions, without the aid of expert testimony. We find no abuse of discretion in the trial court's refusal to allow this witness to testify about the reliability of eyewitness identification.

*Johnson v. State*, 438 So. 2d 774, 777 (Fla. 1983). This holding and the holding of subsequent cases on the issue was interpreted as a categorical bar to the admission of such expert testimony. *McMullen*, 714 So. 2d at 372 (citing *McMullen v. State*, 660 So. 2d 340, 342 (Fla. 4th DCA 1995) (Farmer, J., concurring specially)). However, *McMullen* clarified that the decision to admit expert testimony, including testimony on the reliability of eyewitness identifications, was within the discretion of the trial court.

The State of Florida does not have a jury instruction that specifically provides the factors to be considered by the jury in gauging lineup accuracy. However, in cases in which expert testimony or other types of testimony is admitted, the *Florida Standard Jury Instructions in Criminal Cases* provides the jury with factors to consider when determining the reliability of such testimony.<sup>80</sup> The instruction pertaining to the reliability of testimony of witnesses states in relevant part:

It is up to you to decide what evidence is reliable.

...

You should consider how the witnesses acted, as well as what they said. Some things you should consider are:

1. Did the witness seem to have an opportunity to see and know the things about which the witness testified?
2. Did the witness seem to have an accurate memory?<sup>81</sup>

....

Although this instruction does not include specific factors for gauging lineup accuracy, it does allow the jury, in determining the reliability of the witness, to gauge the accuracy of the witness' memory of the defendant.<sup>82</sup> Therefore, the State of Florida is in partial compliance with the requirements of Recommendation #7.

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<sup>80</sup> FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES §§ 3.9, 3.9(a) (5th ed. 2005).

<sup>81</sup> FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 3.9 (5th ed. 2005) (noting that numbers 6 through 10 "should be included only as required by the evidence").

<sup>82</sup> *Id.*



## CHAPTER FOUR

### CRIME LABORATORIES AND MEDICAL EXAMINER OFFICES

#### INTRODUCTION TO THE ISSUE

With the increased reliance on forensic evidence—including DNA, ballistics, fingerprinting, handwriting comparisons, and hair samples—it is vital that crime laboratories and medical examiner offices, as well as forensic and medical examiners, provide expert, accurate results.

Despite the increased reliance on forensic evidence and those who collect and analyze it, the validity and reliability of work done by unaccredited and accredited crime laboratories have increasingly been called into serious question.<sup>1</sup> While the majority of crime laboratories and medical examiner offices, along with the people who work in them, strive to do their work accurately and impartially, a troubling number of laboratory technicians have been accused and/or convicted of failing to properly analyze blood and hair samples, reporting results for tests that were never conducted, misinterpreting test results in an effort to aid the prosecution, testifying falsely for the prosecution, failing to preserve DNA samples, or destroying DNA or other biological evidence. This has prompted internal investigations into the practices of several prominent crime laboratories and technicians, independent audits of crime laboratories, the re-examination of hundreds of cases, and the conviction of many innocent individuals.

The deficiencies in crime laboratories and the misconduct and incompetence of technicians have been attributed to the lack of proper training and supervision, the lack of testing procedures or the failure to follow such procedures, and inadequate funding.

In order to take full advantage of the power of forensic science to aid in the search for truth and to minimize its potential to contribute to wrongful convictions, crime labs and medical examiner offices must be accredited, examiners and lab technicians must be certified, procedures must be standardized and published, and adequate funding must be provided.

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<sup>1</sup> See Janine Arvizu, *Shattering the Myth: Forensic Laboratories*, 24 CHAMPION 18 (2000); Paul C. Giannelli, *The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories*, 4 VA. J. SOC. POL'Y & L. 439 (1997); Frederic Whitehurst, *Forensic Crime Labs: Scrutinizing Results, Audits & Accreditation—Part 1*, 28 CHAMPION 6 (2004); Frederic Whitehurst, *Forensic Crime Labs: Scrutinizing Results, Audits & Accreditation—Part 2*, 28 CHAMPION 16 (2004).

## I. FACTUAL DISCUSSION

### A. *Crime Laboratories*

In 1974, the State of Florida established a statewide criminal analysis laboratory system to “meet the needs of the criminal justice agencies.”<sup>2</sup> According to section 943.32 of the Florida Statutes, this system includes: (1) state-operated laboratories under the jurisdiction of the Florida Department of Law Enforcement; (2) “certain other crime laboratories presently in existence;” and (3) “such other laboratories as render criminal analysis laboratory services to criminal justice agencies in the state.”<sup>3</sup>

#### 1. Florida Department of Law Enforcement Crime Laboratories

The Florida Department of Law Enforcement (FDLE) has “full operational control” of all state-operated crime laboratories and has the power and the duty to: (1) establish policy and procedures to be employed by the laboratories; (2) establish standards of education and experience for professional and technical personnel employed by the laboratories; and (3) adopt internal procedures for the review and evaluation of laboratory services.<sup>4</sup> In light of these powers and duties, the FDLE has established the following: a Forensic Science Quality Manual,<sup>5</sup> standard operating procedures,<sup>6</sup> minimum qualification requirements for laboratory staff,<sup>7</sup> and training and certification programs for at least some laboratory staff.<sup>8</sup>

##### a. Location, Disciplines, and Responsibilities of FDLE Crime Laboratories

There are seven FDLE crime laboratories, which are located in “certain regions of the state where a distinct need for a significant level of laboratory services has been established.”<sup>9</sup> The seven regional FDLE laboratories include: (1) FDLE Daytona Regional Crime Laboratory, (2) FDLE Fort Meyers Regional Crime Laboratory, (3) FDLE Jacksonville Regional Crime Laboratory, (4) FDLE Orlando Regional Crime

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<sup>2</sup> FLA. STAT. § 943.31(1) (2006).

<sup>3</sup> FLA. STAT. §§ 943.31; 943.32(1)-(3) (2006).

<sup>4</sup> FLA. STAT. § 943.34(1)-(6) (2006).

<sup>5</sup> FLA. DEP’T OF LAW ENFORCEMENT, FORENSIC SCIENCE QUALITY MANUAL (2004) [hereinafter FSQM] (Standard 1.2).

<sup>6</sup> FLA. DEP’T OF LAW ENFORCEMENT, BIOLOGY SECTION, DNA QUALITY ASSURANCE STANDARD OPERATING PROCEDURES 1.0, 6.0, 7.0, 8.1.4 (2005) [hereinafter FDLE DNA QUALITY ASSURANCE SOPS] (on file with author).

<sup>7</sup> FSQM, *supra* note 5 (Standard 4.8). *See, e.g.*, Fla. Dept. of Law Enforcement, Crime Laboratory Analyst, at <http://www.fdle.state.fl.us/CrimeLab/CLA%20Position.htm> (last visited on Aug. 1, 2006); Fla. Dept. of Law Enforcement, Forensic Technologist, at <http://www.fdle.state.fl.us/CrimeLab/FT%20Position.htm> (last visited on Aug. 1, 2006).

<sup>8</sup> *See* FSQM, *supra* note 5 (Standards 3.3-3.5); FLA. DEP’T OF LAW ENFORCEMENT, CONVENTIONAL SEROLOGY AND DNA TRAINING PROGRAM (2002) [hereinafter FDLE SEROLOGY/DNA TRAINING PROGRAM] (on file with author).

<sup>9</sup> FLA. STAT. § 943.31(2) (2006).

Laboratory, (5) FDLE Pensacola Regional Crime Laboratory, (6) FDLE Tallahassee Regional Crime Laboratory, and (7) FDLE Tampa Regional Crime Laboratory.<sup>10</sup>

These laboratories together offer a variety of services within eleven disciplines—Biology, Chemistry, Computer Evidence Recovery, Crime Scene, Documents, Firearms, Gunshot Residue, Latent Prints/Automated Fingerprint Identification System (AFIS), Microanalysis, Toxicology, and Video Enhancement.<sup>11</sup> Each of the seven regional laboratories, however, only provides certain services within some of these disciplines.<sup>12</sup> The disciplines and services offered by the laboratories are:

- (1) FDLE Daytona Regional Crime Laboratory
  - Chemistry-Controlled Substance Identification
  - Crime Scene-Crime Scene Processing and Detect & Recover Buried Bodies
  - Gunshot Residue-Gunshot Residue Identification
  - Latent Prints/AFIS-Latent Print Identification & Comparison, Fingerprint Identification of Unknown Deceased, Footwear Impressions, and AFIS
- (2) FDLE Fort Meyers Regional Crime Laboratory
  - Chemistry-Controlled Substance Identification,
  - Crime Scene-Crime Scene Processing and Detect & Recover Buried Bodies
  - Latent Prints/AFIS-Latent Print Identification & Comparison, Fingerprint Identification of Unknown Deceased, Footwear Impressions, and AFIS
- (3) FDLE Jacksonville Regional Crime Laboratory
  - Biology-Identification of Body Fluid Stains, DNA, and Combined DNA Index System (CODIS)
  - Chemistry-Controlled Substance Identification
  - Crime Scene-Crime Scene Processing and Detect & Recover Buried Bodies
  - Firearms-Distance Determination, Firearms Examinations, Toolmark Identifications, Serial Number Restoration, and NIBIN
  - Latent Prints/AFIS-Latent Print Identification & Comparison, Fingerprint Identification of Unknown Deceased, Footwear & Tire Impressions, and AFIS
- (4) FDLE Orlando Regional Crime Laboratory
  - Biology-Identification of Body Fluid Stains, DNA, CODIS
  - Chemistry-Controlled Substance Identification

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<sup>10</sup> Fla. Dept. of Law Enforcement, Crime Laboratory Services, at <http://www.fdle.state.fl.us/CrimeLab/> (last visited on Aug. 1, 2006); FLA. STAT. § 943.32(1) (2006).

<sup>11</sup> FSQM, *supra* note 5 (Standard 1.2, app. 6.1); *see also* Florida Department of Law Enforcement, Laboratory Disciplines, at <http://www.fdle.state.fl.us/CrimeLab/LABORATORY%20DISCIPLINES.htm> (last visited on Aug. 1, 2006) (including only nine of the eleven disciplines).

<sup>12</sup> FSQM, *supra* note 5 (app. 6.1).

- Crime Scene-Crime Scene Processing, Detect & Recover Buried Bodies, and Bloodstain Pattern Analysis
  - Firearms-Distance Determination, Firearms Examinations, Toolmark Identifications, Serial Number Restoration and NIBIN
  - Latent Prints/AFIS-Latent Print Identification & Comparison, Fingerprint Identification of Unknown Deceased, Footwear & Tire Impressions, and AFIS
  - Microanalysis-Paint/Polymers, Glass, Fracture Match, and Bulb Filaments
  - Toxicology-Blood Alcohol Analysis, Urine Drug Analysis, Blood Drug Analysis, and Beverage Alcohol Analysis
- (5) FDLE Pensacola Regional Crime Laboratory
- Biology-Identification of Body Fluid Stains, DNA, and CODIS
  - Chemistry-Controlled Substance Identification
  - Crime Scene-Crime Scene Processing and Detect & Recover Buried Bodies
  - Documents
  - Firearms-Distance Determination, Firearms Examinations, Toolmark Identifications, Serial Number Restoration, and NIBIN
  - Latent Prints/AFIS-Latent Print Identification & Comparison, Fingerprint Identification of Unknown Deceased, Footwear Impressions, and AFIS
- (6) FDLE Tallahassee Regional Crime Laboratory
- Biology-Identification of Body Fluid Stains, DNA, CODIS, and DNA Database
  - Chemistry-Controlled Substance Identification
  - Computer Evidence Recovery-Computer Systems Examinations, Password Retrieval, and Computer Media
  - Crime Scene-Crime Scene Processing and Detect & Recover Buried Bodies
  - Firearms-Distance Determination, Firearms Examinations, Toolmark Identifications, Serial Number Restoration, and NIBIN
  - Latent Prints/AFIS-Latent Print Identification & Comparison, Fingerprint Identification of Unknown Deceased, Footwear & Tire Impressions, and AFIS
  - Toxicology-Blood Alcohol Analysis, Urine Drug Analysis, Blood Drug Analysis, and Beverage Alcohol Analysis
  - Video Enhancement
- (7) FDLE Tampa Regional Crime Laboratory
- Biology-Identification of Body Fluid Stains, DNA, and CODIS
  - Chemistry-Controlled Substance Identification
  - Computer Evidence Recovery-Computer Systems Examinations, Password Retrieval, and Computer Media
  - Crime Scene-Crime Scene Processing and Detect & Recover Buried Bodies

- Firearms-Distance Determination, Firearms Examinations, Serial Number Restoration, and NIBIN
- Latent Prints/AFIS-Latent Print Identification & Comparison, Fingerprint Identification of Unknown Deceased, Footwear & Tire Impressions, and AFIS
- Microanalysis-Fibers/Textiles and Fracture Match.<sup>13</sup>

FDLE laboratories are responsible for providing these laboratory services upon request to law enforcement officials in the state.<sup>14</sup> These laboratory services also are to be made available in limited circumstances to defendants in criminal cases.<sup>15</sup> However, the defendant or the local public defender is responsible for the costs associated with the laboratory services.<sup>16</sup>

#### b. Policies and Procedures Applicable to FDLE Crime Laboratories

The FDLE policies and procedures that are applicable to FDLE crime laboratories include, but are not limited to, the Forensic Science Quality Manual (FSQM), the minimum qualification and training/certification requirements for laboratory staff, and the standard operating procedures (SOPs).<sup>17</sup>

The FSQM is a compilation of policies and procedures applicable to Florida’s crime laboratories,<sup>18</sup> and it applies to all members of the FDLE that are engaged in “Forensic Science Services.”<sup>19</sup> The FSQM specifically includes, but is not limited to, quality assurance procedures (such as requiring the FDLE to develop and maintain standard operating procedures),<sup>20</sup> proficiency testing requirements,<sup>21</sup> validation requirements,<sup>22</sup> qualification requirements,<sup>23</sup> and training and certification requirements.<sup>24</sup> The FSQM and all other procedural manuals are available on the FDLE intranet.<sup>25</sup>

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<sup>13</sup> *Id.*

<sup>14</sup> FLA. STAT. § 943.33 (2006).

<sup>15</sup> *Id.* A defendant may avail him/herself of these services only upon a showing of good cause and upon an order of the court with jurisdiction in the case. *Id.* “Good cause” requires a finding by the court that: (1) the laboratory service being sought by the defendant is anticipated to produce evidence that is relevant and material to the defense, (2) the service sought is one which is reasonably within the capacity of the state-operated laboratory and will not be unduly burdensome upon the laboratory, and (3) the service cannot be obtained from any qualified private or nonstate operated laboratory within the state or otherwise reasonably available to the defense. *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> FSQM, *supra* note 5 (Standard 1.4).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* (Preface).

<sup>20</sup> *Id.* (Standard 2.1).

<sup>21</sup> *Id.* (Standard 2.9) (stating that all members of the laboratory system who are actively engaged in the analysis of forensic samples must undergo proficiency testing at least once each calendar year).

<sup>22</sup> *Id.* (Standard 2.11) (requiring all technical procedures and analytical instruments to be validated prior to use in casework).

<sup>23</sup> *Id.* (Standard 4.8).

<sup>24</sup> *See id.* (Standards 3.3-3.5)

<sup>25</sup> *Id.* (Standard 1.4).

### i. Standard Operating Procedures

The FDLE has established SOPs for each of the aforementioned eleven disciplines.<sup>26</sup> Similar to the FSQM, the FDLE SOPs include general laboratory procedures and guidelines to ensure the validity and reliability of all analyses.<sup>27</sup> The FDLE SOPs also include quality assurance procedures, proficiency testing requirements, and validation procedures.<sup>28</sup>

In addition to the FDLE SOPs, it appears that at least some, if not all, of the seven regional laboratories have adopted local SOPs for a number of the disciplines mentioned above.<sup>29</sup>

### ii. Minimum Qualification Requirements

The FSQM specifically requires the FDLE to establish position descriptions for members of the laboratory staff detailing their minimum qualification requirements, duties, and responsibilities.<sup>30</sup> The FDLE has established position descriptions for a number of laboratory staff, including, but not limited to: senior crime laboratory analysts,<sup>31</sup> crime laboratory analysts,<sup>32</sup> fingerprint analysts,<sup>33</sup> forensic technologists,<sup>34</sup> and crime laboratory technicians.<sup>35</sup> The position description for crime laboratory analysts, for example, requires them to have “a bachelor’s degree from an accredited college or

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<sup>26</sup> *Id.*

<sup>27</sup> *See, e.g.*, FLA. DEP’T OF LAW ENFORCEMENT, BIOLOGY SECTION, GOOD LABORATORY/ANALYTICAL PRACTICE STANDARD OPERATING PROCEDURES 1.0 (2005) [hereinafter FDLE GOOD LABORATORY/ANALYTICAL PRACTICE SOPS] (on file with author) (stating that the purpose of the SOP was to ensure that the “analyses . . . are done under optimum conditions producing scientifically valid results”); FLA. DEP’T OF LAW ENFORCEMENT, CRIME SCENE OPERATING PROCEDURES MANUAL 2 (2004) (stating that one of the goals of the manual is to “provide a quality product in the processing of crime scenes”).

<sup>28</sup> *See, e.g.* FDLE GOOD LABORATORY/ANALYTICAL PRACTICE SOPS, *supra* note 27, at 3.1-3.3, 3.5-3.6, 3.8-3.9; FDLE DNA QUALITY ASSURANCE SOPS, *supra* note 6, at 1.0, 6.0, 7.0, 8.1.4; FLA. DEP’T OF LAW ENFORCEMENT, BIOLOGY SECTION, TECHNICAL AND ADMINISTRATIVE REVIEW OF CASE FILES STANDARD OPERATING PROCEDURE 1.0 (2005) (on file with author).

<sup>29</sup> It appears that local procedures have been adopted in the following disciplines: Biology, Crime Scene, Computer Evidence Recovery, Latent Prints/AFIS, and Microanalysis.

<sup>30</sup> FSQM, *supra* note 5 (Standard 4.8).

<sup>31</sup> Fla. Dept. of Law Enforcement, Career Service Class Specification, Senior Crime Laboratory Analyst (1996) (on file with the author).

<sup>32</sup> *See* Fla. Dept. of Law Enforcement, Crime Laboratory Analyst, at <http://www.fdle.state.fl.us/CrimeLab/CLA%20Position.htm> (last visited on Aug. 1, 2006); Fla. Dept. of Law Enforcement, Career Service Class Specification, Crime Laboratory Analyst (2001) (on file with the author).

<sup>33</sup> Fla. Dept. of Law Enforcement, Career Service Class Specification, Fingerprint Analyst (1992) (on file with the author).

<sup>34</sup> For a list of the minimum qualifications for forensic technologists, see Fla. Dept. of Law Enforcement, Forensic Technologist, at <http://www.fdle.state.fl.us/CrimeLab/FT%20Position.htm> (last visited on Aug. 1, 2006).

<sup>35</sup> For a list of the minimum qualifications for crime laboratory technicians, see Fla. Dept. of Law Enforcement, Crime Laboratory Technician, at <http://www.fdle.state.fl.us/CrimeLab/CLT%20Position.htm> (last visited on Aug. 3, 2006); Fla. Dept. of Law Enforcement, Career Service Class Specification, Crime Laboratory Technician (1989) (on file with the author).

university with a major in forensic science, criminalistics or in a physical or natural science.”<sup>36</sup> However, “professional or technical experience in a forensic laboratory or in the identification and analysis of fingerprints can substitute on a year-for-year basis for the required college education.”<sup>37</sup>

### iii. Training/Certification Requirements

The FSQM also requires crime laboratory analysts to complete an approved training program in one or more of the forensic services<sup>38</sup> and attain certification prior to conducting independent casework.<sup>39</sup> It similarly recommends that forensic science technicians complete an approved training program.<sup>40</sup>

The FDLE has established a number of training programs particular to some of the eleven disciplines.<sup>41</sup> For example, serology/DNA technicians and support staff are required to take a thirteen-month training program on: (1) the proper handling and screening of sexual assault kits and other evidence that may contain semen, saliva, blood, nail scrapings or hair samples; and (2) quality control training regarding sterilization of instruments and reagents.<sup>42</sup>

## 2. Crime Laboratories Unaffiliated with the FDLE Crime Laboratories<sup>43</sup>

At least five counties in Florida have crime laboratories that are locally operated and not affiliated with FDLE crime laboratories.<sup>44</sup> These crime laboratories include: (1) Miami-

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<sup>36</sup> Fla. Dept. of Law Enforcement, Crime Laboratory Analyst, at <http://www.fdle.state.fl.us/CrimeLab/CLA%20Position.htm> (last visited on Aug. 1, 2006); Fla. Dept. of Law Enforcement, Career Service Class Specification, Crime Laboratory Analyst (2001) (on file with the author).

<sup>37</sup> Fla. Dept. of Law Enforcement, Career Service Class Specification, Crime Laboratory Analyst (2001) (on file with the author).

<sup>38</sup> FSQM, *supra* note 5 (Standard 3.3) (including a detailed description of the training program); *see also* Fla. Dept. of Law Enforcement, Crime Laboratory Analyst, at <http://www.fdle.state.fl.us/CrimeLab/CLA%20Position.htm> (last visited on Aug. 1, 2006); Fla. Dept. of Law Enforcement, Career Service Class Specification, Crime Laboratory Analyst (2001) (on file with the author) (noting that crime laboratory analysts are required to satisfactorily complete the Florida Department of Law Enforcement Crime Laboratory Analyst Training Program or a comparable training program from another forensic laboratory).

<sup>39</sup> FSQM, *supra* note 5 (Standard 3.5) (noting that certified analysts may maintain certification in a forensic service area by independently completing a minimum of five service requests per major area per calendar year and/or one service request per minor area per calendar year in addition to the required proficiency test(s)).

<sup>40</sup> *Id.* (Standard 3.4).

<sup>41</sup> *See, e.g.*, FDLE SEROLOGY/DNA TRAINING PROGRAM, *supra* note 8; Fla. Dep’t of Law Enforcement, Shooting Reconstruction Analyst Training Program (2005) (on file with author); Fla. Dep’t of Law Enforcement, Gunshot Residue (GSR) Training Program (1999) (on file with author).

<sup>42</sup> FDLE SEROLOGY/DNA TRAINING PROGRAM, *supra* note 8.

<sup>43</sup> This discussion will focus on local laboratories unaffiliated with the FDLE. In addition to the FDLE crime laboratories and the local, unaffiliated laboratories, there appear to be some federal laboratories located in Florida, such as the Southeast Laboratory of the Drug Enforcement Administration. *See* American Society of Crime Laboratory Directors, Laboratories Accredited by ASCLD/LAB, at <http://www.ascl-d-lab.org/legacy/aslblegacylaboratories.html#FL> (last visited on Aug. 3, 2006).

Dade Police Department Crime Laboratory,<sup>45</sup> (2) Broward County Sheriff's Office Crime Laboratory,<sup>46</sup> (3) Palm Beach County Sheriff's Office Crime Laboratory, (4) Pinellas County Sheriff's Office,<sup>47</sup> and (5) St. Lucie County's Indian River Regional Crime Laboratory.<sup>48</sup> These laboratories specialize in a number of different disciplines and offer a variety of services, such as DNA testing, firearm analysis, and latent fingerprint identification.<sup>49</sup> All of these laboratories also have written policies and procedures on the preservation of biological evidence.<sup>50</sup>

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<sup>44</sup> FLA. STAT. § 943.35(1)(a)-(e) (2006); Fla. Dep't of Law Enforcement, General Lab FAQs, at <http://www.fdle.state.fl.us/CrimeLab/General%20Lab%20FAQ.htm> (last visited on Aug. 3, 2006).

<sup>45</sup> See Miami-Dade Police Dep't, Crime Laboratory Bureau, at [http://www.miamidade.gov/mdpd/BureausDivisions/Bureau\\_CrimeLab.asp](http://www.miamidade.gov/mdpd/BureausDivisions/Bureau_CrimeLab.asp) (last visited on Aug. 3, 2006).

<sup>46</sup> See Broward County Sheriff's Office, Crime Scene Unit and Crime Lab, at [http://www.sheriff.org/about\\_bso/dle/units/cl.cfm](http://www.sheriff.org/about_bso/dle/units/cl.cfm) (last visited on Aug. 3, 2006).

<sup>47</sup> See, e.g., Pinellas County Sheriff's Office, PCSO Takes Delivery of Mobile Crime Lab, at <http://www.pcsoweb.com/News%20Releases/ReleaseItem.aspx?id=746> (last visited on Aug. 3, 2006).

<sup>48</sup> See St. Lucie County Sheriff's Office, Office of the Chief Deputy, at [http://www.stluciesheriff.com/office\\_chief.php](http://www.stluciesheriff.com/office_chief.php) (last visited on Aug. 3, 2006).

<sup>49</sup> We were only able to locate the disciplines and services offered at three of the five laboratories. The disciplines and services at these laboratories are as follows:

- (1) Miami-Dade Police Department Crime Laboratory Bureau
  - Analytical Section: The Drug Unit analyzes controlled substances and the Trace Evidence Unit analyzes all fiber, paint, glass, fire debris, gun shot residue, tape, serial number restoration and "miscellaneous" evidence.
  - Biology/Serology Section: Evaluates and tests body fluid, including evidence that consists of blood, semen, and saliva.
  - Forensic Identification Section: The Firearms Identification Unit examines firearms.
- (2) Broward County Sheriff's Office Crime Laboratory
  - Analytical Section: The Chemistry Unit identifies controlled substances in seized drugs and Narcotics.
  - Serology/DNA: Identifies and analyzes body fluid evidence and prepares DNA profiles for matching to local, state, and national databases.
  - Forensic Identification: The Firearms Unit deals with analyses involving the comparison of projectiles and cartridge cases found at a scene to submitted firearms. Tool mark analysis associates striations left by a tool with a suspect tool. The Audio/Video Analysis Unit provides investigators and prosecutors with the best possible images and sound from evidentiary tapes. The Questioned Documents Unit deals with analyses concerning handwriting, typewriting and document alteration, including counterfeiting and forgeries.
  - Latent Print Identification: Involves the evaluation and comparison of latent prints recovered from crime scenes.
  - Automated Fingerprint Identification System (AFIS): AFIS Latent Examiners evaluate and compare latent prints recovered from crime scenes with known standards.
- (3) St. Lucie County's Indian River Regional Crime Laboratory
  - Conducts scientific testing on crime scene evidence, firearms, and narcotics.

See Miami-Dade Police Department, Crime Laboratory Bureau, at [http://www.miamidade.gov/mdpd/BureausDivisions/Bureau\\_CrimeLab.asp](http://www.miamidade.gov/mdpd/BureausDivisions/Bureau_CrimeLab.asp) (last visited on Aug. 3, 2006); Broward County Sheriff's Office, Crime Scene Unit and Crime Lab, at [http://www.sheriff.org/about\\_bso/dle/units/cl.cfm](http://www.sheriff.org/about_bso/dle/units/cl.cfm) (last visited on Aug. 3, 2006); Office of the Chief Deputy, St. Lucie County Sheriff's Office, at [http://www.stluciesheriff.com/office\\_chief.php](http://www.stluciesheriff.com/office_chief.php) (last visited on Aug. 3, 2006).

<sup>50</sup> See Memorandum from Robert Parker, Director, Miami-Dade Police Department, to Israel Reyes, Circuit Court Judge, Eleventh Judicial Circuit (March 16, 2006) (on file with author); E-mail from

Although these laboratories are not affiliated with the FDLE, they are part of the statewide criminal analysis laboratory system and each of them is eligible to receive some state funding.<sup>51</sup> In order to receive state funding, each laboratory must submit an annual budget to the FDLE on or before October 15 of each year, which includes, but is not limited to, the actual operating costs of the immediate prior fiscal year and the operating budget approved by the county commission for the fiscal year in progress.<sup>52</sup>

The state must base its funding only on the portion of the current year's actual operating budget, as approved by the county commission, which comes from local contributions.<sup>53</sup> In addition to basing state funding only on local contributions, the state has excluded from consideration for the purpose of appropriating state funds certain laboratory operations, such as the identification of fingerprints other than latent.<sup>54</sup> Additionally, the funding provided to each laboratory may not exceed 75 percent of the laboratory's actual operating cost.<sup>55</sup>

The laboratories that receive state funding are required to provide services "when possible" to any law enforcement official upon request.<sup>56</sup> Additionally, these laboratories have the option to submit a request to the FDLE to become a state-operated laboratory.<sup>57</sup> The request must include an offer to convey to the state the "laboratory facility, including the physical plant, fixtures, equipment, and property on which such facility is located."<sup>58</sup>

### 3. Accreditation of FDLE Crime Laboratories and Crime Laboratories Unaffiliated with the FDLE

All seven FDLE affiliated crime laboratories and all five unaffiliated crime laboratories are currently accredited through ASCLD/LAB.<sup>59</sup> ASCLD/LAB offers two accreditation programs: the ASCLD/LAB-Legacy Accreditation Program and the ASCLD/LAB-*International* Accreditation Program. Both programs are voluntary and require crime laboratories to demonstrate compliance with a number of established standards.

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Stephanie L. Stoiloff, Bureau Commander, Miami-Dade Police Department Crime Laboratory, to Israel Reyes, Circuit Court Judge, Eleventh Judicial Circuit (Aug. 4, 2006) (on file with author).

<sup>51</sup> FLA. STAT. § 943.35(1), (2) (2006); FLA. STAT. § 943.31(3) (2006) (noting that it is the intent of the Legislature to "provide financial assistance to certain other crime laboratories presently in existence and adequately serving the needs of specific portions of the state").

<sup>52</sup> FLA. STAT. § 943.36 (2006);

<sup>53</sup> FLA. STAT. § 943.35(2) (2006).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> FLA. STAT. § 943.36(5) (2006).

<sup>57</sup> FLA. STAT. § 943.37(1) (2006).

<sup>58</sup> *Id.*

<sup>59</sup> As previously noted, in addition to the seven FDLE crime laboratories and five local, unaffiliated crime laboratories, there appear to be some federal laboratories located in Florida, some of which have also obtained accreditation through ASCLD/LAB. *See supra* note 43.

a. ASCLD/LAB-Legacy Accreditation Program

i. Application Process for ASCLD/LAB-Legacy Accreditation Program

To obtain accreditation through the ASCLD/LAB-Legacy Accreditation Program (ASCLD/LAB-Legacy), the laboratory must submit an “Application for Accreditation,” documenting the qualifications of staff, laboratory quality manual(s), procedures for handling and preserving evidence, procedures on case records, and security procedures.<sup>60</sup> In addition to the application, the laboratory must submit a “Grade Computation/Summation of Criteria Ratings,” which is based on the laboratory’s self-evaluation of whether it is in compliance with all of the criteria contained in the ASCLD/LAB Laboratory Accreditation Board 2003 Manual.<sup>61</sup>

ii. ASCLD/LAB-Legacy Accreditation Standards and Criteria

The ASCLD/LAB Laboratory Accreditation Board 2003 Manual (Manual) contains various standards and criteria; each of which is assigned a rating of Essential, Important, or Desirable.<sup>62</sup> In order to obtain accreditation, “[the] laboratory must achieve not less than 100 percent of the Essential,<sup>63</sup> 75 percent of the Important,<sup>64</sup> and 50 percent of the Desirable<sup>65</sup> criteria.”<sup>66</sup> Some of the Essential criteria contained in the Manual require as follows:

- (1) clearly written and well understood procedures for handling and preserving the integrity of evidence, laboratory security, preparation, storage, security and disposition of case records and reports, and for maintenance and calibration of equipment and instruments;<sup>67</sup>
- (2) a training program to develop the technical skills of employees in each applicable functional area;<sup>68</sup>
- (3) a chain of custody record that provides a comprehensive, documented history of evidence transfer over which the laboratory has control;<sup>69</sup>
- (4) the proper storage of evidence to protect the integrity of the evidence;<sup>70</sup>

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<sup>60</sup> ASCLD/LAB LABORATORY ACCREDITATION BOARD 2003 MANUAL, at app. 1 (on file with author) [hereinafter ASCLD/LAB 2003 MANUAL].

<sup>61</sup> *Id.* at 3.

<sup>62</sup> *Id.* at 2.

<sup>63</sup> The Manual defines “Essential” as “[s]tandards which directly affect and have fundamental impact on the work product of the laboratory or the integrity of the evidence.” *Id.*

<sup>64</sup> The Manual defines “Important” as “[s]tandards which are considered to be key indicators of the overall quality of the laboratory but may not directly affect the work product nor the integrity of the evidence.” *Id.*

<sup>65</sup> The Manual defines “Desirable” as “[s]tandards which have the least effect on the work product or the integrity of the evidence but which nevertheless enhance the professionalism of the laboratory.” *Id.*

<sup>66</sup> *Id.* (emphasis omitted).

<sup>67</sup> *Id.* at 14.

<sup>68</sup> *Id.* at 19.

<sup>69</sup> *Id.* at 20.

<sup>70</sup> *Id.* at 21.

- (5) a comprehensive quality manual;<sup>71</sup>
- (6) the performance of an annual review of the laboratory's quality system;<sup>72</sup>
- (7) the use of scientific procedures that are generally accepted in the field or supported by data gathered and recorded in a scientific manner;<sup>73</sup>
- (8) the performance and documentation of administrative reviews of all reports issued;<sup>74</sup>
- (9) the monitoring of the testimony of each examiner at least annually;<sup>75</sup> and
- (10) a documented program of proficiency testing, measuring examiners' capabilities and the reliability of analytical results.<sup>76</sup>

The Manual also contains Essential criteria on personnel qualifications, requiring each examiner to have a specialized baccalaureate degree relevant to his/her crime laboratory specialty, experience/training commensurate with the examinations and testimony required, and an understanding of the necessary instruments, methods, and procedures.<sup>77</sup> Additionally, the examiners must successfully complete a competency test prior to assuming casework and thereafter they must complete annual proficiency tests.<sup>78</sup>

Once the laboratory has assessed whether it is in compliance with the criteria and submitted a complete application, the ASCLD/LAB inspection team, headed by a team captain, will arrange an on-site inspection of the laboratory.<sup>79</sup>

### iii. On-Site Inspection, Decisions on Accreditation, and the Duration of Accreditation

The on-site inspection consists of interviewing analysts and reviewing a sample of case files, including all notes and data, generated by each analyst.<sup>80</sup> The inspection team will also interview all trainees to evaluate the laboratory's training program.<sup>81</sup> At the conclusion of the inspection, the inspection team will meet with the laboratory director to review the findings and discuss any deficiencies.<sup>82</sup>

The inspection team must provide a draft inspection report to the Executive Director of ASCLD/LAB, who will then distribute the report to the "audit committee," which consists of a member of the ASCLD/LAB Board, the Executive Director, at least three staff inspectors, and the inspection team captain.<sup>83</sup> Decisions on accreditation must be made within twelve months of "the date of the laboratory's first notification of an audit

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<sup>71</sup> *Id.* at 23.

<sup>72</sup> *Id.* at 27.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 31.

<sup>75</sup> *Id.* at 32.

<sup>76</sup> *Id.* at 33.

<sup>77</sup> *Id.* at 38-45.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 5.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 6.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

committee’s consideration of the draft inspection report.”<sup>84</sup> During that time period, the laboratory may correct any deficiencies identified by the inspection team during the on-site inspection.<sup>85</sup>

If the ASCLD/LAB Board grants accreditation to the laboratory, it will be effective for five years “provided that the laboratory continues to meet ASCLD/LAB standards, including completion of the Annual Accreditation Audit Report and participation in prescribed proficiency testing programs.”<sup>86</sup> After the five-year time period, the laboratory must apply for reaccreditation and undergo another on-site inspection.<sup>87</sup>

To date, all seven FDLE laboratories and all five unaffiliated laboratories are accredited through the ASCLD/LAB-Legacy Program.<sup>88</sup>

#### b. ASCLD/LAB-*International* Accreditation Program

In addition to obtaining ASCLD/LAB-Legacy Accreditation, the Broward County Sheriff’s Office Crime Laboratory has also obtained accreditation through the ASCLD/LAB-*International* Accreditation Program (ASCLD-LAB-*International*). ASCLD/LAB-*International* is “a program of accreditation in which any crime laboratory may participate to demonstrate that its management, technical operations, and overall quality management system” meet ISO/IEC 17025: 1999 General Requirements for the Competence of Testing and Calibration Laboratories (ISO/IEC 17025) and ASCLD/LAB-*International* Supplemental Requirements for the Accreditation of Forensic Science Testing and Calibration Laboratories (ASCLD/LAB-*International* Supplemental Requirements).<sup>89</sup> ISO/IEC 17025 “specifies the general requirements for the competence to carry out tests and/or calibrations, including sampling,”<sup>90</sup> and the ASCLD/LAB-*International* Supplemental Requirements contains “supplemental accreditation requirements for forensic science laboratories for the examination or analysis of evidence, or calibration as a work product, as it relates to legal proceedings.”<sup>91</sup>

The application process for the ASCLD/LAB-*International* Program is similar to the application process for the Legacy Program. Prior to submitting an application, the laboratory must conduct a comprehensive self-evaluation using the ASCLD/LAB-

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<sup>84</sup> *Id.* at 7.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 1.

<sup>87</sup> *Id.*

<sup>88</sup> American Society of Crime Laboratory Directors, Laboratories Accredited by ASCLD/LAB, at <http://www.ascl-d-lab.org/legacy/aslablegacylaboratories.html#FL> (last visited on Aug. 9, 2006).

<sup>89</sup> ASCLD/LAB-International Accreditation Program, Program Overview, at <http://www.ascl-d-lab.org/international/pdf/aslabinternprogramoverview.pdf> (last visited on Aug. 9, 2006).

<sup>90</sup> ISO/IEC 17025, GENERAL REQUIREMENTS FOR THE COMPETENCE OF TESTING AND CALIBRATION LABORATORIES, at 1 [hereinafter GENERAL REQUIREMENTS FOR THE COMPETENCE].

<sup>91</sup> ASCLD/LAB-INTERNATIONAL, SUPPLEMENTAL REQUIREMENTS FOR THE ACCREDITATION OF FORENSIC SCIENCE TESTING AND CALIBRATION LABORATORIES, at 2 [hereinafter SUPPLEMENTAL REQUIREMENTS].

*International Field Assessment Guide*.<sup>92</sup> Following the self-evaluation, the laboratory must implement, if necessary, any corrective actions to address any non-conformity.<sup>93</sup> Once corrective action has been taken, the laboratory may submit its formal application for accreditation using the ASCLD/LAB-*International Application for Accreditation*.<sup>94</sup>

With the application or any time prior to the on-site visit, the laboratory must also submit a *Conformance File* to ASCLD/LAB, confirming compliance with all of the Management and Technical Requirements of ISO/IEC 17025 and all of the ASCLD/LAB-*International Supplemental Requirements*.<sup>95</sup> These requirements are similar to the requirements of the Legacy Program. For example, ISO/IEC 17025 requires the laboratory to have a quality manual,<sup>96</sup> a training program,<sup>97</sup> and laboratory personnel who are “qualified on the basis of appropriate education, training, experience, and/or demonstrated skills.”<sup>98</sup> Additionally, the ASCLD/LAB-*International Supplemental Requirements* specifically requires the laboratory to have “a documented training program that will be used to train the individual in the knowledge, skills, and abilities needed to perform the testing.”<sup>99</sup> ISO/IEC 17025 and the ASCLD/LAB-*International Supplemental Requirements* also include extensive criteria governing appropriate testing and calibration methods.<sup>100</sup>

Following submission of the *Conformance File*, the ASCLD/LAB will perform an on-site visit.<sup>101</sup> If the ASCLD/LAB grants the laboratory’s accreditation request, the ASCLD/LAB-*International Program* accreditation certificate will specify the field(s), discipline(s), and sub-discipline(s) for which accreditation is granted.<sup>102</sup> For example, Broward County is accredited in the field of Forensic Science and in the disciplines of Controlled Substances, Biology, Trace Evidence, Firearms/Toolmarks, Latent Prints, and Questioned Documents.<sup>103</sup>

## B. Medical Examiners

### 1. Medical Examiner Districts

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<sup>92</sup> ASCLD/LAB-International Accreditation Program, Program Overview, at <http://www.ascldlab.org/international/pdf/aslabinternprogramoverview.pdf> (last visited on Aug. 3, 2006).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> GENERAL REQUIREMENTS FOR THE COMPETENCE, *supra* note 90, at 3.

<sup>97</sup> *Id.* at 11.

<sup>98</sup> *Id.* at 10.

<sup>99</sup> SUPPLEMENTAL REQUIREMENTS, *supra* note 91, at 11

<sup>100</sup> *Id.* at 14; GENERAL REQUIREMENTS FOR THE COMPETENCE, *supra* note 90, at 12-15.

<sup>101</sup> ASCLD/LAB-International Accreditation Program, Program Overview, at <http://www.ascldlab.org/international/pdf/aslabinternprogramoverview.pdf> (last visited on Aug. 3, 2006).

<sup>102</sup> *Id.*

<sup>103</sup> Broward County Sheriff’s Office of Crime Laboratory, Scope of Accreditation, ASCLD/LAB-International Program (2005) (on file with the author).

Florida has a statewide medical examiners system, which is divided into twenty-four medical examiner districts.<sup>104</sup> The practices of these district medical examiner offices are overseen by the Medical Examiners Commission and are governed by Part I of Chapter 406 of the Florida Statutes,<sup>105</sup> Chapter 11G of the Florida Administrative Code,<sup>106</sup> and the Practice Guidelines of the Florida Association of Medical Examiners (Guidelines).<sup>107</sup>

a. Medical Examiners Commission

The Medical Examiners Commission (Commission) is housed within the Florida Department of Law Enforcement<sup>108</sup> and is composed of nine members who are each appointed by the Governor for a term of four years.<sup>109</sup> The members include: two licensed physicians who are active district medical examiners; one licensed funeral director; one state attorney; one public defender; one sheriff; one county commissioner; the Attorney General or designated proxy; and the Secretary of Health or designated proxy.<sup>110</sup>

The Commission's responsibilities include, but are not limited to:

- (1) submitting nominations to the Governor for appointment of a district medical examiner for each of the twenty-four medical examiner districts;<sup>111</sup>
- (2) monitoring the legislature for proposed laws that may effect the medical examiner system;<sup>112</sup> and
- (3) removing or suspending district medical examiners and conducting investigations into possible violations of Part I of Chapter 406 of the Florida Statutes.<sup>113</sup>

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<sup>104</sup> FLA. STAT. § 406.05 (2006) (noting that the Medical Examiner Commission is responsible for “establish[ing] medical examiner districts within the state, taking into consideration population, judicial circuits of the state, geographical size of the area of coverage, availability of training personnel, death rate by both natural and unnatural causes, and similar related factors”)

<sup>105</sup> FLA. STAT. § 406.04 (2006).

<sup>106</sup> *Id.* (requiring the Commission to adopt rules); FLA. ASS'N OF MED. EXAMINERS, PRACTICE GUIDELINES FOR FLORIDA'S MEDICAL EXAMINERS (2003) [hereinafter PRACTICE GUIDELINES], at <http://www.fdle.state.fl.us/cjst/mec/2003%20FAME%20adopted%20guidelines.pdf> (last visited on Aug. 3, 2006).

<sup>107</sup> *Id.*

<sup>108</sup> FLA. STAT. § 406.02(1) (2006).

<sup>109</sup> FLA. STAT. § 406.02(1), (2) (2006).

<sup>110</sup> FLA. STAT. § 406.02(1) (2006). For a list of the current Commission members, see Medical Examiners Commission, Commission Members, at <http://www.fdle.state.fl.us/cjst/mec/MECList.pdf> (last visited on Aug. 3, 2006).

<sup>111</sup> FLA. STAT. § 406.06(1)(a) (2006); FLA. ADMIN. CODE 11G-1.001(2) (2006).

<sup>112</sup> Fla. Dep't of Law Enforcement, Medical Examiners Commission, at <http://www.fdle.state.fl.us/cjst/mec/index.html> (last visited on Aug. 3, 2006).

<sup>113</sup> FLA. STAT. § 406.02(4)(c) (2006); *see also* FLA. STAT. § 406.06(7) (2006) (noting that the Commission may “temporarily suspend a medical examiner who is unable to carry out the duties of a medical examiner by reason of the use of alcohol, drugs, narcotics, chemicals, or any other types of material”); FLA. STAT. § 406.075 (2006) (listing the grounds for discipline and the disciplinary proceedings).

The Commission is also responsible for overseeing the distribution of state funds to medical examiner districts.<sup>114</sup>

#### b. District Medical Examiners and Associate Medical Examiners

As indicated above, the Commission is charged with nominating a district medical examiner for each medical examiner district.<sup>115</sup> To be eligible for nomination by the Commission,<sup>116</sup> an individual must be a practicing physician in pathology.<sup>117</sup> Additionally, nominations may be made only after the solicitation of comments from city, county, and state officials as well as from funeral home directors.<sup>118</sup> These nominations must be submitted to the Governor within thirty days after the Commission has voted on nominees.<sup>119</sup>

Once the nominations are submitted to the Governor, s/he is required to appoint for a term of three years a district medical examiner for each medical examiner district.<sup>120</sup> Following the three-year term, the district medical examiner may be eligible for reappointment depending upon his/her performance.<sup>121</sup> Commission members who are physicians are eligible to serve as district medical examiners upon approval of the Governor.<sup>122</sup>

Once appointed, each district medical examiner is authorized to appoint “as many physicians as associate medical examiners as may be necessary to provide service at all times and all places within the district.”<sup>123</sup> Individuals appointed as associate medical examiners serve at the pleasure of the district medical examiner<sup>124</sup> and their appointments expire with the expiration of the appointing district medical examiner’s appointment.<sup>125</sup> Both district medical examiners and associate medical examiners are entitled to reasonable compensation as established by the board of county commissioners in their respective districts.<sup>126</sup> Fees, salaries, and expenses may be paid from the general funds or any other funds under the control of the board of county commissioners.<sup>127</sup>

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<sup>114</sup> FLA. STAT. § 406.02(4)(d) (2006).

<sup>115</sup> FLA. STAT. § 406.06(1)(a) (2006); FLA. ADMIN. CODE 11G-1.001(2), 11G-5.004(1) (2006).

<sup>116</sup> For a description of the nomination process, see FLA. ADMIN. CODE 11G-5.004(1) (2006).

<sup>117</sup> FLA. STAT. § 406.06(1)(a) (2006).

<sup>118</sup> See FLA. ADMIN. CODE 11G-5.004(1) (2006).

<sup>119</sup> See *id.*

<sup>120</sup> FLA. STAT. § 406.06(1)(a) (2006).

<sup>121</sup> See FLA. ADMIN. CODE 11G-5.004(2)(a) (2006) (describing the Commission’s role in reappointment process for district medical examiners); see also Fla. Dep’t of Law Enforcement, Medical Examiners Commission, at <http://www.fdle.state.fl.us/cjst/mec/index.html> (last visited on Aug. 3, 2006) (stating that one of the Commission’s responsibilities is to “survey[] one third of Florida’s District Medical Examiner constituents each year for reappointments by Governors Appointment Office”).

<sup>122</sup> FLA. STAT. § 406.06(1)(b) (2006).

<sup>123</sup> See FLA. STAT. § 406.06(2) (2006).

<sup>124</sup> See *id.*

<sup>125</sup> FLA. ADMIN. CODE 11G-1.002(3) (2006).

<sup>126</sup> FLA. STAT. § 406.06(3) (2006).

<sup>127</sup> FLA. STAT. § 406.08(1) (2006).

The Guidelines state that each district medical examiner should have accessible to its staff “current written procedures, including the areas of safety.”<sup>128</sup> Additionally, each district medical examiner is required to “supervise the work and work product of associate medical examiners on a regular basis as necessary to insure consistency and quality.”<sup>129</sup> Similarly, the professional staff, including associate medical examiners, should have the opportunity to participate in continuing education.<sup>130</sup>

## 2. Accreditation of Medical Examiner Districts

The National Association of Medical Examiners (NAME) is the primary accrediting entity for medical examiner offices. Currently, four of Florida’s twenty-four district medical examiner offices are accredited by NAME.<sup>131</sup> These offices include: (1) District 21 Medical Examiner Office, Ft. Myers; (2) District 12 Medical Examiner Office, Sarasota; (3) District 14 Medical Examiner Office, Panama City; and (4) District 11 Medical Examiner Office, Miami-Dade.<sup>132</sup>

The NAME accreditation process for district medical examiner offices is similar to that associated with crime laboratories. The applicant must perform a self-inspection using the NAME Accreditation Checklist,<sup>133</sup> file an application, and undergo an external inspection using the NAME Accreditation Checklist to evaluate whether the facility meets the NAME Standards for Accreditation.<sup>134</sup>

The external inspection is conducted by a NAME inspector, who will “systematically examine in detail each question on the Accreditation Checklist with the chief medical examiner or his or her representative.”<sup>135</sup> The checklist contains a series of questions designated as either Phase I or Phase II questions; Phase I questions refer to standards that are not absolutely essential requirements, while Phase II questions refer to essential requirements.<sup>136</sup> Phase II questions include, but are not limited to:

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<sup>128</sup> PRACTICE GUIDELINES, *supra* note 106.

<sup>129</sup> FLA. ADMIN. CODE 11G-1.002(5) (2006).

<sup>130</sup> PRACTICE GUIDELINES, *supra* note 106.

<sup>131</sup> Nat’l Ass’n of Med. Examiners, NAME Accredited Offices, *at* [http://thename.org/index.php?option=com\\_content&task=view&id=67&Itemid=69](http://thename.org/index.php?option=com_content&task=view&id=67&Itemid=69) (last visited on Aug. 3, 2006).

<sup>132</sup> *Id.*

<sup>133</sup> For a copy of the NAME Accreditation Checklist, see NAT’L ASS’N OF MED. EXAMINERS, ACCREDITATION CHECKLIST [hereinafter NAME ACCREDITATION CHECKLIST], *at* [http://thename.org/index.php?option=com\\_docman&task=doc\\_download&gid=27&Itemid=26&mode=view](http://thename.org/index.php?option=com_docman&task=doc_download&gid=27&Itemid=26&mode=view) (last visited on Aug. 3, 2006); *see also* NAT’L ASS’N OF MED. EXAMINERS, INSPECTION & ACCREDITATION POLICIES AND PROCEDURES MANUAL 4 (2003) [hereinafter INSPECTION & ACCREDITATION MANUAL], *at* [http://thename.org/index.php?option=com\\_docman&task=doc\\_download&gid=25&Itemid=26&mode=view](http://thename.org/index.php?option=com_docman&task=doc_download&gid=25&Itemid=26&mode=view) (last visited on Aug. 3, 2006) (stating a signed copy of the Accreditation Checklist is to be submitted with the completed application materials).

<sup>134</sup> INSPECTION & ACCREDITATION MANUAL, *supra* note 133, at 1.

<sup>135</sup> *Id.* at 6.

<sup>136</sup> *Id.* at 1.

- (1) Does the office have a written and implemented policy or standard operating procedure, signed within the last two years covering facility maintenance?;
- (2) Does the office have a written and implemented policy or standard operating procedure, signed within the last two years covering security?;
- (3) Does the office have a written and implemented policy or standard operating procedure, signed within the last two years covering personnel issues?;
- (4) Is the Chief Medical Examiner or the Coroner's autopsy surgeon a pathologist granted by the American Board of Pathology, a certificate of qualification for the practice of Forensic Pathology, and does s/he have at least two years of forensic pathology work experience beyond forensic pathology residency/fellowship training?;
- (5) Are there written and implemented qualifications established for medical investigators?<sup>137</sup>

The inspection report must be submitted to the NAME office within thirty days of the inspection.<sup>138</sup> The report will conclude with a recommendation for full accreditation, provisional accreditation, or non-accreditation.<sup>139</sup> In order to obtain full accreditation,<sup>140</sup> the applicant may not have more than fifteen Phase I deficiencies and may not have any Phase II deficiencies.<sup>141</sup> Full accreditation is conferred for a period of five years.<sup>142</sup>

If the office has no more than twenty-five Phase I and no more than five Phase II deficiencies, provisional accreditation can be conferred for one year and can be extended for up to four additional one-year periods.<sup>143</sup> The applicant may seek to modify its status from provisional to full accreditation by providing written documentation that the deficiencies have been remedied.<sup>144</sup> If the office is found to have more than twenty-five Phase I deficiencies or more than five Phase II deficiencies, however, it is not eligible for accreditation.<sup>145</sup> The offices that are provisionally accredited or non-accredited have the right to appeal.<sup>146</sup>

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<sup>137</sup> NAME ACCREDITATION CHECKLIST, *supra* note 133, 4-7, 10.

<sup>138</sup> INSPECTION & ACCREDITATION MANUAL, *supra* note 133, at 9.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 9-10.

<sup>141</sup> *Id.* at 2.

<sup>142</sup> *Id.* at 10.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 11. For the NAME Inspection and Accreditation Forms, see Nat'l Ass'n of Med. Examiners, NAME Accredited forms, *at* [http://thename.org/index.php?option=com\\_docman&task=doc\\_download&gid=26&Itemid=26&mode=view](http://thename.org/index.php?option=com_docman&task=doc_download&gid=26&Itemid=26&mode=view) (last visited on Aug. 3, 2006).

## II. ANALYSIS

### A. Recommendation #1

**Crime laboratories and medical examiner offices should be accredited, examiners should be certified, and procedures should be standardized and published to ensure the validity, reliability, and timely analysis of forensic evidence.**

#### Crime Laboratories

The State of Florida does not require crime laboratories to be accredited. However, all of the crime laboratories of the Florida Department of Law Enforcement (FDLE) are currently accredited by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB). Similarly, all five unaffiliated crime laboratories are currently accredited by ASCLD/LAB. In fact, one of these four laboratories, the Broward County Sheriff's Office Crime Laboratory, has obtained accreditation through both ASCLD/LAB accreditation programs—the Legacy Program and the *International* Program.

As a prerequisite for accreditation, both programs require laboratories to take measures to ensure the validity, reliability and timely analysis of forensic evidence. For example, the Legacy Program requires the laboratory to have clearly written procedures for handling and preserving the integrity of evidence; preparing, storing, securing and disposing of case records and reports; and for maintaining and calibrating equipment.<sup>147</sup> Similarly, the ISO/IEC 17025 and the ASCLD/LAB-*International Supplemental Requirements* require the laboratory to establish and maintain procedures for identifying, collecting, indexing, accessing, filing, storing, maintaining, and disposing of quality and technical reports.<sup>148</sup> Both programs require these procedures to be included in the laboratory's quality manual.<sup>149</sup>

Both accreditation programs also require laboratory personnel to possess certain qualifications. The ASCLD/LAB Laboratory Accreditation Board 2003 Manual, for example, requires the examiners to have a specialized baccalaureate degree relevant to his/her crime laboratory specialty, experience/training commensurate with the

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<sup>147</sup> ASCLD/LAB 2003 MANUAL, *supra* note 60, at 21.

<sup>148</sup> GENERAL REQUIREMENTS FOR THE COMPETENCE, *supra* note 90; SUPPLEMENTAL REQUIREMENTS, *supra* note 91, at 8.

<sup>149</sup> ASCLD/LAB 2003 MANUAL, *supra* note 60; GENERAL REQUIREMENTS FOR THE COMPETENCE, *supra* note 90; SUPPLEMENTAL REQUIREMENTS, *supra* note 91, at 7. The ISO/IEC 17025 program specifically requires the laboratory quality manual to “include or make reference to the supporting procedures including technical procedures.” *Id* at 3. Similarly, the ASCLD/LAB program requires the quality manual to contain or reference the documents or policies/procedures pertaining, but not limited to: (1) control and maintenance of documentation of case records and procedure manuals; (2) validation of test procedures used; (3) handling evidence; (4) use of standards and controls in the laboratory; (5) calibration and maintenance of equipment; (6) practices for ensuring continued competence of examiners; and (7) taking corrective action whenever analytical discrepancies are detected. ASCLD/LAB 2003 MANUAL, *supra* note 60, at 3.

examinations and testimony required, and an understanding of the necessary instruments, methods, and procedures.<sup>150</sup> The examiners must also successfully complete a competency test prior to assuming casework responsibility and successfully complete annual proficiency tests.<sup>151</sup>

Even though Florida law does not require laboratories to obtain accreditation, section 943.34 of the Florida Statutes does require the FDLE to establish certain policies and procedures that are similar to the requirements of both ASCLD/LAB accreditation programs.<sup>152</sup> Specifically, the FDLE is required to establish: (1) policy and procedures to be employed by the laboratories; (2) standards of education and experience for professional and technical personnel employed by the laboratories; and (3) internal procedures for the review and evaluation of laboratory services.<sup>153</sup> As a result, the FDLE created a Forensic Science Quality Manual (FSQM) and established standard operating procedures (SOPs) for each of the eleven disciplines in which it provides services.<sup>154</sup> Both the FSQM and the SOPs include, but are not limited to, quality assurance procedures, proficiency testing requirements, and validation requirements.<sup>155</sup> The FSQM and all other procedural manuals are available on FDLE's intranet.<sup>156</sup>

Additionally, the FDLE has established minimum qualification requirements for a number of laboratory staff members, including senior crime laboratory analysts,<sup>157</sup> crime laboratory analysts,<sup>158</sup> fingerprint analysts,<sup>159</sup> forensic technologists,<sup>160</sup> and crime laboratory technicians.<sup>161</sup> The FSQM also requires crime laboratory analysts to complete an approved training program in one or more of the forensic services<sup>162</sup> and attain

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<sup>150</sup> ASCLD/LAB 2003 MANUAL, *supra* note 60, at 37-50.

<sup>151</sup> *Id.*

<sup>152</sup> *See supra* note 4.

<sup>153</sup> *See id.*

<sup>154</sup> *See* FSQM, *supra* note 5.

<sup>155</sup> *See supra* notes 20-24.

<sup>156</sup> *See supra* note 25.

<sup>157</sup> Fla. Dep't of Law Enforcement, Career Service Class Specification, Senior Crime Laboratory Analyst (1996) (on file with the author).

<sup>158</sup> *See* Fla. Dep't of Law Enforcement, Crime Laboratory Analyst, at <http://www.fdle.state.fl.us/CrimeLab/CLA%20Position.htm> (last visited on Aug. 3, 2006); Fla. Dep't of Law Enforcement, Career Service Class Specification, Crime Laboratory Analyst (2001) (on file with the author).

<sup>159</sup> Fla. Dep't of Law Enforcement, Career Service Class Specification, Fingerprint Analyst (1992) (on file with the author).

<sup>160</sup> For a list of the minimum qualifications for forensic technologists, see Fla. Dep't of Law Enforcement, Forensic Technologist, at <http://www.fdle.state.fl.us/CrimeLab/FT%20Position.htm> (last visited on Aug. 3, 2006).

<sup>161</sup> For a list of the minimum qualifications for crime laboratory technicians, see Fla. Dep't of Law Enforcement, Crime Laboratory Technician, at <http://www.fdle.state.fl.us/CrimeLab/CLT%20Position.htm> (last visited on Aug. 3, 2006); Fla. Dep't of Law Enforcement, Career Service Class Specification, Crime Laboratory Technician (1989) (on file with the author).

<sup>162</sup> FSQM, *supra* note 5 (Standard 3.3) (including a detailed description of the training program); *see also* Fla. Dep't of Law Enforcement, Crime Laboratory Analyst, at <http://www.fdle.state.fl.us/CrimeLab/CLA%20Position.htm> (last visited on Aug. 3, 2006); Fla. Dep't of Law Enforcement, Career Service Class Specification, Crime Laboratory Analyst (2001) (on file with the author) (noting that crime laboratory analysts are required to satisfactorily complete the Florida Department

certification prior to conducting independent casework.<sup>163</sup> It similarly recommends that forensic science technicians complete an approved training program.<sup>164</sup>

Apart from the FDLE laboratories, however, it appears that as required by ASCLD/LAB accreditation programs, all unaffiliated, accredited laboratories have adopted policies and procedures to ensure the validity, reliability, and timely analysis of forensic evidence.<sup>165</sup> We were, however, only able to confirm the contents of these policies and procedures for the Miami-Dade Police Department Crime Laboratory.

Specifically, the Miami-Dade Police Department has formal procedures providing the proper method of collecting blood, hair, and other fluids; the proper method of storing such items;<sup>166</sup> and the appropriate manner of maintaining the chain of custody and security of such evidence.<sup>167</sup> Additionally, the Miami-Dade Police Department Crime Laboratory also has written procedures for proper sterilization and calibration of instruments used during DNA testing,<sup>168</sup> as well as requirements for documenting all aspects of DNA analysis procedure.<sup>169</sup>

Despite the accreditation of all FDLE affiliated laboratories and unaffiliated, local laboratories and the policies and procedures adopted by the FDLE and all unaffiliated crime laboratories, the validity and reliability of work completed by at least two of these laboratories have been called into question. In February 2002, a DNA lab worker at the FDLE Orlando Regional Crime Laboratory admitted to falsifying DNA data in a test designed to check the quality of work.<sup>170</sup> Despite the lab worker's actions, the FDLE only re-tested about ten of the lab worker's cases, reasoning that the falsification was an isolated incident.<sup>171</sup> The lab worker since has resigned from the FDLE.<sup>172</sup>

Similarly, in 2003, a DNA analyst at the Broward County Sheriff's Office Crime Lab, accidentally mixed DNA from a murder case with a separate rape case.<sup>173</sup> Following the

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of Law Enforcement Crime Laboratory Analyst Training Program or a comparable training program from another forensic laboratory).

<sup>163</sup> FSQM, *supra* note 5 (Standard #3.5) (noting that certified analysts may maintain certification in a forensic service area by independently completing a minimum of five service requests per major area per calendar year and/or one service request per minor area per calendar year in addition to the required proficiency test(s)).

<sup>164</sup> *Id.* (Standard #3.4).

<sup>165</sup> E-mail from Stephanie L. Stoiloff, Bureau Commander, Miami-Dade Police Department Crime Laboratory, to Israel Reyes, Circuit Court Judge, Eleventh Judicial Circuit (Aug. 4, 2006) (on file with author).

<sup>166</sup> MIAMI-DADE POLICE DEP'T, CRIME SCENE INVESTIGATIONS BUREAU, STANDARD OPERATING PROCEDURES 102-03, 112-14 (2005).

<sup>167</sup> *Id.* at 26-27.

<sup>168</sup> MIAMI-DADE POLICE DEP'T CRIME LABORATORY, DNA QUALITY ASSURANCE 5-1(a) (2005).

<sup>169</sup> *Id.* at 4-1.

<sup>170</sup> Rene Stutzman, *FDLE Says No Cases in Danger*, ORLANDO SENTINEL, July 20, 2002; *see also* Timothy W. Maier, *Inside the DNA Labs*, INSIGHT, June 2003.

<sup>171</sup> Stutzman, *supra* note 170; *see also* Maier, *supra* note 170.

<sup>172</sup> Stutzman, *supra* note 170.

<sup>173</sup> Bill Hirschman, *Sheriff's Staff Raising DNA Standards, Goal Is to Increase Accuracy After Errors in Murder Case*, S. FLA. SUN-SENTINEL, Oct. 7, 2003.

mix-up, an internal audit and two analyses by outside agencies were ordered.<sup>174</sup> The outside agencies reviewed thirty cases handled by the analyst in question and five cases by each of the ten other DNA analysts.<sup>175</sup> In the end, the incident was deemed to be isolated.<sup>176</sup>

DNA analysis performed and presented by the Federal Bureau of Investigation (FBI)—separate and apart from the FDLE or the other local Florida laboratories—has at times also proved to be unreliable. For example, one FBI analyst possibly tainted a number of Florida cases by “sometimes testif[ying] beyond his expertise, misleading juries about the scientific basis for his conclusions, misstating FBI policy or keeping notes that were inadequate to support his forensic opinions.”<sup>177</sup>

### Medical Examiners

Like crime laboratories, the State of Florida does not require district medical examiner offices to be accredited. Four of the twenty-four medical examiner districts, however, have voluntarily obtained accreditation through the National Association of Medical Examiners (NAME). As a prerequisite for accreditation, NAME requires medical examiner offices to adopt and implement standardized procedures to ensure the validity, reliability, and timely analysis of forensic evidence.<sup>178</sup>

Additionally, the State of Florida has established the Medical Examiners Commission to oversee the practices of all medical examiners and has adopted certain laws and procedures to govern the practices of medical examiners. The Florida Association of Medical Examiners has also established the *Practice Guidelines of the Florida Association of Medical Examiners* (Guidelines) to “provide guidance to medical examiners in furtherance of the aims of [the Florida Statutes] and Florida Administrative Code.”<sup>179</sup>

The Florida Statutes and the Guidelines set forth qualification and training standards for some medical examiners. Specifically, the Florida Statutes require each district medical examiner to be a practicing physician in pathology,<sup>180</sup> and the Guidelines state that “personnel positions under the control of the medical examiner should have position descriptions setting forth the skill, knowledge, education and training required of the potential hire.”<sup>181</sup> The Guidelines also recommend that medical examiners verify applicants’ skills, knowledge, education, and training.<sup>182</sup>

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<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> Sydney Freedburg, *Reports Highlight More Tainted Testimony*, ST. PETERSBURG TIMES, May 3, 2001; see also Edna Buchanan, *Did FBI Help Send Wrong Man to Death Row?*, MIAMI HERALD, May 31, 2003; *Cleaning Up the Crime Scene Lab Series*, ST. PETERSBURG TIMES, Mar. 12, 2001.

<sup>178</sup> See *supra* notes 133-136 and accompanying text.

<sup>179</sup> See *supra* notes 106-107 and accompanying text.

<sup>180</sup> FLA. STAT. § 406.06(1)(a) (2006).

<sup>181</sup> PRACTICE GUIDELINES, *supra* note 106.

<sup>182</sup> *Id.*

Similarly, the Florida Administrative Code and the Guidelines both provide standardized procedures pertaining, but not limited to, the identification of dead bodies, death scene investigations, the collection of evidence, and the performance and documentation of autopsies.<sup>183</sup> Additionally, the Guidelines state that each district medical examiner office should have accessible to its staff “current written procedures, including the area of safety.”<sup>184</sup> In fact, the Guidelines indicate that as of May 2003, “every district medical examiner ha[d] office policies that prescribe actions for associate medical examiners and paraprofessional staff.”<sup>185</sup> We were, however, only able to verify the existence of office policies for the district medical examiner offices that post this information on their websites, which includes Districts Four, Six, Seven, and Eleven.<sup>186</sup>

## Conclusion

Although the State of Florida does not require crime laboratories or medical examiner districts to obtain accreditation, we commend all crime laboratories and medical examiner districts that have voluntarily obtained such accreditation. However, there remain a number of district medical examiner offices that have yet to obtain accreditation.

Additionally, although the FDLE has adopted the FSQM and SOPs on the eleven disciplines for which it provides services, these policies and procedures apply only to FDLE laboratories. It appears, however, that all unaffiliated, accredited local laboratories have similar policies and procedures, but we were only able to confirm the contents of the policies and procedures of the Miami-Dade Police Department Crime Laboratory.

Lastly, we commend the State of Florida for establishing the Medical Examiners Commission and adopting certain laws and procedures to govern the practices of medical examiners.

Based on this information, however, the State of Florida is only in partial compliance with Recommendation #1. We note, however, that even though all FDLE and unaffiliated crime laboratories have procedures and policies on the preservation and testing of forensic evidence, at least some of these laboratories are having problems with the validity, reliability, and timely analysis of forensic evidence

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<sup>183</sup> FLA. ADMIN. CODE 11G-2.001-2.005 (2006); PRACTICE GUIDELINES, *supra* note 106.

<sup>184</sup> PRACTICE GUIDELINES, *supra* note 106.

<sup>185</sup> *Id.*

<sup>186</sup> District Four Medical Examiner’s Office, Policies and Procedures, *at* <http://www.coj.net/Departments/Medical+Examiner/Policies+and+Procedures.htm> (last visited on Aug. 3, 2006); District Six Medical Examiner’s Office, Policy Statement, *at* <http://www.co.pinellas.fl.us/forensics/policy/policystatement.htm> (last visited on Aug. 3, 2006); District Seven Medical Examiner’s Office, *at* <http://volusia.org/medicalexaminer/> (last visited on Aug. 3, 2006); District Eleven Medical Examiner’s Office, *at* <http://www.co.miami-dade.fl.us/medexam/#> (last visited on Aug. 3, 2006);

*B. Recommendation #2*

**Crime laboratories and medical examiner offices should be adequately funded.**

We were able to obtain only limited information about the funding provided to Florida crime laboratories and district medical examiner offices. For Fiscal Year 2005-06, the Florida Legislature appropriated \$37,287,156 for crime laboratory services.<sup>187</sup> In addition to this state funding, in 2004, the Department of Justice awarded \$8.7 million to Florida DNA testing agencies, including the Florida Department of Law Enforcement, the Miami-Dade Police Department, and the Broward County and Palm Beach County crime laboratories.<sup>188</sup>

Even with the funding provided to FDLE crime laboratories and the five unaffiliated crime laboratories, it appears that these laboratories are all over-burdened with an increasing caseload, which adds to a pre-existing backlog of cases.<sup>189</sup> Within the last three years, the FDLE's DNA lab services have had a 27 percent increase in requests for DNA analysis.<sup>190</sup> Given the increase in requests for services and the growing backlog, the FDLE has had to "outsource backlogged cases and has transferred incoming serology/DNA cases among different labs."<sup>191</sup> In light of this information, it is questionable whether the FDLE and the five unaffiliated crime laboratories are provided with sufficient funding to properly handle all of the requests for services.

Similarly, although we know that all fees, salaries, and expenses for district medical examiner offices are to be paid from the general funds or any other funds under the control of the board of county commissioners,<sup>192</sup> we were unable to obtain specific figures detailing the amount of money allocated for each district medical examiner office to assess the sufficiency of such funding.

Because we were unable to obtain sufficient information to appropriately assess the adequacy of the funding provided to FDLE and unaffiliated crime laboratories as well as the district medical examiner offices, we cannot determine whether the State of Florida is in compliance with Recommendation #2.

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<sup>187</sup> Florida Legislature, Office of Program Policy Analysis and Government Accountability, Department of Law Enforcement, Criminal Investigations and Forensic Science, at <http://www.oppaga.state.fl.us/profiles/1061/> (last visited on Aug. 3, 2006).

<sup>188</sup> See U.S. Dep't of Justice, Office of Justice Programs, Press Release, at [http://www.ojp.usdoj.gov/pressreleases/DNA\\_FL.htm](http://www.ojp.usdoj.gov/pressreleases/DNA_FL.htm) (last visited on Aug. 3, 2006). For a description of the DNA Initiative, see U.S. Dep't of Justice, The President's DNA Initiative, at <http://www.dna.gov/info/> (last visited on Aug. 3, 2006).

<sup>189</sup> See *supra* note 187; see also E-mail from Stephanie L. Stoiloff, Bureau Commander, Miami-Dade Police Department Crime Laboratory, to Israel Reyes, Circuit Court Judge, Eleventh Judicial Circuit (Aug. 4, 2006) (on file with author).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> FLA. STAT § 406.08(1) (2006).



## CHAPTER FIVE

### PROSECUTORIAL PROFESSIONALISM

#### INTRODUCTION TO THE ISSUE

The prosecutor plays a critical role in the criminal justice system. Although the prosecutor operates within the adversary system, the prosecutor's obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public.

Because prosecutors are decision makers on a broad policy level and preside over a wide range of cases, they are sometimes described as "administrators of justice." Each prosecutor has responsibility for deciding whether to bring charges and, if so, what charges to bring against the accused. S/he must also decide whether to prosecute or dismiss charges or to take other appropriate actions in the interest of justice. Moreover, in cases in which capital punishment can be sought, prosecutors have enormous discretion in deciding whether or not to seek the death penalty. The character, quality, and efficiency of the whole system are shaped in great measure by the manner in which the prosecutor exercises his/her broad discretionary powers.

While the great majority of prosecutors are ethical, law-abiding individuals who seek justice, one cannot ignore the existence of prosecutorial misconduct and the impact it has on innocent lives and society at large. Between 1970 and 2004, individual judges and appellate court panels across the nation cited prosecutorial misconduct as a factor when dismissing charges at trial, reversing convictions or reducing sentences in at least 2,012 criminal cases, including both death penalty and non-death penalty cases.<sup>1</sup>

Prosecutorial misconduct can encompass various actions, including but not limited to, failing to disclose exculpatory evidence, abusing discretion in filing notices of intent to seek the death penalty, racially discriminating in making peremptory challenges, covering-up and/or endorsing perjury by informants and jailhouse snitches, or making inappropriate comments during closing arguments.<sup>2</sup> The causes of prosecutorial misconduct range from an individual's desire to obtain a conviction at any cost to lack of proper training, inadequate supervision, insufficient resources, and excessive workloads.

In order to curtail prosecutorial misconduct and to reduce the number of wrongly convicted individuals, federal, state, and local governments must provide adequate funding to prosecutors' offices, adopt standards to ensure manageable workloads for prosecutors, and require that prosecutors scrutinize cases that rely on eyewitness identifications, confessions, or testimony from witnesses who receive a benefit from the

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<sup>1</sup> STEVE WEINBERG, CENTER FOR PUBLIC INTEGRITY, *BREAKING THE RULES: WHO SUFFERS WHEN A PROSECUTOR IS CITED FOR MISCONDUCT?* (2004), available at <http://www.publicintegrity.org/pm/> (last visited on Aug. 3, 2006).

<sup>2</sup> *Id.*; see also Innocence Project, *Police and Prosecutorial Misconduct*, at <http://www.innocenceproject.org/causes/policemisconduct.php> (last visited on Aug. 3, 2006).

police or prosecution. Perhaps most importantly, there must be meaningful sanctions, both criminal and civil, against prosecutors who engage in misconduct.

## I. FACTUAL DISCUSSION

### A. *Prosecution Offices*

#### 1. State Attorneys' Offices

The State of Florida is divided into twenty judicial circuits and each has a state attorney,<sup>3</sup> who is elected at the general election for a term of four years.<sup>4</sup> Each state attorney is responsible for “appear[ing] in the circuit and county courts within his[er] judicial circuit and prosecut[ing] or defend[ing] on behalf of the state [practically]<sup>5</sup> all suits, applications, or motions, civil or criminal, in which the state is a party,”<sup>6</sup> including death penalty cases. To assist with this responsibility and others, a state attorney is authorized to appoint<sup>7</sup> assistant state attorneys to serve during the appointing state attorney’s term.<sup>8</sup> A state attorney may also employ other staff,<sup>9</sup> such as an executive director,<sup>10</sup> stenographer,<sup>11</sup> and investigator.<sup>12</sup> Once an assistant state attorney is appointed,<sup>13</sup> s/he will have all of the powers and duties of the appointing state attorney, “under the direction of that state attorney.”<sup>14</sup>

#### a. Responsibilities of State Attorneys and Assistant State Attorneys

In addition to prosecuting cases, state attorneys and assistant state attorneys are required to:

- (1) whenever required by the grand jury, attend grand juries for the purpose of examining witnesses in their presence, or of giving legal advice in any matter before them;<sup>15</sup>
- (2) prepare bills of indictment;<sup>16</sup>

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<sup>3</sup> For a list of the state attorneys’ offices in Florida, see Florida Prosecuting Attorneys Association, State Attorneys, at [http://www.fpaa.state.fl.us/ASP/SA\\_Circuitlist1.asp](http://www.fpaa.state.fl.us/ASP/SA_Circuitlist1.asp) (last visited July 25, 2006).

<sup>4</sup> FLA. STAT. § 27.01 (2006). Once elected, state attorneys are prohibited from private practice while holding the position. See Fla. Stat. § 27.015 (2006).

<sup>5</sup> Certain proceedings related to children, however, are an exception. See FLA. STAT. § 27.02(1) (2006).

<sup>6</sup> *Id.*

<sup>7</sup> Each appointment must be in writing and recorded in the office of the clerk of the circuit court of the county in which the appointing state attorney resides. See FLA. STAT. § 27.181(1) (2006); see also FLA. STAT. § 27.25 (2006) (stating that the state attorney may employ “assistant state attorneys”).

<sup>8</sup> FLA. STAT. § 27.181(1) (2006).

<sup>9</sup> FLA. STAT. § 27.25(1) (2006).

<sup>10</sup> FLA. STAT. § 27.25(2) (2006).

<sup>11</sup> FLA. STAT. § 27.25(3) (2006).

<sup>12</sup> FLA. STAT. §§ 27.251, 27.255 (2006).

<sup>13</sup> Before performing any of the duties of an assistant state attorney, the appointee must take and subscribe to a written oath that s/he “will faithfully perform the duties of assistant state attorney and shall have caused the oath to be recorded in the office of the clerk of the circuit court of the county in which the appointing state attorney resides.” FLA. STAT. § 27.181(1) (2006). Upon the recordation of the appointment and the oath, the appointing state attorney must ensure that certified copies of the written appointment are transmitted to the Secretary of State. *Id.*

<sup>14</sup> FLA. STAT. § 27.181(2) (2006).

<sup>15</sup> FLA. STAT. § 27.03 (2006).

- (3) summon all witnesses required on behalf of the state;<sup>17</sup>
- (4) assist the Attorney General in the preparation and presentation of all appeals to the Supreme Court, from the circuit court of their respective circuits, of all civil and criminal cases in which the state is a party;<sup>18</sup>
- (5) represent the state in all habeas corpus cases arising in their respective circuits;<sup>19</sup> and
- (6) represent the state in cases of preliminary trials of persons charged with capital offenses in all cases where the committing trial court judge must have given due and timely notice of the time and place of such trial.<sup>20</sup>

Additionally, state attorneys and assistant state attorneys may sign indictments, informations,<sup>21</sup> and other official documents.<sup>22</sup> The discharging of all of these duties by each state attorney is overseen by the Attorney General of the State of Florida.<sup>23</sup>

#### b. Funding for State Attorneys' Offices

State attorneys' offices receive both state and local funding. Each county is responsible for the overhead costs associated with running the state attorney's office in its judicial circuit,<sup>24</sup> while the state is responsible for all other costs. The state appropriations for the twenty state attorneys' offices must be "determined by a funding formula based on population and such other factors as may be deemed appropriate."<sup>25</sup> During Fiscal Year 2005-2006, the appropriations and the number of full-time equivalent positions (FTEs) for state attorneys' offices ranged from 61 FTEs and \$4,082,400 for the Sixteenth Circuit Office to 1,256.75 FTEs and \$69,662,698 for the Eleventh Circuit Office.<sup>26</sup>

### 2. Office of the Attorney General (also know as Department of Legal Affairs)<sup>27</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> FLA. STAT. § 27.04 (2006).

<sup>18</sup> FLA. STAT. § 27.05 (2006).

<sup>19</sup> FLA. STAT. § 27.06 (2006).

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

<sup>21</sup> An assistant state attorney may not sign an information unless specifically designated to do so by the state attorney. *See* FLA. STAT. § 27.181(2) (2006).

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

<sup>23</sup> FLA. STAT. § 16.08 (2006).

<sup>24</sup> FLA. STAT. § 29.008(1) (2006); *see also* THE FLORIDA LEGISLATURE, OFFICE OF PROGRAM POLICY ANALYSIS AND GOVERNMENT ACCOUNTABILITY, JUSTIFICATION REVIEW: JUSTICE ADMINISTRATIVE COMMISSION, STATE ATTORNEYS, PUBLIC DEFENDERS 4 (2001), *at* <http://www.oppaga.state.fl.us/reports/pdf/0164rpt.pdf> (last visited on Aug. 3, 2006) (containing in Exhibit 3 a list of county contributions to state attorneys' offices for 1999-2000).

<sup>25</sup> FLA. STAT. § 27.25(5) (2006).

<sup>26</sup> The Florida Legislature, Office of Program Policy Analysis and Government Accountability, Justice Administrative Commission, State Attorney Appropriations and FTE, 2005-06, *at* [www.oppaga.state.fl.us/profiles/1023/02/right.asp?programnum=1023](http://www.oppaga.state.fl.us/profiles/1023/02/right.asp?programnum=1023) (last visited on Aug. 3, 2006).

<sup>27</sup> The Department of Legal Affairs is responsible for providing all legal services required by any department, except where a "professional conflict of interest" exists and potentially where "emergency circumstances" exist. *See* FLA. STAT. § 16.015 (2006).

The State of Florida elects an Attorney General in a statewide general election, held every four years.<sup>28</sup> To be eligible to serve as Attorney General, one must be at least thirty years of age, have resided in the state for the preceding seven years, and have been a member of The Florida Bar for the preceding five years.<sup>29</sup> Once sworn in, the Attorney General serves as “the chief state legal officer,”<sup>30</sup> and is required to, among other things:

- (1) exercise oversight and direction over the state attorneys as to the manner of discharging their respective duties;<sup>31</sup>
- (2) whenever requested by the state attorneys, give such attorneys his/her opinion upon any question of law;<sup>32</sup>
- (3) appear in and attend to, on behalf of the state, all suits or prosecutions, civil, criminal, or in equity, in which the state may be a party, or in anyway interested, in the Supreme Court and district courts of appeal of Florida;<sup>33</sup> and
- (4) act as co-counsel of record in capital collateral proceedings.<sup>34</sup>

The Attorney General is also required to appoint a Statewide Prosecutor to head the Office of Statewide Prosecution,<sup>35</sup> which is located within the Office of the Attorney General. The Office of the Attorney General also contains other specialty offices/units,<sup>36</sup> such as the Criminal Division and the Capital Appeals Bureau.<sup>37</sup>

a. The Office of Statewide Prosecution

The Office of Statewide Prosecution, as part of the Office of the Attorney General, has concurrent jurisdiction with Florida state attorneys to prosecute a number of offenses, including, but not limited to: murder, kidnapping, and robbery,<sup>38</sup> if the offense “is occurring or has occurred, in two or more judicial circuits as part of a related transaction, or when any such offense is connected with an organized criminal conspiracy affecting two or more judicial circuits.”<sup>39</sup> The Office of Statewide Prosecution is headed by the

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<sup>28</sup> FLA. CONST. art. IV, § 5(a).

<sup>29</sup> FLA. CONST. art. IV, § 5(b).

<sup>30</sup> FLA. CONST. art. IV, § 4(b).

<sup>31</sup> FLA. STAT. § 16.08 (2006).

<sup>32</sup> *Id.*

<sup>33</sup> FLA. STAT. § 16.01(4) (2006).

<sup>34</sup> FLA. STAT. § 16.01(6) (2006).

<sup>35</sup> FLA. CONST. art. IV, § 4(b); FLA. STAT. § 16.56(2) (2006).

<sup>36</sup> For a listing of these offices/units, see Office of the Attorney General of Florida, AG Programs and Units, at <http://myfloridalegal.com/agunits> (last visited on Aug. 3, 2006).

<sup>37</sup> Office of the Attorney General of Florida, Criminal Appeals, at <http://myfloridalegal.com/pages.nsf/4492d797dc0bd92f85256cb80055fb97/7295a759cf3fb5c985256cc600587a33!OpenDocument> (last visited on Aug. 3, 2006).

<sup>38</sup> Some of the other offenses include or involve: bribery, burglary, criminal usury, extortion, gambling, larceny, prostitution, perjury, carjacking, home-invasion robbery, narcotics, fraud, computer pornography, child exploitation, voter registration fraud, and violations of the Florida RICO Act, Anti-Fencing Act, Antitrust Act, or the Motor Fuel Tax Relief Act. See FLA. STAT. § 16.56(1)(a)(1)-(12) (2006).

<sup>39</sup> FLA. CONST. art. IV, § 4(b); FLA. STAT. § 16.56(1)(a)(1)-(12) (2006).

Statewide Prosecutor,<sup>40</sup> who, as indicated above, is appointed by the Attorney General from a list of not less than three persons nominated by the Judicial Nominating Commission for the Florida Supreme Court.<sup>41</sup> The Statewide Prosecutor must be appointed for a term of four years to run concurrently with the term of the appointing Attorney General.<sup>42</sup>

Once appointed, the Statewide Prosecutor may designate one or more assistant prosecutors to assist him/her with his/her duties, which include:

- (1) conducting hearings anywhere in the state;
- (2) summoning and examining witnesses;
- (3) requiring the production of physical evidence;
- (4) signing informations, indictments, and any other official documents;
- (5) conferring immunity;
- (6) moving the court to reduce the sentence of a person convicted of drug trafficking who provides substantial assistance;
- (7) attending to and serving as the legal advisor to the statewide grand jury; and
- (8) exercising such other powers as by law are granted to state attorneys.<sup>43</sup>

b. The Criminal Division and the Capital Appeals Bureau

The Office of the Attorney General's Criminal Division generally represents and defends the state in most criminal appeals.<sup>44</sup> However, the Capital Appeals Bureau, which is a separate statewide bureau overseen by the Attorney General's Office, handles appeals in cases in which a death sentence was imposed at trial.<sup>45</sup>

*B. The Florida Rules of Professional Conduct*

The State Bar of Florida has promulgated the Florida Rules of Professional Conduct to address the professional and ethical responsibilities of all attorneys, including prosecutors. The Comment to Rule 4-3.8 of the Florida Rules of Professional Conduct specifically states: “[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations such as making a reasonable effort to assure that the accused has been advised of the right to and the procedure for obtaining counsel and has been given a reasonable opportunity to obtain counsel so that guilt is decided upon the basis of sufficient evidence.”<sup>46</sup> To ensure

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<sup>40</sup> The current Statewide Prosecutor is Peter Williams. *See* Office of the Attorney General of Florida, Statewide Prosecutor, *at* <http://myfloridalegal.com/pages.nsf/4492D797DC0BD92F85256CB80055FB97/9266F749B804B74F85256CCC007BD87B?OpenDocument> (last visited on Aug. 3, 2006).

<sup>41</sup> FLA. CONST. art. IV, § 4(b); FLA. STAT. § 16.56(2) (2006).

<sup>42</sup> FLA. STAT. § 16.56(2) (2006).

<sup>43</sup> FLA. STAT. § 16.56(3) (2006).

<sup>44</sup> *See supra* note 37.

<sup>45</sup> *See id.*

<sup>46</sup> FLA. RULES OF PROF'L CONDUCT R. 4-3.8 cmt.

that these obligations are met, Rule 4-3.8 of the Florida Rules of Professional Conduct requires a prosecutor in a criminal case to comply with a number of rules, including:

- (1) refraining from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (2) refraining from obtaining from an unrepresented accused a waiver of important pre-trial rights such as a right to a preliminary hearing; and
- (3) making timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.<sup>47</sup>

The Florida Rules of Professional Conduct also state that attorneys, including prosecutors, should not “violate or attempt to violate the Rules of Professional Conduct,” including “engag[ing] in conduct in connection with the practice of law that is prejudicial to the administration of justice.”<sup>48</sup> All attorneys are also required to report certain misconduct. Rule 4-8.3 of the Florida Rules of Professional Conduct specifically states, “[a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate professional authority.”<sup>49</sup>

The Florida Supreme Court has the exclusive jurisdiction over the discipline of persons admitted to practice law in Florida, including prosecutors.<sup>50</sup> However, to assist the Florida Supreme Court with disciplining these persons, the Florida Rules of Discipline has designated three entities—the Board of Governors of The Florida Bar, grievance committees,<sup>51</sup> and referees—as agencies of the Florida Supreme Court and granted these entities the jurisdiction and powers necessary to “conduct the proper and speedy disposition of any investigation or cause.”<sup>52</sup> Additionally, counsel for The Florida Bar<sup>53</sup> are responsible for screening inquires relating to alleged misconduct, investigating allegations, and recommending an appropriate disposition of misconduct complaints, such as dismissing the complaint, recommending diversion to practice and professionalism enhancement programs, or referring the complaint to a grievance

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<sup>47</sup> FLA. RULES OF PROF’L CONDUCT R. 4-3.8.

<sup>48</sup> FLA. RULES OF PROF’L CONDUCT R. 4-8.4.

<sup>49</sup> FLA. RULES OF PROF’L CONDUCT R. 4-8.3(a).

<sup>50</sup> FLA. RULES OF DISCIPLINE R. 3-3.1.

<sup>51</sup> For a description of the composition of the grievance committees, see FLA. RULES OF DISCIPLINE R. 3-3.4.

<sup>52</sup> FLA. RULES OF DISCIPLINE. R. 3-3.1.

<sup>53</sup> FLA. RULES OF DISCIPLINE. R. 3-3.3 (discussing the hiring of staff and bar counsel).

committee.<sup>54</sup> Alternatively, complainants may file their complaint directly with the grievance committee.<sup>55</sup>

Regardless of how a grievance committee receives a complaint, it may investigate the complaint, with the assistance of Bar Counsel or an investigator,<sup>56</sup> and/or hold a hearing<sup>57</sup> to determine whether probable cause exists to believe that the respondent has violated a rule.<sup>58</sup> Based on the investigation and/or hearing, the grievance committee may (1) find that no probable cause exists, (2) find that probable cause does exist,<sup>59</sup> (3) find that minor misconduct has occurred,<sup>60</sup> or (4) recommend diversion to remedial programs.<sup>61</sup> The grievance committee's findings and recommendations must be given to the "designated reviewer for review."<sup>62</sup>

The "designated reviewer" may "request the grievance committee to reconsider its action or may refer the grievance committee action to the [disciplinary review committee of the] Board of Governors for its review" and make recommendations as to the disposition of the complaint.<sup>63</sup> Such recommendations include: "(1) referral of the matter to the grievance mediation program; (2) referral of the matter to the fee arbitration program; (3) closure of the disciplinary file by diversion to a component of the practice and professionalism enhancement program; (4) closure of the disciplinary file by the entry of a finding of no probable cause; (5) closure of the disciplinary file by the entry of a finding of no probable cause with a letter of advice; (6) a finding of minor misconduct; or (7) a finding of probable cause that further disciplinary proceedings are warranted."<sup>64</sup>

If the designated reviewer does not refer a grievance committee formal complaint to the disciplinary review committee, the complaint must be filed with the Florida Supreme Court and a request must be made to have the Court assign a "referee to try the cause."<sup>65</sup> On the other hand, if the grievance committee matter is referred to the disciplinary review committee, the disciplinary review committee must make a report to the Board of Governors; the report may confirm, reject, or amend the recommendation of the

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<sup>54</sup> FLA. RULES OF DISCIPLINE R. 3-7.3(a), (b), (d), (f).

<sup>55</sup> FLA. RULES OF DISCIPLINE R. 3-7.4(b). The Florida Bar also has a client assistance program, called the Attorney Consumer Assistance Program (ACAP). The ACAP has a hotline through which some client complaints may be resolved before a complaint is filed. See The Florida Bar, Public Information, Attorney Consumer Assistance Program (ACAP), at [http://www.floridabar.org/\\_852567090070C998.nsf/0A92A6DC28E76AE58525700A005D0D53/37E34BBB81F1EE4E85256C0D00703FF4](http://www.floridabar.org/_852567090070C998.nsf/0A92A6DC28E76AE58525700A005D0D53/37E34BBB81F1EE4E85256C0D00703FF4) (last visited on Aug. 3, 2006).

<sup>56</sup> FLA. RULES OF DISCIPLINE R. 3-7.4(f).

<sup>57</sup> FLA. RULES OF DISCIPLINE R. 3-7.4(a).

<sup>58</sup> FLA. RULES OF DISCIPLINE R. 3-7.4(j)(1).

<sup>59</sup> FLA. RULES OF DISCIPLINE R. 3-7.4(l).

<sup>60</sup> FLA. RULES OF DISCIPLINE R. 3-7.4(m); see also FLA. RULES OF DISCIPLINE R. 3-5.1(b) (noting that "minor misconduct is the only type of misconduct for which an admonishment is an appropriate disciplinary action").

<sup>61</sup> FLA. RULES OF DISCIPLINE R. 3-7.4(o).

<sup>62</sup> FLA. RULES OF DISCIPLINE R. 3-7.5(a).

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

<sup>64</sup> *Id.*

<sup>65</sup> FLA. RULES OF DISCIPLINE R. 3-7.4(p); see also FLA. RULES OF DISCIPLINE R. 3-7.6 (detailing the procedures before a referee).

designated reviewer in whole or in part<sup>66</sup> and “shall be final unless overruled by the [B]oard.”<sup>67</sup> The Board of Governors may confirm, reject, or amend the recommendation of the disciplinary review committee either in whole or in part.<sup>68</sup> A finding that no probable cause exists to warrant further disciplinary proceedings by the Board “shall be final and no further proceedings shall be had in the matter by The Florida Bar.”<sup>69</sup>

However, if the Board of Governors finds that probable cause exists to warrant further proceedings, then the complaint may be assigned by the Chief Justice of the Florida Supreme Court for trial before a referee.<sup>70</sup> A trial before a referee is an adversary proceeding,<sup>71</sup> and after the proceeding concludes, the referee must file a report that includes: (1) a finding of fact as to each item of misconduct with which the respondent is charged; (2) recommendations as to whether the respondent should be found guilty of misconduct justifying disciplinary measures; (3) recommendations as to the disciplinary measures to be applied; (4) a statement of any past disciplinary measures against the respondent that are on record with the Executive Director of The Florida Bar or otherwise became known to the referee through evidence properly admitted during the proceedings; and (5) a statement of costs incurred and recommendations as to the matter in which such costs should be taxed.<sup>72</sup> The available disciplinary measures include, but are not limited to: admonishments, probation, public reprimand, suspension, and disbarment.<sup>73</sup>

Either party “may procure review [by the Florida Supreme Court] of a report of a referee or a judgment.”<sup>74</sup> The Court must “review all reports and judgments of referees recommending probation, public reprimand, suspension, disbarment, or resignation pending disciplinary proceedings.”<sup>75</sup>

### *C. Relevant Prosecutorial Responsibilities*

#### 1. Notice of Intent to Seek the Death Penalty

Within forty-five days after the date of arraignment, the state attorney has the option, but is not required, to file a “Notice of Intent to Seek the Death Penalty”<sup>76</sup> in any case in which the defendant is charged with a capital offense, which includes: (1) first-degree murder, as prescribed in section 782.04 of the Florida Statutes; (2) the capital offense involving the making and use of a destructive device, as prescribed in section 790.161 of the Florida Statutes; and (3) capital drug trafficking, as prescribed in section 893.135 of

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<sup>66</sup> FLA. RULES OF DISCIPLINE R. 3-7.5(b).

<sup>67</sup> *Id.*

<sup>68</sup> FLA. RULES OF DISCIPLINE R. 3-7.5(c).

<sup>69</sup> FLA. RULES OF DISCIPLINE R. 3-7.5(e).

<sup>70</sup> FLA. RULES OF DISCIPLINE R. 3-7.6(a), (b).

<sup>71</sup> FLA. RULES OF DISCIPLINE R. 3-7.6(b). For additional information on the structure of the proceedings, see FLA. RULES OF DISCIPLINE R. 3-7.6(c)-(l), (o).

<sup>72</sup> FLA. RULES OF DISCIPLINE R. 3-7.6(m)(1)(A)-(E).

<sup>73</sup> FLA. RULES OF DISCIPLINE R. 3-5.1(a)-(f).

<sup>74</sup> FLA. RULES OF DISCIPLINE R. 3-7.7(a)(1).

<sup>75</sup> FLA. RULES OF DISCIPLINE R. 3-7.7(a)(2).

<sup>76</sup> FLA. R. CRIM. P. 3.202(a).

the Florida Statutes.<sup>77</sup> In determining whether to file a notice of intent, the state attorney may consider whether the evidence supports a finding of any of the fifteen aggravating circumstances found in section 921.141(5) of the Florida Statutes.<sup>78</sup>

If the state attorney files a timely notice of intent and the defendant intends to raise mental retardation as a bar to the death sentence or to establish statutory or nonstatutory mental mitigating circumstances, the defendant must file a “Notice of Intent to Present Expert Testimony of Mental Mitigation” at least twenty days before trial.<sup>79</sup> The state attorney’s failure to timely file the notice of intent relieves the defendant from this filing requirement, but does not preclude the state from seeking the death penalty.<sup>80</sup>

## 2. Plea Agreements

The Florida Rules of Criminal Procedure contain guidelines for state attorneys, defense attorneys,<sup>81</sup> and trial judges<sup>82</sup> on conducting plea discussions and reaching plea agreements.<sup>83</sup> Under Rule 3.171 of the Florida Rules of Criminal Procedure, a state attorney is authorized to engage in discussions with defense counsel, or with the defendant if s/he is representing him/herself, for the purpose of reaching a plea agreement.<sup>84</sup> If the defendant is represented, the discussion and agreement must be conducted in the presence of the defendant’s counsel, otherwise the discussion and agreement between the state attorney and defendant “shall be of record.”<sup>85</sup>

During the course of the plea discussion, the state attorney may consult the victim, investigating officer, or other interested persons and advise the trial judge of their views.<sup>86</sup> If during the discussion, the defendant enters a plea of guilty or *nolo contendere* to a charged offense or to a lesser or related offense, the state attorney may do any of the following:

- (1) abandon other charges;
- (2) make a recommendation, or agree not to oppose the defendant’s request for a particular sentence, with the understanding that such recommendation or request shall not be binding on the trial judge; or

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<sup>77</sup> FLA. STAT. §§ 782.04(1)(a), 790.161(4), 893.135(1)(b)(2) (2006); *see also* FLA. STAT. § 794.011(2)(a), (8)(c) (2006) (providing that capital sexual battery is also punishable by death). *But see* Buford v. State, 403 So. 2d 943, 951 (Fla. 1981); Rowe v. State, 417 So. 2d 981, 982 (Fla. 1982).

<sup>78</sup> FLA. STAT. § 921.141(5) (2006).

<sup>79</sup> FLA. STAT. § 921.137(3) (2006); FLA. R. CRIM. P. 3.202(b), (c).

<sup>80</sup> Gonzalez v. State, 829 So. 2d 277, 278 - 279 (Fla. 2d DCA 2002) (citing to *Amendments to Fla. Rule of Criminal Procedure 3.220-Discovery (3.202-Expert Testimony of Mental Mitigation During Penalty Phase of Capital Trial)*, 674 So. 2d 83, 84 (Fla. 1995) (stating that “[i]f the State fails to give notice of its intent to seek the death penalty within ten days after arraignment, the State still may seek the death penalty, although it may not avail itself of the provisions of the rule”).

<sup>81</sup> For the guidelines for defense attorneys, see FLA. R. CRIM. P. 3.171(c).

<sup>82</sup> For the guidelines for trial judges, see FLA. R. CRIM. P. 3.171(d).

<sup>83</sup> FLA. R. CRIM. P. 3.171.

<sup>84</sup> FLA. R. CRIM. P. 3.171(b)(1)(A).

<sup>85</sup> FLA. R. CRIM. P. 3.171(a).

<sup>86</sup> FLA. R. CRIM. P. 3.171(b)(1)(B).

- (3) agree to a specific sentence.<sup>87</sup>

Prior to acceptance of the plea by the trial judge, the state attorney must (1) “apprise the trial judge of all material facts known to the attorney regarding the offense and the defendant’s background,” and (2) if the defendant represented him/herself, make the record of the direct discussions with the defendant available to the trial judge.<sup>88</sup>

### 3. Discovery

#### a. Discovery Requirements

State and federal law require the state to disclose evidence favorable to the defendant when such evidence is material either to the defendant’s guilt or punishment (*Brady* material).<sup>89</sup> Such evidence includes both exculpatory and impeachment evidence,<sup>90</sup> even if there has been no request from the accused.<sup>91</sup> Similarly, a prosecutor has a duty to disclose evidence of which s/he is aware as well as “favorable evidence known to the others acting on the government’s behalf,” even if the prosecutor is not personally aware of its existence.<sup>92</sup> “In order to comply with *Brady*, therefore, ‘the individual prosecutor has a duty to learn of any favorable evidence know to the others acting on the government’s behalf . . . , including the police.’”<sup>93</sup>

Additionally, in all criminal cases, including capital cases, defendants may elect to participate in “reciprocal discovery” by filing with the court and serving on the prosecuting attorney a “Notice of Discovery,” which binds both the defense and prosecution to certain discovery obligations, including discovery depositions.<sup>94</sup> Within fifteen days after service of the Notice of Discovery, the prosecutor must serve a written “Discovery Exhibit,” disclosing to the defendant and permitting the defendant to “inspect, copy, test, and photograph” the following information and material within the state’s possession or control:

- (1) a list of the names and addresses of all persons known to the prosecutor to

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<sup>87</sup> FLA. R. CRIM. P. 3.171(b)(1)(A)(i)-(iii).

<sup>88</sup> FLA. R. CRIM. P. 3.171(b)(2)(A), (B).

<sup>89</sup> See *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Rogers v. State*, 782 So. 2d 373, 376-77 (Fla. 2001); FLA. R. CRIM. P. 3.220(b)(4) (stating “[a]s soon as practicable after the filing of the charging document the prosecutor shall disclose to the defendant any material information within the state’s possession or control that tends to negate the guilt of the defendant as to any offense charged”).

<sup>90</sup> *United States v. Bagley*, 473 U.S. 667, 676 (1985); *Rogers*, 782 So. 2d at 377-78.

<sup>91</sup> *Rogers*, 782 So. 2d at 377-78; *Cardona v. State*, 826 So. 2d 968, 972 (Fla. 2002).

<sup>92</sup> *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995); see also *Rogers*, 782 So. 2d at 378.

<sup>93</sup> *Rogers*, 782 So. 2d at 378 (citing *Kyles*, 514 U.S. at 437).

<sup>94</sup> FLA. R. CRIM. P. 3.220(a); see also FLA. R. CRIM. P. 3.220(h). We note that in addition to these reciprocal discovery rules, the Florida Rules of Criminal Procedure authorize defense counsel to issue subpoenas for production of tangible evidence before the Court. See FLA. R. CRIM. P. 3.361(b).

have information that may be relevant to any offense charged or any defense thereto, or to any similar fact evidence to be presented at trial as character evidence;<sup>95</sup>

- (2) written statements<sup>96</sup> of any person whose name is furnished on the list;
- (3) any written or recorded statements and the substance of any oral statements made by the defendant, including a copy of any statements contained in police reports or report summaries, together with the name and address of each witness to the statements;
- (4) any written or recorded statements and the substance of any oral statements made by a codefendant if the trial is to be a joint trial;
- (5) portions of recorded grand jury minutes that contain testimony of the defendant;
- (6) any tangible papers or objects that were obtained from or belonged to the defendant;
- (7) reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons; and
- (8) any tangible papers or objects that the prosecuting attorney intends to use in the hearing or trial and that were not obtained from or did not belong to the defendant.<sup>97</sup>

Additionally, the prosecuting attorney must disclose:

- (1) whether the state has any material or information that has been provided by a confidential informant;

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<sup>95</sup> The names and addresses of the witnesses must be “clearly designated in the following categories:”

- (1) Category A. These witnesses shall include (1) eye witnesses; (2) alibi witnesses and rebuttal to alibi witnesses; (3) witnesses who were present when a recorded or unrecorded statement was taken from or made by a defendant or codefendant, which shall be separately identified within this category; (4) investigating officers; (5) witnesses known by the prosecutor to have any material information that tends to negate the guilt of the defendant as to any offense charged; (6) child hearsay witnesses; and (7) expert witnesses who have not provided a written report and a curriculum vitae or who are going to testify to test results or give opinions that will have to meet the test set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923);
- (2) Category B. All witnesses not listed in either Category A or Category C; and
- (3) Category C. All witnesses who performed only ministerial functions or whom the prosecutor does not intend to call at trial and whose involvement with and knowledge of the case is fully set out in a police report or other statement furnished to the defense.

*See* FLA. R. CRIM. P. 3.220(b)(1)(A)(i)-(iii).

<sup>96</sup> The term “statement” includes: (1) “a written statement made by the person and signed or otherwise adopted or approved by the person;” (2) “any statement of any kind or manner made by the person and written or recorded or summarized in any writing or recording;” and (3) “all police and investigative reports of any kind prepared for or in connection with the case, but shall not include the notes from which those reports are compiled.” *See* FLA. R. CRIM. P. 3.220(b)(1)(B).

<sup>97</sup> FLA. R. CRIM. P. 3.220(b)(1)(A)-(F), (J)-(K).

- (2) whether there has been any electronic surveillance, including wiretapping, of the defendant's premises or of conversations to which the defendant was a party and any documents relating thereto; and
- (3) whether there has been any search or seizure and any documents relating thereto.<sup>98</sup>

The defendant must make similar disclosures within fifteen days after receipt of the prosecutor's Discovery Exhibit.<sup>99</sup> Additionally, if, following compliance with these discovery rules, either party "discovers additional witnesses or material that the party would have been under a duty to disclose or produce at the time of the previous compliance, the party shall promptly disclose or produce the witnesses or material in the same manner as required under these rules for initial discovery."<sup>100</sup>

Neither party, however, is required to disclose the identification of a confidential informant "unless the confidential informant is to be produced at a hearing or trial or a failure to disclose the informant's identity will infringe the constitutional rights of the defendant," nor need it disclose written documents containing a prosecutor's or his/her staff's opinions, theories, or conclusions.<sup>101</sup>

The court must also "deny or partially restrict [the authorized] disclosures . . . if it finds there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment resulting from the disclosure, that outweighs any usefulness of the disclosure to either party."<sup>102</sup> Similarly, "[i]f the court determines, in camera, that any police or investigative report contains irrelevant, sensitive information or information interrelated with other crimes or criminal activities and the disclosure of the contents of the police report may seriously impair law enforcement or jeopardize the investigation of those other crimes or activities, the court may prohibit or partially restrict the disclosure."<sup>103</sup>

#### b. Challenges to Discovery Violations

If during the proceedings either party fails to comply with any applicable discovery rule or related court order, the court has the discretion to order the non-complying party to allow the discovery or inspection of discoverable materials, prohibit the introduction of the undisclosed evidence, or prohibit the undisclosed witnesses from testifying; the court also has the discretion to grant a continuance or mistrial, or issue any other order deemed just.<sup>104</sup> Upon a showing of a "willful violation by counsel," the court must subject the violating counsel to "appropriate sanctions," which may include, but are not limited to,

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<sup>98</sup> FLA. R. CRIM. P. 3.220(b)(1)(G)-(I).

<sup>99</sup> FLA. R. CRIM. P. 3.220(d)(1)-(3).

<sup>100</sup> FLA. R. CRIM. P. 3.220(j).

<sup>101</sup> FLA. R. CRIM. P. 3.220(g)(1), (2).

<sup>102</sup> FLA. R. CRIM. P. 3.220(e).

<sup>103</sup> FLA. R. CRIM. P. 3.220(b)(2).

<sup>104</sup> FLA. R. CRIM. P. 3.220(b)(3), (n)(1).

contempt proceedings against the counsel, as well as levying of costs incurred by the opposing party.<sup>105</sup>

On the issue of judicial discretion to remedy a party's noncompliance with any applicable discovery rule, Florida courts require the trial court to hold a *Richardson*<sup>106</sup> hearing to determine whether the discovery violation "(1) was willful or inadvertent; (2) was substantial or trivial; and (3) had a prejudicial effect on the aggrieved party's trial preparation."<sup>107</sup> Once the court determines that a violation exists, it has the discretion to choose the appropriate remedy or sanction.<sup>108</sup> However, the extreme sanction of excluding evidence "should be used only as a last resort" when no other remedy will suffice.<sup>109</sup>

Following the trial, a defendant may establish that a prosecutor withheld *Brady* material by proving that: (1) the evidence at issue is favorable to the defendant, either because it is exculpatory, or because it is impeaching; (2) the evidence was suppressed by the prosecution, either willfully or inadvertently; and (3) prejudice has ensued.<sup>110</sup> To establish prejudice, the defendant must show that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict" to the extent that "there is a reasonable probability that had the information been disclosed to the defendant, the result of the proceeding would have been different."<sup>111</sup> The suppression of such evidence constitutes constitutional error,<sup>112</sup> and the defendant is entitled to a new guilt/innocence or penalty phase.<sup>113</sup>

#### 4. Limitations on Arguments

##### a. Substantive Limitations

"The purpose of an opening statement is for counsel to outline the facts expected to be proved at trial. It is not the appropriate place for argument."<sup>114</sup> In contrast, "[t]he proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence."<sup>115</sup> Counsel is afforded "wide latitude" during argument, but there are certain limitations.<sup>116</sup>

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<sup>105</sup> FLA. R. CRIM. P. 3.220(n)(2).

<sup>106</sup> See *Richardson v. State*, 246 So. 2d 771, 775 (Fla. 1971).

<sup>107</sup> *State v. Evans*, 770 So. 2d 1174, 1183 (Fla. 2000); *State v. Eaton*, 868 So. 2d 650, 653 (Fla. 2d DCA 2004).

<sup>108</sup> *Eaton*, 868 So. 2d at 653.

<sup>109</sup> See *id.*

<sup>110</sup> *Floyd v. State*, 902 So. 2d 775, 779 (Fla. 2005); *Cardona v. State*, 826 So. 2d 968, 973 (Fla. 2002); *Rogers v. State*, 782 So. 2d 373, 378 (Fla. 2001).

<sup>111</sup> *Floyd*, 902 So. 2d at 782-783; see also *Young v. State*, 739 So. 2d 553, 557 (Fla. 1999).

<sup>112</sup> *Rogers*, 782 So. 2d at 376-77.

<sup>113</sup> *Floyd*, 902 So. 2d at 783; *Young*, 739 So. 2d at 561 (vacating the defendant's death sentence and ordering a new penalty phase hearing in light of a *Brady* violation).

<sup>114</sup> *Conahan v. State*, 844 So. 2d 629, 638 (Fla. 2003) (citing *First v. State*, 696 So. 2d 1357, 1358 (Fla. 2d DCA 1997)).

<sup>115</sup> *Bertolotti v. State*, 476 So. 2d 130, 134 (Fla. 1985).

<sup>116</sup> *Franqui v. State*, 804 So. 2d 1185, 1195 (Fla. 2001).

The prosecutor must not use his/her argument “to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.”<sup>117</sup> For example, prosecutors may not “invite[] the jury to imagine the pain and suffering of the victim,”<sup>118</sup> urge the jury to consider the message a sentence other than death would send to the community,<sup>119</sup> or ask the jury to reject mercy on the basis of the lack of mercy the defendant showed to his/her victim.<sup>120</sup> Similarly, prosecutors may not “[make] any comment which is ‘fairly susceptible’ of being interpreted as a comment on [the defendant’s] silence;”<sup>121</sup> refer to the defendant’s potential for committing violent acts in the future;<sup>122</sup> or interject their personal opinions about the merits of the case, the credibility of witnesses, unless based on the evidence,<sup>123</sup> or about the defendant’s guilt.<sup>124</sup>

#### b. Challenges to Prosecutorial Arguments

“When there is overzealousness or misconduct on the part of either the prosecutor or defense lawyer, it is proper for either trial or appellate courts to exercise their supervisory powers by registering their disapproval, or, in appropriate cases, referring the matter to The Florida Bar for disciplinary investigation.”<sup>125</sup> At trial, judges may offer a curative instruction following a prosecutor’s improper remarks.<sup>126</sup> Improper prosecutorial comments that are objected to at trial are subject to the harmless error test on appeal.<sup>127</sup>

In order for an error to be harmless, the state must “prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.”<sup>128</sup> Therefore, “[i]f the appellate court cannot say beyond a reasonable doubt that the error did not affect

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<sup>117</sup> *Bertolotti*, 476 So. 2d at 134.

<sup>118</sup> *Davis v. State*, 928 So. 2d 1089, 1122 (Fla. 2005); *see also* *Urbin v. State*, 714 So. 2d 411, 419 (Fla. 1998); *Garron v. State*, 528 So. 2d 353, 358-59 (Fla.1988) (“[Y]ou can just imagine the pain this young girl was going through as she was laying there on the ground dying . . . . I would hope . . . that the jurors will listen to the screams and to her desires for punishment.”); *Bertolotti*, 476 So. 2d at 133.

<sup>119</sup> *Bertolotti*, 476 So. 2d at 133.

<sup>120</sup> *Urbin*, 714 So. 2d at 421-22.

<sup>121</sup> *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986); FLA. R. CRIM. P. Rule 3.250 (stating that a “prosecuting attorney [is not] permitted before the jury or court to comment on the failure of the accused to testify in his or her own behalf”).

<sup>122</sup> *Cf. Walker v. State*, 707 So. 2d 300, 313-14 (Fla. 1997) (finding that the prosecutor’s question as to whether the defendant will kill again constituted error, but was harmless).

<sup>123</sup> *Ruiz v. State*, 743 So. 2d 1, 4 (Fla. 1999)

<sup>124</sup> *Gore v. State*, 719 So. 2d 1197, 1202 (Fla. 1998) (citing *Conley v. State*, 592 So. 2d 723, 731 (Fla. 1st DCA 1992)); *Tyson v. State*, 100 So. 254, 255 (Fla. 1924); *see also* *Ruiz*, 743 So. 2d at 4 (finding that it is improper to imply that the defendant has in essence already been found guilty);

<sup>125</sup> *State v. Murray*, 443 So. 2d 955, 956 (Fla. 1984).

<sup>126</sup> *See, e.g., Card v. State*, 803 So. 2d 613, 620-21 (Fla. 2001) (offering a curative instruction regarding the meaning of “life without the possibility of parole” (LWOP) after the prosecutor implied that LWOP did not mean that the defendant would be in jail for the rest of his natural life).

<sup>127</sup> *See* *State v. DiGuilio*, 491 So. 2d 1129, 1134 (Fla. 1986); *Murray*, 443 So. 2d at 956.

<sup>128</sup> *DiGuilio*, 491 So. 2d at 1135.

the verdict, then the error is by definition harmful,”<sup>129</sup> warranting the reversal of the defendant’s conviction and/or sentence. The failure to object to improper comments at trial, however, forecloses reversal unless the comments constitute fundamental error.<sup>130</sup>

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<sup>129</sup> Goodwin v. State, 751 So. 2d 537, 541 (Fla. 1999).

<sup>130</sup> *Id.* at 544.

## II. ANALYSIS

### A. Recommendation #1

**Each prosecutor’s office should have written policies governing the exercise of prosecutorial discretion to ensure the fair, efficient, and effective enforcement of criminal law.**

The State of Florida does not require state attorneys’ offices to have written policies governing the exercise of prosecutorial discretion. The State Bar of Florida, however, has promulgated the Florida Rules of Professional Conduct (the rules), which address prosecutorial discretion in the context of the role and responsibilities of prosecutors.<sup>131</sup> The rules describe the prosecutor’s role as that of a “minister of justice and not simply that of an advocate.”<sup>132</sup> The rules also require the prosecutor to “refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause” and to disclose to the defense “all evidence or information known to the prosecutor that tends to negate the guilt of the accused or that mitigates the offense.”<sup>133</sup>

In terms of seeking the death penalty, the State of Florida currently gives state attorneys the discretion to do so—by filing a “Notice of Intent to Seek the Death Penalty”—in any case in which the defendant is charged with a capital offense. A capital offense includes: (1) first-degree murder, as prescribed in section 782.04 of the Florida Statutes; (2) the capital offense involving the making and use of a destructive device, as prescribed in section 790.161 of the Florida Statutes; and (3) capital drug trafficking, as prescribed in section 893.135 of the Florida Statutes.<sup>134</sup>

In determining whether to file a notice of intent, the state attorney may consider whether the evidence supports a finding of any of the fifteen aggravating circumstances found in section 921.141(5) of the Florida Statutes.<sup>135</sup> State attorneys, however, can seek and pursue the death penalty even without filing a notice of intent. In fact, the only repercussion associated with not filing a notice of intent to seek the death penalty is that it relieves the defendant of his/her obligation to inform the state about his/her intention to present expert testimony of mental mitigation.<sup>136</sup>

Apart from these statutes limiting the crimes for which death can be sought, we were unable to obtain—despite repeated requests—any statewide or local written policies governing the state’s decision to seek the death penalty. At least one state attorney’s office in the State of Florida may have such policies, but we were unable to obtain the

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<sup>131</sup> FLA. RULES OF PROF’L CONDUCT R. 4-3.8.

<sup>132</sup> FLA. RULES OF PROF’L CONDUCT R. 4-3.8 cmt.

<sup>133</sup> FLA. RULES OF PROF’L CONDUCT R. 4-3.8(a), (c).

<sup>134</sup> FLA. STAT. §§ 782.04(1)(a), 790.161(4), 893.135(1)(b)(2) (2006).

<sup>135</sup> FLA. STAT. § 921.141(5) (2006).

<sup>136</sup> See *Gonzalez v. State*, 829 So. 2d 277, 278-89 (Fla. 2d DCA 2002); see also FLA. STAT. § 921.137(3) (2006); FLA. R. CRIM. P. 3.202(a)-(c).

policies to confirm the content.<sup>137</sup> In the absence of uniform written policies, it is possible that state attorneys' offices may have different bases for deciding to seek the death penalty. For example, a 1992 Orlando Sentinel study, which analyzed all 283 first-degree murder cases prosecuted from January 1, 1986 through September 30, 1991, in Orange, Osceola, Seminole, Brevard, Lake, and Volusia counties, found that prosecutors in those counties sought the death penalty more often for killers of whites.<sup>138</sup> The study specifically found:

- (1) In spousal killings, [prosecutors] sought the death penalty 3 1/2 times more often in cases with white victims than those involving black or Hispanic victims.
- (2) In cases in which victims and accused killers were friends or relatives, prosecutors in Orange and Seminole counties asked for the death penalty four times more often when the victim was white. When victims and killers were strangers, prosecutors asked for the death penalty in white-victim cases 50 percent more often.
- (3) In cases in which the accused killer was charged with committing another felony along with the killing, prosecutors in Orange and Seminole counties sought death 3 1/2 times more often when the victim was white. When no other felony was involved, the figure was 50 percent more often in white-victim cases.<sup>139</sup>

We note that it appears that this study only includes cases in which death was sought and does not include cases in which it was not sought. Therefore, it did not compare either the quality or quantity of aggravating circumstances present in those cases wherein the death penalty was sought as opposed to those cases where it was not.

In conclusion, although the State of Florida has adopted statutes limiting the cases in which the death penalty can be sought, it does not require state attorneys' offices to have written policies governing the exercise of prosecutorial discretion in death penalty cases. Similarly, although we know that one state attorney's office may have policies governing the exercise of prosecutorial discretion, we were unable to determine whether all offices have such relevant policies. Consequently, we are unable to ascertain whether the State of Florida is in compliance with the requirements of Recommendation #1.

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<sup>137</sup> To collect research for this section, we sent out questionnaires to all twenty state attorneys' offices. We received replies from three offices: Second Circuit; Fourth Circuit; and Eighth Circuit. We also conducted a phone interview with a prosecutor from the Eleventh Circuit. The prosecutor from the Eleventh Circuit indicated that the Eleventh Circuit has a written policy on the decision-making process for seeking the death penalty. We note also that in at least the Fourth and Eleventh Circuits, defense attorneys and prosecutors discuss the decision to seek the death penalty.

<sup>138</sup> Bob Evensong & Debbie Salamone, *Prosecutors See Death Penalty in Black and White*, ORLANDO SENTINEL, May 24, 1992, at A1; see also Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC'Y REV. 587, 618-19 (1985) (stating that "[i]t appears that not only are prosecutors sometimes motivated to seek a death sentence for reasons that reflect the racial configuration of the crime, but that they do so in a way that greatly reduces the possibilities for discovering evidence of discrimination and arbitrariness when only later stages of the judicial process are examined.")

<sup>139</sup> *Id.*

Based on this information, the Florida Death Penalty Assessment Team recommends that the State of Florida develop statewide protocols for determining who may be charged with a capital crime, in an effort to standardize the charging decision.

*B. Recommendation #2*

**Each prosecutor’s office should establish procedures and policies for evaluating cases that rely upon eyewitness identification, confessions, or the testimony of jailhouse snitches, informants, and other witnesses who receive a benefit.**

The State of Florida does not require each state attorney’s office to establish procedures and policies for evaluating cases that rely upon eyewitness identification, confessions, or the testimony of jailhouse snitches, informants, and other witnesses who receive a benefit. Each state attorney’s office may have such procedures and policies, but, despite repeated requests, we were unable to obtain copies of any of these procedures or policies. Therefore, we are unable to ascertain whether the State of Florida is in compliance with Recommendation #2.

We note, however, that the State of Florida has established certain trial procedures relevant to the admissibility and/or reliability of certain types of evidence. For instance, the Florida Supreme Court has held that the admission of expert testimony regarding the reliability of eyewitness identifications is in the discretion of the trial court.<sup>140</sup> Such testimony, however, “should be excluded when the facts testified to are of such nature as not to require any special knowledge or experience in order for the jury to form its conclusions.”<sup>141</sup> Based on the cases in which the Florida Supreme Court has addressed this issue, it appears that judges generally exercise their discretion to exclude either part or all of the expert testimony.<sup>142</sup>

In cases in which expert testimony or other types of testimony is admitted, the *Florida Standard Jury Instructions in Criminal Cases* provides the jury with factors to consider when determining the reliability of such testimony.<sup>143</sup> The instruction pertaining to the reliability of testimony of witnesses states:

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<sup>140</sup> McMullen v. State, 714 So. 2d 368, 372 (Fla. 1998) (reaffirming the Court’s decision in *Johnson v. State*, 438 So. 2d 774 (Fla. 1983)); see also *Simmons v. State*, 2006 WL 1299617, at \*12 (Fla. May 11, 2006).

<sup>141</sup> *Johnson v. State*, 438 So. 2d 774, 777 (Fla. 1983).

<sup>142</sup> *McMullen*, 714 So. 2d at 372 (stating that since *Johnson* “we have addressed the issue of expert testimony regarding the reliability of eyewitness identification in four other cases . . . . In each of these cases, we have approved the exclusion of part or all of expert testimony or approved the denial of costs for same based on our decision in *Johnson*.”); see also *Espinosa v. State*, 589 So. 2d 887, 893 (Fla. 1991) (finding the trial judge did not abuse his discretion in not authorizing costs for expert testimony); *Lewis v. State*, 572 So. 2d 908, 911 (Fla. 1990) (finding the trial judge did not abuse his discretion in excluding expert testimony on the eyewitness identification process); *Rogers v. State*, 511 So. 2d 526, 530 (Fla. 1987) (finding the trial court did not err in limiting the expert testimony on the accuracy of eyewitness identifications).

<sup>143</sup> FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES §§ 3.9, 3.9(a) (5th ed. 2005).

It is up to you to decide what evidence is reliable.

...

You should consider how the witnesses acted, as well as what they said. Some things you should consider are:

1. Did the witness seem to have an opportunity to see and know the things about which the witness testified?
2. Did the witness seem to have an accurate memory?
3. Was the witness honest and straightforward in answering the attorneys' questions?
4. Did the witness have some interest in how the case should be decided?
5. Does the witness' testimony agree with the other testimony and other evidence in the case?

....

6. Has the witness been offered or received any money, preferred treatment or other benefit in order to get the witness to testify?
7. Had any pressure or threat been used against the witness that affected the truth of the witness' testimony?
8. Did the witness at some other time make a statement that is inconsistent with the testimony [he] [she] gave in court?
9. Was it proved that the witness had been convicted of a crime?
10. Was it proved that the general reputation of the witness for telling the truth and being honest was bad?<sup>144</sup>

In determining the reliability of the witness, this instruction specifically allows the jury to consider whether the witness has a stake in the case and, if evidenced, whether s/he was offered or received any benefits, such as money or preferred treatment, in exchange for his/her testimony.<sup>145</sup>

Additionally, the *Florida Standard Jury Instructions in Criminal Cases* provides the jury with factors to consider when determining the voluntariness of a defendant's confession.<sup>146</sup> The instructions specifically state:

A statement claimed to have been made by the defendant outside of court has been placed before you. Such a statement should always be considered with caution and be weighed with great care to make certain it was freely and voluntarily made.

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<sup>144</sup> FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 3.9 (5th ed. 2005) (noting that numbers 6 through 10 "should be included only as required by the evidence").

<sup>145</sup> *Id.*

<sup>146</sup> FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 3.9(e) (5th ed. 2005)

Therefore, you must determine from the evidence that the defendant's alleged statement was knowingly, voluntarily, and freely made.

In making this determination, you should consider the total circumstances, including but not limited to

1. whether, when the defendant made the statement, [he] [she] had been threatened in order to get [him] [her] to make it, and
2. whether anyone had promised [him] [her] anything in order to get [him] [her] to make it.

If you conclude the defendant's out of court statement was not freely and voluntarily made, you should disregard it.<sup>147</sup>

### *C. Recommendation #3*

**Prosecutors should fully and timely comply with all legal, professional, and ethical obligations to disclose to the defense information, documents, and tangible objects and should permit reasonable inspection, copying, testing, and photographing of such disclosed documents and tangible objects.**

State and federal laws require prosecutors to disclose evidence favorable to the defendant when such evidence is material either to the defendant's guilt or punishment. This includes exculpatory and impeachment evidence.<sup>148</sup> Additionally, a prosecutor has a duty to disclose evidence of which s/he is aware as well as "favorable evidence known to the others acting on the government's behalf."<sup>149</sup>

Furthermore, in cases in which the defendant opts to participate in "reciprocal discovery," which includes discovery depositions, prosecutors are required to disclose to the defendant and permit the defendant to "inspect, copy, test, and photograph" certain types of information and material within the state's possession or control, including, but not limited to: written statements of any person who is "known to the prosecutor to have information that may be relevant to any offense charged or any defense thereto, or to any similar fact evidence to be presented at trial" as character evidence; "any written or recorded statements and the substance of any oral statements made by the defendant;" and "any tangible papers or objects that were obtained from or belonged to the defendant" or that "the prosecuting attorney intends to use in the hearing or trial."<sup>150</sup>

Regardless of whether the defendant opts to participate in reciprocal discovery, the Florida Rules of Professional Conduct, in addition to state and federal law, require all prosecutors to disclose "all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with

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<sup>147</sup> *Id.*

<sup>148</sup> *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *FLA. R. CRIM. P. 3.220(b)(4)*; *United States v. Bagley*, 473 U.S. 667, 676 (1985); *Rogers v. State*, 782 So. 2d 373, 377-78 (Fla. 2001).

<sup>149</sup> *Kyles v. Whitley*, 514 U.S. 419, 437 (1995); *Rogers*, 782 So. 2d at 378.

<sup>150</sup> *FLA. R. CRIM. P. 3.220(a), (b)(1)(A)-(K)*.

sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.”<sup>151</sup>

Based on this information, it appears that the State of Florida provides the necessary framework to allow prosecutors to fully and timely disclose information, documents, and tangible objects to the defense and permits reasonable inspection, copying, testing and photographing of such disclosed documents or tangible objects. However, it appears that some prosecutors still occasionally fail to comply with discovery requirements. For example, a Center for Public Integrity study of Florida appellate cases addressing alleged prosecutorial error or misconduct from 1970 until June 2003 revealed a number of cases (including death and non-death cases) in which prosecutors withheld evidence from defendants.<sup>152</sup> The study identified 567 cases in which defendants alleged prosecutorial error or misconduct,<sup>153</sup> and in 253 of these cases, “judges ruled a prosecutor’s conduct prejudiced a defendant and reversed or remanded the [defendant’s] conviction, sentence or indictment.”<sup>154</sup> Of the cases in which judges ruled a prosecutor prejudiced the defendant, 40 involved the prosecution withholding evidence from the defense.<sup>155</sup>

Although many prosecutors fully and timely comply with all legal, professional, and ethical obligations to disclose evidence, this is not always the case. We, therefore, conclude that the State of Florida is only in partial compliance with Recommendation #3.

#### *D. Recommendation #4*

**Each jurisdiction should establish policies and procedures to ensure that prosecutors and others under the control or direction of prosecutors who engage in misconduct of any kind are appropriately disciplined, that any such misconduct is disclosed to the criminal defendant in whose case it occurred, and that the prejudicial impact of any such misconduct is remedied.**

The State of Florida has entrusted The Florida Bar with investigating grievances and disciplining practicing attorneys. These powers have been delegated to grievance committees, the Board of Governors of The Florida Bar, and referees.<sup>156</sup> Initially, a complaint is either filed directly with a grievance committee by a complainant, or referred to a grievance committee by counsel for The Florida Bar.<sup>157</sup> All attorneys,

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<sup>151</sup> FLA. RULES OF PROF’L CONDUCT R. 4-3.8(c).

<sup>152</sup> Center for Public Integrity, Harmful Error, at <http://www.publicintegrity.org/pm/states.aspx?st=FL> (last visited on Aug. 3, 2006).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* Examples of capital cases in which Florida courts have found reversible prosecutorial error include: *Cardona v. State*, 826 So. 2d 968, 972 (Fla. 2002); *Rogers v. State*, 782 So. 2d 373, 376-78 (Fla. 2001); *Brooks v. State*, 762 So. 2d 879, 898 (Fla. 2000); and *Ruiz v. State*, 743 So. 2d 1, 10 (Fla. 1999).

<sup>155</sup> *See supra* note 152.

<sup>156</sup> FLA. RULES OF DISCIPLINE R. 3-3.1.

<sup>157</sup> *See* FLA. RULES OF DISCIPLINE R. 3-7.3(f); FLA. RULES OF DISCIPLINE R. 3-7.4(b) (stating that a complaint may be filed directly with a grievance committee); *see also supra* note 55 (discussing hotline for complaints).

including prosecutors, are required to report professional misconduct of other attorneys to The Florida Bar.<sup>158</sup> Similarly, the Florida Supreme Court has stated that when trial and appellate courts are confronted with overzealousness or misconduct, they should “exercise their supervisory powers by registering their disapproval, or, in appropriate cases, referring the matter to The Florida Bar for disciplinary investigation.”<sup>159</sup>

Depending on the merits of the complaint, it may be reviewed further by a designated reviewer, a disciplinary review committee, the Board of Governors of The Florida Bar, a referee, and/or the Florida Supreme Court.<sup>160</sup> In the end, the available disciplinary measures include, but are not limited to: an admonishment, probation, public reprimand, suspension, and disbarment.<sup>161</sup> However, it is questionable whether an elected State Attorney or Public Defender can even be removed from office by The Florida Bar for trial misconduct because they are constitutional officers and the specific method for their removal expressed in the Florida Constitution does not involve that sanction being carried out by the Bar.<sup>162</sup>

There is at least one appellate court that has questioned the efficacy of The Florida Bar’s disciplinary efforts.<sup>163</sup> In *Johnnides v. Amoco Oil Company*,<sup>164</sup> the court stated:

[W]e have no illusions that [referring lawyers to The Florida Bar] will have any practical effect. Our skepticism is caused by the fact that, of the many occasions in which members of this court—reluctantly and usually only after agonizing over what we thought was the seriousness of doing so—have found it appropriate to make such a referral about a lawyer’s conduct in litigation, none has resulted in the public imposition of any discipline—not even a reprimand—whatsoever. In fact, the reported decisions do not reflect that the Bar has responded concretely at all to the tide of uncivil and unprofessional conduct which has been the subject of so much article-writing, sermon-giving, seminar-holding and general hand-wringing for at least the past twenty years.<sup>165</sup>

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<sup>158</sup> FLA. RULES OF PROF’L CONDUCT R. 4-8.3(a). The misconduct must raise “a substantial question as to that lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects.” *Id.*

<sup>159</sup> *See State v. Murray*, 443 So. 2d 955, 956 (Fla. 1984).

<sup>160</sup> *See supra* notes 58-75 and accompanying text.

<sup>161</sup> FLA. RULES OF DISCIPLINE R. 3-5.1(a)-(f).

<sup>162</sup> In *State v. Davis*, No. 91-2291-CF, a capital case, Judge Stan Morris signed an order finding that the state attorney had violated the ethics rule on pre-trial publicity. Defense Attorney David Tarbert forwarded the order to The Florida Bar, which responded with a citation to *The Florida Bar v. McCain*, 330 So. 2d 712 (Fla. 1976), where the Florida Supreme Court held that “where the constitution creates an office, fixes its term and provides upon what conditions the incumbent may be removed before the expiration of his term, it is beyond the power of the legislature or any other authority to remove or suspend such officer in any manner than that provided by the constitution.” *The Florida Bar v. McCain*, 330 So. 2d 712, 715-716 (Fla. 1976) (citing *In re Investigation of Circuit Judge of Eleventh Judicial Circuit of Fla.*, 93 So. 2d 601 (Fla. 1957)).

<sup>163</sup> *Johnnides v. Amoco Oil Co., Inc.*, 778 So. 2d 443, 445 n.2 (Fla. 3d DCA 2001).

<sup>164</sup> 778 So. 2d 443 (Fla. 3d DCA 2001).

<sup>165</sup> *Id.* at 445 n.2.

Reiterating the appellate court's criticisms, the organization HALT, which evaluates lawyer discipline systems across the country, recently assigned a grade of "C+" to Florida's system, based on an assessment of the adequacy of discipline imposed, its publicity and responsiveness efforts, the openness of the process, the fairness of the disciplinary procedures, the amount of public participation, and promptness of follow-up on complaints.<sup>166</sup> HALT specifically found that "[n]inety-seven percent of all investigated cases do not lead to any form of discipline in Florida."<sup>167</sup>

According to the American Bar Association's Center for Professional Responsibility, The Florida Bar received 8,820 complaints about alleged attorney misconduct in 2004 and had another 3,777 complaints pending from previous years.<sup>168</sup> Of these cases, 1,373 were summarily dismissed for lack of jurisdiction, 10,939 were investigated, 6,236 were dismissed after investigation, and 742 were found to warrant the filing of formal charges.<sup>169</sup> Furthermore, sixty-one lawyers were disbarred, eighty-three were suspended, thirty-eight were suspended on an interim basis (for risk of harm or criminal conviction), 111 were publicly reprimanded and/or censured, thirty-four were placed on probation, and one was transferred to disability/inactive status.<sup>170</sup> We were unable to determine how many, if any, of these attorneys were or are prosecutors, and we were unable to find any cases where a prosecutor was directly sanctioned by the Bar for misconduct during a capital case. However, according to the four prosecutor offices from which we obtained information,<sup>171</sup> no ethical complaints had ever been filed against prosecutors in their office in connection with a capital case. Similarly, a request to the Bar for complaints filed against attorneys in death penalty cases resulted in a report detailing eight such cases, all directed at defense attorneys. It should be noted that the Bar was only able to provide files on cases where the capital defendant made a complaint, rather than a judge or another attorney, and we know of at least one appellate decision where the judge referenced the reporting of a prosecutor to the Bar for improper behavior in a capital case.<sup>172</sup>

These data are troubling given that the Florida Supreme Court has for some time expressed its concern over the prevalence of prosecutorial misconduct.<sup>173</sup> Recently, in *Gore v. State*, the Court reiterated an admonishment from an earlier case stating:

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<sup>166</sup> See HALT, FLORIDA, LAWYER DISCIPLINE 2006 REPORT CARD, at [http://www.halt.org/reform\\_projects/lawyer\\_accountability/report\\_card\\_2006/pdf/FL\\_LDRC\\_06.pdf](http://www.halt.org/reform_projects/lawyer_accountability/report_card_2006/pdf/FL_LDRC_06.pdf) (last visited on Aug. 3, 2006).

<sup>167</sup> *Id.*

<sup>168</sup> ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, SURVEY ON LAWYER DISCIPLINE SYSTEMS, 2004, at <http://www.abanet.org/cpr/discipline/sold/04-ch1.xls> (last visited on Aug. 3, 2006).

<sup>169</sup> *Id.*

<sup>170</sup> ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, SURVEY ON LAWYER DISCIPLINE SYSTEMS, 2004, CHART II: SANCTIONS IMPOSED, at <http://www.abanet.org/cpr/discipline/sold/04-ch2.xls> (last visited on Aug. 3, 2006).

<sup>171</sup> See *supra* note 137.

<sup>172</sup> See, e.g., *Ruiz v. State*, 743 So. 2d 1, 9-10 (Fla. 1999) (referring prosecutor to Bar based on misconduct in a capital case);

<sup>173</sup> See, e.g., *Ruiz*, 743 So. 2d at 10, 10 n.8 - 9; *Urbin v. State*, 714 So. 2d 411, 419-22 (Fla. 1998); *Garron v. State*, 528 So. 2d 353, 359 (Fla. 1988); *Bertolotti v. State*, 476 So. 2d 130, 133 (Fla. 1985).

[W]e are deeply disturbed as a Court by continuing violations of prosecutorial duty, propriety and restraint. We have recently addressed incidents of prosecutorial misconduct in several death penalty cases . . . It ill becomes those who represent the state in the application of its lawful penalties to *themselves* ignore the precepts of their profession and their office.<sup>174</sup>

Furthermore, as previously discussed in Recommendation #3, the Center for Public Integrity's study of Florida criminal appeals, including both death and non-death cases, from 1970 to June 2003, revealed 567 cases in which the defendant alleged prosecutorial error or misconduct.<sup>175</sup> In 253 of these cases, judges ruled that the prosecutor's conduct prejudiced the defendant and remedied the misconduct by reversing or remanding the conviction, sentence, or indictment.<sup>176</sup> In an additional nineteen cases, dissenting judges believed prosecutorial conduct prejudiced the defendant.<sup>177</sup> "Of the cases in which judges ruled a prosecutor's conduct prejudiced the defendant, 183 involved improper trial arguments or tactics, 40 involved the prosecution withholding evidence from the defense, eleven involved discrimination in jury selection, four involved manipulating a witness, four involved a speedy trial violation, two involved a subpoena error, two involved paying a witness, two involved pre-trial tactics, two involved allowing perjured testimony, one involved improper contact with a judge, one involved goading a defendant into a mistrial and one involved destruction of evidence."<sup>178</sup> In the majority of opinions in which the defendant alleged prosecutorial misconduct, however, the prosecutor's conduct or error was found to be harmless.<sup>179</sup>

Most recently, in July 2006, the Special Commission on Lawyer Regulation, which was charged in 2003 by the Bar with "evaluating the efficacy of the current Florida lawyer regulation system," issued a series of recommendations related to the Bar's disciplinary process.<sup>180</sup> The Commission's recommendations touch upon over twenty topics, varying from the intake of complaints to the maintenance of fairness, and include, but are not limited to: (1) the screening of all complaints through the Attorneys and Consumers Assistance Program; (2) continuing focus on the Practice and Professional Enhancement Program, which serves as an alternative to the disciplinary process and includes mandating attorney participation in ethics schools, professional workshops, fee arbitrations, grievance mediations, continuing legal education courses, etc.; (3) expediting disciplinary investigations; (4) creating policies or standards to guide the determination of whether a hearing before the grievance committee should be held; (5) posting all grievance sanctions on the website; and (6) providing better training to Bar

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<sup>174</sup> Gore v. State, 719 So. 2d 1197, 1202 (Fla. 1998).

<sup>175</sup> See *supra* note 152.

<sup>176</sup> *Id.*; see also *supra* note 154.

<sup>177</sup> See *supra* note 152.

<sup>178</sup> *Id.*

<sup>179</sup> Center for Public Integrity, Nationwide Numbers, at <http://www.publicintegrity.org/pm/search.aspx?act=nat&hID=y> (last visited on Aug. 3, 2006).

<sup>180</sup> Draft Special Commission on Lawyer Regulation, Report and Recommendations, available at [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/370A16A14B04DC678525718400568E7E/\\$FILE/SCLawyerReg%20Report.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/370A16A14B04DC678525718400568E7E/$FILE/SCLawyerReg%20Report.pdf?OpenElement) (last visited on Aug. 3, 2006).

counsel, grievance committee members, disciplinary referees, and the Board.<sup>181</sup> The extent to which many of these recommendations will be implemented, however, remains unclear.

Although the State of Florida, through The Florida Bar, has established a procedure by which grievances are investigated and members of The Florida Bar are disciplined, the procedure's effectiveness is questionable. Based on this information, the State of Florida is only in partial compliance with Recommendation #4.

*E. Recommendation #5*

**Prosecutors should ensure that law enforcement agencies, laboratories, and other experts under their direction or control are aware of and comply with their obligation to inform prosecutors about potentially exculpatory or mitigating evidence.**

The Florida Supreme Court, relying on precedent from the United States Supreme Court, has found that a prosecutor is required to disclose evidence of which s/he is aware as well as "favorable evidence known to others acting on the government's behalf," even if the evidence is "known only to police investigators and not to the prosecutor."<sup>182</sup> In fact, the Florida Supreme Court has stated that a prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf.<sup>183</sup>

Given that a prosecutor is responsible for disclosing favorable evidence that s/he is not personally aware of but is known to others acting on the government's behalf (i.e., law enforcement officers), it is in the best interest of all prosecutors to ensure that law enforcement agencies, laboratories, and other experts under their direction or control are aware of and comply with their obligation to inform prosecutors about potentially exculpatory or mitigation evidence. We are, however, aware of at least two cases in which a police agency failed to disclose material evidence to the prosecutor.<sup>184</sup> This information is insufficient to draw any conclusions as to whether Florida prosecutors are meeting or failing to meet Recommendation #5. Therefore, we are unable to conclude whether the State of Florida meets Recommendation #5.

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<sup>181</sup> *Id.*

<sup>182</sup> *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995).

<sup>183</sup> *Rogers v. State*, 782 So. 2d 373, 378 (Fla. 2001) (citing *Kyles*, 514 U.S. at 437).

<sup>184</sup> *See, e.g., Rogers v. State*, 782 So. 2d at 376-78. In *Rogers v. State*, the Court stated:

Applying *Brady*, *Kyles*, *Strickler*, and *Young* to the circumstances of this case, we conclude that the failure by the State to make available to Rogers the reports of the various law enforcement agencies that were investigating the robberies of retail establishments which occurred along the Interstate 4 corridor from the fall of 1981 through the spring of 1982 was a *Brady* violation. Our holding is dictated by our conclusion that the police reports of the various law enforcement agencies in the joint investigation of the similar robberies were in the constructive possession of the prosecutor and were material documents within the scope of materiality as set out by *Kyles*, *Strickler*, and *Young*.

*Id.* at 380; *see also Whites v. State*, 730 So. 2d 762, 764 (Fla. 5th DCA 1999).

*F. Recommendation #6*

**The jurisdiction should provide funds for the effective training, professional development, and continuing education of all members of the prosecution team, including training relevant to capital prosecutions.**

The Florida Prosecuting Attorneys Association sponsors thirty-three seminars and trial schools each year,<sup>185</sup> one of which focuses on the death penalty. A number of national organizations also offer training for prosecutors, including the National District Attorney's Association, National College of Trial Attorneys, American Prosecutors Research Institute, and the National College of District Attorneys. These training programs are not mandatory, but prosecutors may earn their required continuing legal education credits at these trainings. In addition to these training programs, it appears that some state attorneys' offices engage in routine mandatory training for prosecutors, and prosecutors routinely teach relevant Florida laws to law enforcement officers.

Based on this information, the State of Florida is in compliance with Recommendation #6.

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<sup>185</sup> Florida Prosecuting Attorneys Association, About the FPAA, *at* [http://www.fpaa.state.fl.us/updates/About\\_US.htm](http://www.fpaa.state.fl.us/updates/About_US.htm) (last visited on Aug. 3, 2006).



## CHAPTER SIX

### DEFENSE SERVICES

#### INTRODUCTION TO THE ISSUE

Defense counsel competency is perhaps the most critical factor determining whether a capital offender/defendant will receive the death penalty. Although anecdotes about inadequate defenses long have been part of trial court lore, a comprehensive 2000 study shows definitively that poor representation has been a major cause of serious errors in capital cases as well as a major factor in the wrongful conviction and sentencing to death of innocent defendants.

Effective capital case representation requires substantial specialized training and some experience in the complex laws and procedures that govern a capital case in a given jurisdiction, as well as the resources to conduct a complete and independent investigation in a timely way. Full and fair compensation to the lawyers who undertake such cases also is essential, as is proper funding for experts.

Under current case law, a constitutional violation of the Sixth Amendment right to effective assistance of counsel is established by a showing that the representation was not only deficient but also prejudicial to the defendant—i.e., there must be a reasonable probability that, but for defense counsel's errors, the result of the proceeding would have been different.<sup>1</sup> The 2000 study found that between 1973 and 1995, state and federal courts undertaking reviews of capital cases identified sufficiently serious errors to require retrials or re-sentencing in 68 percent of the cases reviewed.<sup>2</sup> In many of those cases, more effective trial counsel might have helped avert the constitutional errors at trial that led ultimately to relief.

In the majority of capital cases, however, defendants lack the means to hire lawyers with the knowledge and resources to develop effective defenses. The lives of these defendants often rest with new or incompetent court-appointed lawyers or overburdened public defender services provided by the state.

Although lawyers and the organized bar have provided, and will continue to provide, *pro bono* representation in capital cases, most *pro bono* representation is limited to post-conviction proceedings. Only the jurisdictions themselves can address counsel representation issues in a way that will ensure that all capital defendants receive effective representation at all stages of their cases. Jurisdictions that authorize capital punishment therefore have the primary—and constitutionally mandated—responsibility for ensuring adequate representation of capital defendants through appropriate appointment procedures, training programs, and compensation measures.

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<sup>1</sup> Strickland v. Washington, 466 U.S. 668 (1984).

<sup>2</sup> JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995 (2000), available at <http://www.thejusticeproject.org/press/reports/broken-system-studies.html> (last visited on Aug. 4, 2006).

## I. FACTUAL DISCUSSION

### A. Florida's Indigent Legal Representation System

In recent years, Florida's indigent legal representation system has undergone significant review by the Florida Legislature, which has led to a number of changes within the system.<sup>3</sup> The system is currently composed of twenty public defenders' offices,<sup>4</sup> two Capital Collateral Regional Counsel Offices,<sup>5</sup> and twenty-one attorney registries. Twenty of the attorney registries are compiled and maintained by Article V Indigent

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<sup>3</sup> See, e.g., ISABELLE POTTS & GRETCHEN HIRT, REPORT TO THE COMMISSION ON THE ADMINISTRATION OF JUSTICE IN CAPITAL CASES, EXECUTIVE SUMMARY, at <http://www.fcc.state.fl.us/fcc/reports/fsu/fsuexsum.html> (last visited on Aug. 4, 2006) (stating that in 1998, the Florida Senate commissioned a study to look at whether the "elimination of state post-conviction proceedings in death penalty cases will reduce delays in carrying out a sentence of death in capital cases"). Due at least in part to the findings of the Potts and Hirt report, the Florida Legislature closed one of the three Capital Collateral Regional Counsel Offices—which was located in the Northern Region of Florida in Tallahassee—and adopted a "pilot program" whereby private attorneys are appointed to represent death sentenced inmates in capital collateral proceedings in that region. See FLA. STAT. § 27.701(2) (2006); COMMISSION ON CAPITAL CASES, FISCAL YEAR 2003-2004 REPORT PILOT PROJECT, TRANSFER OF RESPONSIBILITIES FROM CAPITAL COLLATERAL REGIONAL COUNSEL-NORTH TO THE STATEWIDE ATTORNEY REGISTRY (2004), available at <http://www.floridacapitalcases.state.fl.us/Publications/fiscal%20report%202004.pdf> (last visited on Aug. 4, 2006); see also Commission on Capital Cases, Capital Collateral Resource Council, at <http://www.floridacapitalcases.state.fl.us/c-crc.cfm> (last visited on Aug. 4, 2006).

In addition to adopting the pilot program, the State of Florida recently revised Article V of the Florida Constitution, which resulted in, among other things, the State of Florida assuming the responsibility of providing funding for court-appointed trial and appellate counsel. See Revision No. 7 to Article V of the Florida Constitution, at <http://www.ninja9.org/courtadmin/Revision%207/Revision%207.pdf> (last visited on Aug. 4, 2006); FLA. CONST. art. V, § 14; see also FLA. STAT. § 29.014(1) (2006) (creating the Article V Indigent Services Advisory Board for the purpose of "advising the Legislature in establishing qualifications and compensation standards governing the expenditure of state appropriated funds for those providing state-funded due process services for indigents"). To review the Indigent Services Advisory Board's Final Report, released on January 6, 2005, see JUSTICE ADMINISTRATIVE COMMISSION, ARTICLE V INDIGENT SERVICES ADVISORY BOARD, FINAL REPORT-JANUARY 2005 (2005), at [http://www.justiceadmin.org/art\\_V/](http://www.justiceadmin.org/art_V/) (last visited on Aug. 4, 2006).

Lastly, per the recommendations of a legislative study commission charged with studying the feasibility of judicial administration reforms, including minimum standards of counsel in capital cases, the Florida Supreme Court recently adopted minimum standards for counsel in capital cases. See *In re* Amendment to Florida Rules of Judicial Administration - Minimum Standards for Appointed Counsel in Capital Cases, 711 So. 2d 1148, 1149-1150 (Fla. 1998) (stating that the Florida Legislature enacted SB 1328 (Fla. 1998), creating the commission to study reforms); *In re* Amendment to Florida Rules of Criminal Procedure - Minimum Standards for Attorneys in Capital Cases, 759 So. 2d 610, 611 (Fla. 1999) (stating that the commission's report, released in 1999, recommended that the Florida Supreme Court, rather than the Legislature, adopt the standards for counsel in capital cases); FLA. R. CRIM. P. 3.112. These standards were also extended to counsel in capital direct appeals. *In re* Amendment to Florida Rules of Criminal Procedure - Rule 3.112 Minimum Standards for Attorneys in Capital Cases, 820 So. 2d 185 (Fla. 2002).

<sup>4</sup> See *infra* notes 3-24 and accompanying text for a discussion on the public defenders' offices.

<sup>5</sup> See *infra* notes 48-54 and accompanying text for a discussion on the capital collateral regional counsel offices. "Capital collateral regional counsel" are lawyers who are employed by the state to represent death-sentenced inmates during state post-conviction proceedings.

Services Committees<sup>6</sup> and used by judges to appoint private attorneys at trial and on appeal in cases of a conflict of interest;<sup>7</sup> and the remaining registry is compiled and maintained by the Commission on Capital Cases<sup>8</sup> and used by judges to appoint private attorneys for capital collateral proceedings (known as capital collateral registry attorneys).<sup>9</sup> The work of these offices and attorneys is supported and/or overseen by two different bodies—the Justice Administrative Commission and the Commission on Capital Cases.

### 1. The Justice Administrative Commission and the Commission on Capital Cases

The Justice Administrative Commission (JAC) provides budgetary and accounting support to the offices of the public defenders and capital collateral regional counsels.<sup>10</sup> It also provides compliance and financial review of costs associated with private court-appointed counsel’s “due process costs,” which include, but are not limited to, witness and expert witness fees and mental health professionals.<sup>11</sup> The JAC is composed of: (1) two state attorneys, who are appointed by the President of the Florida Prosecuting Attorneys Association; and (2) two public defenders, who are appointed by the President of the Florida Public Defenders Association.<sup>12</sup> Members of the JAC serve for a period of two years.<sup>13</sup>

On the other hand, the Commission on Capital Cases (Commission), which includes six members, who are appointed by the Governor, President of the Senate, and Speaker of the House of Representatives,<sup>14</sup> is responsible for, among other things: reviewing the

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<sup>6</sup> See *infra* notes 25-37 and accompanying text for a discussion on circuits’ Article V Indigent Services Committees.

<sup>7</sup> See FLA. STAT. § 27.5303(1)(a) (2006); FLA. R. CRIM. P. Rule 3.112(d).

<sup>8</sup> See *infra* notes 14-16 and accompanying text for a discussion on the Commission on Capital Cases.

<sup>9</sup> See, e.g., FLA. STAT. §§ 27.40(2) (2006); 27.701(2) (2006). “Capital collateral registry attorneys” are private lawyers who are appointed from the statewide registry to represent death-sentenced inmates during post-conviction proceedings in cases of a conflict of interest or when the defendant was convicted and sentenced to death in the Northern Region of Florida, which no longer has a Capital Collateral Regional Counsel Office.

<sup>10</sup> Justice Administrative Commission, Homepage, at <http://www.justiceadmin.org/> (last visited on Aug. 4, 2006); see also FLA. STAT. § 43.16 (2006); 2006 Fla. Laws ch. 1.

<sup>11</sup> Justice Administrative Commission, Homepage, at <http://www.justiceadmin.org/> (last visited on Aug. 4, 2006); see also FLA. STAT. § 43.16 (2006); Justice Administrative Commission, Due Process Costs, at [http://www.justiceadmin.org/ind\\_for\\_cost/due-process/](http://www.justiceadmin.org/ind_for_cost/due-process/) (last visited on Aug. 4, 2006); see, e.g., FLA. STAT. § 29.007(3)-(6) (2006).

<sup>12</sup> See FLA. STAT. § 43.16(2)(a), (b) (2006). The JAC currently includes: Dennis Roberts, Public Defender, 3rd Judicial Circuit; Diamond R. Litty, Public Defender, 19th Judicial Circuit; Jerry Hill, State Attorney, 10th Judicial Circuit; and Jerry M. Blair, State Attorney, 3rd Judicial Circuit. See Commissioners, Justice Administrative Commission, at <http://www.justiceadmin.org/commissioners/> (last visited Aug. 17, 2006).

<sup>13</sup> See FLA. STAT. § 43.16(2) (2006).

<sup>14</sup> FLA. STAT. § 27.709(1)(a), (2)(a) (2006). Members of the Commission are appointed for terms of four years, except that a member’s term expires upon leaving office as a member of the Senate or the House of Representatives. See FLA. STAT. § 27.709(1)(e) (2006). The current members of the Commission include: Senator Walter Campbell, Senator Victor D. Crist, Representative Dan Gelber, Representative Juan-Carlos

administration of justice in all capital collateral cases; reviewing the operation of capital collateral regional counsel and private court-appointed attorneys in capital collateral proceedings; and receiving complaints regarding the practice of any office of regional counsel and private court-appointed counsel in capital collateral proceedings and referring any complaint to The Florida Bar, the State Supreme Court, or the Commission on Ethics, as appropriate.<sup>15</sup> Additionally, the Executive Director of the Commission is required to compile and maintain a statewide registry of private attorneys who are qualified to handle capital collateral cases.<sup>16</sup>

## 2. Public Defenders' Offices and Article V Indigent Services Committees

### a. Composition and Responsibilities of the Public Defenders' Offices

The State of Florida is divided into twenty judicial circuits, and each has a public defender,<sup>17</sup> who must be, and must have been for the preceding five years, a member in good standing of The Florida Bar.<sup>18</sup> Each public defender is elected at the general election for a term of four years.<sup>19</sup> Once elected, the public defender serves as the chief administrator of all public defender services within the circuit,<sup>20</sup> which includes hiring assistant public defenders and other staff, such as investigators.<sup>21</sup>

All twenty public defenders' offices are responsible for representing at trial any indigent defendant who is under arrest for, or charged with, a felony, misdemeanor, a criminal contempt citation, a traffic offense punishable by imprisonment, or a municipal ordinance that is ancillary to a state charge.<sup>22</sup> Five of the twenty public defenders' offices<sup>23</sup> also are authorized to represent indigent defendants on appeal, including direct appeals to the Florida Supreme Court.<sup>24</sup>

### b. Composition and Responsibilities of Article V Indigent Services Committees

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Planas, Judge Leslie B. Rothenberg, and Judge Paul M. Hawkes. *See* Commission Members, Commission on Capital Cases, at <http://www.floridacapitalcases.state.fl.us/c-members.cfm> (last visited Aug. 17, 2006).

<sup>15</sup> FLA. STAT. § 27.709(2)(a), (c) (2006).

<sup>16</sup> FLA. STAT. § 27.710(1) (2006).

<sup>17</sup> For a list the public defenders' offices, see Florida Public Defender Association, Inc., Public Defenders, at [http://www.flpda.org/pages/public\\_defenders.htm](http://www.flpda.org/pages/public_defenders.htm) (last visited on Aug. 4, 2006).

<sup>18</sup> *See* FLA. CONST. art. V, § 18; FLA. STAT. § 27.50 (2006).

<sup>19</sup> FLA. CONST. art. V, § 18; FLA. STAT. § 27.50 (2006).

<sup>20</sup> FLA. STAT. § 27.58 (2006).

<sup>21</sup> FLA. CONST. art. V, § 18; FLA. STAT. § 27.53(1) (2006).

<sup>22</sup> FLA. STAT. § 27.51(1)(a), (b) (2006).

<sup>23</sup> The public defenders' offices in the Second, Seventh, Tenth, Eleventh, and Fifteenth judicial circuits are authorized to handle appeals. *See* FLA. STAT. § 27.51(4)(a)-(e) (2006). To review the websites for these public defenders' offices, see Public Defender for the Second Circuit, at <http://www.co.leon.fl.us/pd/index.asp> (last visited Aug. 4, 2006), Public Defender for the Seventh Circuit at, <http://www.volusia.org/> (last visited March 10, 2006), Public Defender for the Tenth Circuit, at <http://www.public-defender10-fl.org/general.html> (last visited Aug. 4, 2006), Public Defender for the Eleventh Circuit, at <http://www.pdmiami.com/> (last visited on Aug. 4, 2006), and Public Defender for the Fifteenth Circuit, at [http://www.pd15.state.fl.us/PD-15\\_Frameset-2.htm](http://www.pd15.state.fl.us/PD-15_Frameset-2.htm) (last visited on Aug. 4, 2006).

<sup>24</sup> FLA. STAT. § 27.51(1)(e), (f) (2006).

In addition to a public defender's office, each circuit is required to establish a circuit Article V Indigent Services Committee (Indigent Services Committee).<sup>25</sup> Each Indigent Services Committee must include: (1) the chief judge of the judicial circuit or the chief judge's designee, who serves as the chair; (2) the public defender of the judicial circuit, or designee from within the office of the public defender; (3) an experienced private criminal defense attorney; and (4) an experienced civil trial attorney.<sup>26</sup> All Indigent Services Committees are responsible for managing the appointment and compensation of private court-appointed counsel in cases of a conflict of interest, which includes, but is not limited to: compiling and maintaining a registry of attorneys in private practice, organized by county and by category of cases;<sup>27</sup> developing a schedule of standard fees and expense allowances for the different types of cases; and developing a schedule of standard allowances for due process expenses for cases in which the court has declared a person "indigent for costs."<sup>28</sup>

The compiling and maintaining of a circuit registry requires each Indigent Services Committee to approve qualified attorneys and remove unqualified attorneys from the registry.<sup>29</sup> In at least two circuits, each Indigent Services Committee has delegated this responsibility to the circuit court administrative office.<sup>30</sup> Regardless of who is charged with this responsibility, when compiling and maintaining the circuit registries, all Indigent Services Committees are encouraged to obtain input from experienced capital defense counsel.<sup>31</sup>

In order for a private attorney to be included on a circuit registry, s/he must certify that s/he meets the applicable qualification requirements; is available to represent indigent defendants in cases requiring private court-appointed counsel; and is willing to abide by the terms of the contract for services, which all private court-appointed attorneys must enter into with the JAC.<sup>32</sup> The contract contained on the JAC website specifically

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<sup>25</sup> FLA. STAT. § 27.42(1) (2006).

<sup>26</sup> FLA. STAT. § 27.42(1)(a)-(d) (2006).

<sup>27</sup> From October 1, 2005 through September 30, 2007, the list of attorneys compiled by the Eleventh Judicial Circuit must contain the race, gender, and national origin of assigned attorneys. *See* FLA. STAT. § 27.40(3)(a) (2006).

<sup>28</sup> FLA. STAT. §§ 27.42(2), 27.40 (2006). "Indigent for costs" refers to a person who "is eligible to be represented by a public defender but who is represented by private counsel not appointed by the court for a reasonable fee as approved by the court, on a pro bono basis, or who is proceeding pro se." *See* FLA. STAT. § 27.52(5) (2006); *see also* JUSTICE ADMINISTRATIVE COMMISSION, JAC POLICIES AND PROCEDURES FOR INDIGENT FOR COSTS (2005), *at* [http://www.justiceadmin.org/ind\\_for\\_cost/IFC%20Policies%20&%20Procedures.pdf](http://www.justiceadmin.org/ind_for_cost/IFC%20Policies%20&%20Procedures.pdf) (last visited on Aug. 4, 2006).

<sup>29</sup> FLA. STAT. § 27.40(3)(a) (2006); FLA. R. CRIM. P. 3.112(d)(2).

<sup>30</sup> *See, e.g.*, Registry for Due Process Legal Services, In the Thirteenth Judicial Circuit Court for Hillsborough County, Florida, Admin. Order S-2005-222 (Dec. 19, 2005); In re: Conflict Counsel Approved for the Nineteenth Judicial Circuit for 2005/2006, In the Circuit Court of the Nineteenth Judicial Circuit in the State of Florida, Admin. Order 2005-02 (July 1, 2005).

<sup>31</sup> FLA. R. CRIM. P. 3.112(d)(2).

<sup>32</sup> FLA. STAT. § 27.40(3)(a) (2006). To review a sample contract, see Justice Administrative Commission, Agreement for Attorney Services, *at* [http://www.justiceadmin.org/court\\_app\\_counsel/](http://www.justiceadmin.org/court_app_counsel/) (last visited on Aug. 4, 2006).

requires these attorneys to “perform the legal services while at all times complying with all requirements of the Rules of Professional Conduct, the rules regulating The Florida Bar, and the practice and procedures of the courts within the Circuit.”<sup>33</sup> Failure to comply with the terms of the contract for services may result in termination of the contract and the attorney’s removal from the registry.<sup>34</sup>

Each circuit’s registry for capital cases varies in size from anywhere between five<sup>35</sup> to thirty-six attorneys.<sup>36</sup> A copy of each circuit’s registry must be sent quarterly by the Indigent Services Committee to the Chief Justice of the Florida Supreme Court; the chief judge, the state attorney and public defender in each judicial circuit; and the clerk of court in each county, the JAC, and the Indigent Services Advisory Board.<sup>37</sup>

c. Funding for Public Defenders’ Offices and Private Court-Appointed Attorneys

The State of Florida is responsible for funding the court-related functions of the public defenders’ offices,<sup>38</sup> but counties are responsible for funding communications services; existing radio systems; existing multi-agency criminal justice information systems; and the cost of construction or lease, maintenance, and security of the facilities as well as the cost of utilities.<sup>39</sup> Additionally, since July 1, 2004,<sup>40</sup> the State of Florida has funded the fees and expenses associated with private court-appointed counsel.<sup>41</sup>

In fiscal year 2005-2006, the Florida Legislature allocated \$169.2 million and 2,706 full-time equivalents (FTEs) for the twenty public defenders’ offices, including the five appellate divisions.<sup>42</sup> The appropriations vary from office to office, ranging from 33

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<sup>33</sup> See Justice Administrative Commission, Agreement for Attorney Services, at [http://www.justiceadmin.org/court\\_app\\_counsel/](http://www.justiceadmin.org/court_app_counsel/) (last visited on Aug. 4, 2006). The contract is not currently available on the JAC website, but a new version is forthcoming. See Justice Administration Commission, Court Appointed Attorney – New Contract and Legislative Update, at [http://www.justiceadmin.org/court\\_app\\_counsel/New%20Attorney%20Contract%20-%20Website%20Notice.pdf](http://www.justiceadmin.org/court_app_counsel/New%20Attorney%20Contract%20-%20Website%20Notice.pdf) (last visited on Aug. 4, 2006).

<sup>34</sup> FLA. STAT. § 27.40(3)(a) (2006).

<sup>35</sup> See, e.g., Registry for Due Process Legal Services, In the Thirteenth Judicial Circuit Court for Hillsborough County, Florida, Admin. Order S-2005-222 (Dec. 19, 2005); Indigent Services Committee, 20th Judicial Circuit, Registry of Court-Appointed Attorneys for Appointments (Feb. 13, 2006).

<sup>36</sup> See, e.g., Seventeenth Judicial Circuit, Court-Appointed Attorney Information, List of Court Appointed Attorneys (July 1, 2006), at [http://www.17th.flcourts.org/html/conflict\\_attorneys.html](http://www.17th.flcourts.org/html/conflict_attorneys.html) (last visited on Aug. 4, 2006). In the seventeenth Judicial Circuit, an additional forty-seven registry attorneys are listed as “Capital Co-Counsel.” *Id.*

<sup>37</sup> FLA. STAT. § 27.40(3)(d) (2006); see also *supra* note 3 for a description of the purpose of the Indigent Services Advisory Board.

<sup>38</sup> FLA. STAT. § 29.006 (2006).

<sup>39</sup> FLA. CONST. art. V, § 14(c); FLA. STAT. § 29.008 (2006).

<sup>40</sup> Prior to July 1, 2004, county governments were responsible for paying and monitoring court-appointed attorneys. For a discussion on the amount of funding provided by counties, see *infra* note 389.

<sup>41</sup> FLA. CONST. art. V, § 14(a), (c); FLA. STAT. § 29.007 (2006).

<sup>42</sup> Florida Legislature, Office of Program Policy Analysis and Government Accountability, Justice Administrative Commission, Public Defenders, at <http://www.oppaga.state.fl.us/profiles/1024/right.asp?programnum=1024> (last visited on Aug. 4, 2006). The amount allocated in the past by the Legislature to the public defenders’ offices is as follows: Fiscal

FTEs and \$2.5 million for the Third Judicial Circuit Public Defender’s Office to 415.5 FTEs and \$24.5 million for the Eleventh Judicial Circuit Public Defender’s Office.<sup>43</sup> The Florida Legislature also allocated \$16.5 million in “due process costs” and \$37.4 million for fees and expenses of court-appointed counsel.<sup>44</sup> Lastly, it set aside \$1 million as contingency funds for public defender and state attorney due process expenses.<sup>45</sup>

### 3. Capital Collateral Regional Counsel Offices and the Capital Collateral Counsel Registry

In 1985, the Florida Legislature created the Office of Capital Collateral Representative,<sup>46</sup> and twelve years later, in 1997, the Florida Legislature divided the Office of Capital Collateral Representative into three Capital Collateral Regional Counsel Offices<sup>47</sup> (CCRC)—the North, Middle,<sup>48</sup> and South.<sup>49</sup> Each CCRC is charged with representing

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Year 2003-04, the Legislature allocated \$177,223,951 and 2,886 FTEs; Fiscal Year 2001-02, the Legislature allocated \$144,780,592 and 2,634 FTEs; Fiscal Year 2000-01, the Legislature allocated \$144,762,592 and 2,634 FTEs; and Fiscal Year 1999-2000, the Legislature allocated \$136,703,398 and 2,555 FTEs. THE FLORIDA LEGISLATURE, OFFICE OF PROGRAM POLICY ANALYSIS AND GOVERNMENT ACCOUNTABILITY, JUSTIFICATION REVIEW: JUSTICE ADMINISTRATIVE COMMISSION, STATE ATTORNEYS, PUBLIC DEFENDERS 3 (2001) [hereinafter JUSTIFICATION REVIEW], at <http://www.oppaga.state.fl.us/reports/pdf/0164rpt.pdf> (last visited on Aug. 4, 2006).

<sup>43</sup> Florida Legislature, Office of Program Policy Analysis and Government Accountability, Justice Administrative Commission, Public Defenders, at <http://www.oppaga.state.fl.us/profiles/1024/right.asp?programnum=1024> (last visited on Aug. 4, 2006). For a complete list of the appropriations and FTEs for each public defender’s office, see Justice Administrative Commission, Appropriations and FTEs by Circuit, at [www.oppaga.state.fl.us/profiles/1024/01/right.asp?programnum=1024](http://www.oppaga.state.fl.us/profiles/1024/01/right.asp?programnum=1024) (last visited on Aug. 4, 2006).

<sup>44</sup> Florida Legislature, Office of Program Policy Analysis and Government Accountability, Justice Administrative Commission, Public Defenders, at <http://www.oppaga.state.fl.us/profiles/1024/right.asp?programnum=1024> (last visited on Aug. 4, 2006).

<sup>45</sup> *Id.*

<sup>46</sup> 1985 Fla. Laws ch. 332, § 3; see Advisory Legal Opinion of the Attorney General, AGO 2006-16, April 25, 2006, Capital Collateral Regional Councils, at n.6.

<sup>47</sup> Op. Att’y Gen. 2006-16 (Fla. 2006) (discussing Capital Collateral Regional Counsel Offices and noting that “Chapter 97-313, Laws of Florida, abolished the Office of Capital Collateral Representative and replaced it with three regional offices of capital collateral counsel (CCR) located in the northern, middle and southern regions of Florida”).

<sup>48</sup> The Middle Regional Office is located in Tampa and covers the following Judicial Circuits: Fifth, Sixth, Seventh, Ninth, Tenth, Twelfth, Thirteenth, and Eighteenth. See FLA. STAT. § 27.701(1) (2006); Florida Legislature, Office of Program Policy Analysis and Government Accountability, Justice Administrative Commission, Capital Collateral Regional Councils (Death Penalty Appeals), at <http://www.oppaga.state.fl.us/profiles/1025/> (last visited on Aug. 4, 2006).

<sup>49</sup> The Southern Regional Office is located in Fort Lauderdale and covers the following Judicial Circuits: Eleventh, Fifteenth, Sixteenth, Seventeenth, Nineteenth, and Twentieth. See FLA. STAT. §27.701(1) (2006); Florida Legislature, Office of Program Policy Analysis and Government Accountability, Justice Administrative Commission, Capital Collateral Regional Councils (Death Penalty Appeals), at <http://www.oppaga.state.fl.us/profiles/1025/> (last visited on Aug. 4, 2006). We note that a report by the Florida Department of Financial Services and the Florida Commission on Ethics recently concluded that the head of CCRC-South improperly used state funds to pay for lobbyists, trips to Cuba, and a personal computer. See Rick Halperin, *Report Criticizes Death Row Lawyer’s Handling of State Office, Taxpayer Money*, S. FLA. SUN-SENTINEL, Aug. 30, 2006.

persons convicted and sentenced to death within its region in capital collateral proceedings.<sup>50</sup>

On July 1, 2003, the Florida Legislature implemented a “pilot program” whereby the CCRC-North was closed<sup>51</sup> and the responsibilities of CCRC-North were transferred to a registry of attorneys compiled and maintained by the Commission on Capital Cases.<sup>52</sup> The effectiveness and efficiency of the pilot program is currently under review by the Auditor General, who is required to submit his/her findings to the President of the Senate and the Speaker of the House of Representatives by January 30, 2007, at which time, the Legislature will decide whether to convert the pilot program into a permanent program.<sup>53</sup>

a. Composition and Responsibilities of the Capital Collateral Regional Counsel Offices

Both CCRC-Middle and the CCRC-South are administered by a regional counsel, who must be, and must have been for the preceding five years, a member in good standing of

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<sup>50</sup> FLA. STAT. § 27.702(2) (2006).

<sup>51</sup> The Northern Region Office was previously located in Tallahassee and covered the following Judicial Circuits: First, Second, Third, Fourth, Eighth, and Fourteenth. *See* FLA. STAT. §27.701(1) (2006); Florida Legislature, Office of Program Policy Analysis and Government Accountability, Justice Administrative Commission, Capital Collateral Regional Counsels (Death Penalty Appeals), *at* <http://www.oppaga.state.fl.us/profiles/1025/> (last visited on Aug. 4, 2006). The closure of the CCRC-North was due at least in part to the findings of the Potts and Hirt report. *See supra* note 3. Potts and Hirt were commissioned to look at whether “elimination of state post-conviction proceedings in death penalty cases will reduce delays in carrying out a sentence of death in capital cases.” *Id.* The legislation specifically required a review of “the average number of post-conviction motions and writs filed in capital cases, prior legislative and judicial attempts to reduce delays in capital cases, and the length of time required for capital post-conviction claims in state and federal court,” as well as a determination of the “average delays in capital cases, whether those delays have increased in the last 10 years, and the reasons for any increase in delays.” *Id.* The report was also to address “the legal, fiscal, and practical considerations concerning the elimination of state post-conviction proceedings.” *Id.* The report was completed in 1999 and made the following findings: (1) the Florida Supreme Court cannot eliminate all post-conviction proceedings because habeas corpus writs are guaranteed by the Florida Constitution; (2) despite the fact that the U.S. Supreme Court and the Florida Supreme Courts have held the Sixth Amendment does not guarantee an absolute right to state-paid representation in post-conviction proceedings, both courts recognize a due process right to such representation under the Fifth Amendment, on a case-by-case basis; (3) the Florida Supreme Court would probably not uphold legislation eliminating all state funding for post-conviction proceedings or imposing an absolute limit of one state post-conviction proceeding per death-row inmate; and (4) privatization of post-conviction representation would save money for the State of Florida. *Id.*

<sup>52</sup> FLA. STAT. §§ 27.701(2), 27.710(1) (2006). At the time in which the CCRC-North was closed, it was responsible for sixty-three cases. *See* WILLIAM O. MONROE, FLA. AUDITOR GEN., CAPITAL COLLATERAL REGIONAL COUNSEL-NORTHERN REGION: RESPONSIBILITIES TO THE REGISTRY OF ATTORNEYS – PILOT PROGRAM 6 (2004) [hereinafter AUDITOR GENERAL REPORT], *available at* [http://www.myflorida.com/audgen/pages/pdf\\_files/2004-124.pdf](http://www.myflorida.com/audgen/pages/pdf_files/2004-124.pdf) (last visited on Aug. 4, 2006); *see also* COMMISSION ON CAPITAL CASES, FISCAL YEAR 2003-2004 REPORT PILOT PROJECT, TRANSFER OF RESPONSIBILITIES FROM CAPITAL COLLATERAL REGIONAL COUNSEL-NORTH TO THE STATEWIDE ATTORNEY REGISTRY (2004), *available at* <http://www.floridacapitalcases.state.fl.us/Publications/fiscal%20report%202004.pdf> (last visited on Aug. 4, 2006). All of these cases were reassigned within an average of twenty-six days, and the majority of these cases (forty-five) were reassigned to former CCRC-North attorneys who joined the registry. *Id.* at 3.

<sup>53</sup> AUDITOR GENERAL REPORT, *supra* note 52, at 3.

The Florida Bar or a similar organization in another state.<sup>54</sup> Regional counsels are appointed by the Governor,<sup>55</sup> who selects the appointee from a list of three nominees created by the Supreme Court Judicial Nominating Committee.<sup>56</sup> Once selected, the regional counsel is appointed for a term of three years, subject to Senate confirmation.<sup>57</sup> Each regional counsel may (1) hire assistant regional counsel, investigators, and other clerical and support staff, (2) contract with private counsel for the purpose of providing representation, and (3) appoint pro bono assistant counsel.<sup>58</sup>

#### b. Capital Collateral Registry

The Executive Director of the Capital Case Commission is charged with compiling and maintaining a statewide registry of private attorneys who are qualified to handle capital collateral cases.<sup>59</sup> Attorneys from the registry are appointed either when there is a conflict of interest<sup>60</sup> or when the defendant was convicted and sentenced to death in the Northern Region of Florida, which no longer has a CCRC Office.<sup>61</sup>

In order for attorneys to be included on the registry, they must certify on an application provided by the Executive Director that they (1) satisfy the minimum qualification requirements for full-time assistant regional counsel;<sup>62</sup> (2) are counsel of record for not more than four post-conviction capital collateral proceedings; (3) comply with the continuing legal education requirements; and (4) will provide representation under the terms and conditions set forth in section 27.711 of the Florida Statutes (which in part pertain to the compensation of registry attorneys)<sup>63</sup> until the sentence is reversed, reduced, or carried out or unless permitted to withdraw.<sup>64</sup>

The number of attorneys on the registry must remain above fifty at all times.<sup>65</sup> Before September 1 of each year, and as necessary thereafter, the Executive Director of the Commission must provide to the Chief Justice of the Supreme Court, the chief judge and state attorney in each judicial circuit, and the Attorney General a current copy of its

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<sup>54</sup> FLA. STAT. § 27.701(1) (2006).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* If it is in the best interest of the fair administration of justice in capital cases, the Governor may reject the nominations and request the submission of three new nominees by the Supreme Court Judicial Nominating Commission. *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> FLA. STAT. § 27.704(1)-(3) (2006).

<sup>59</sup> FLA. STAT. § 27.710(1) (2006).

<sup>60</sup> FLA. STAT. §§ 27.703(1), 27.710(5)(a) (2006)

<sup>61</sup> FLA. STAT. § 27.701(2) (2006); *see also* Olive v. Maas, 811 So. 2d 644, 650 (Fla. 2002) (noting that the original goal behind establishing the registry was to “alleviate CCRC’s backlog of capital cases which have not been assigned to an attorney”).

<sup>62</sup> FLA. STAT. § 27.710(1) (2006); *see also* FLA. STAT. § 27.704(2) (2006) (containing the minimum qualification requirements).

<sup>63</sup> *See infra* notes 230-233 for a discussion on the terms and conditions of section 27.711 of the Florida Statutes.

<sup>64</sup> *See* Commission on Capital Cases, Application for Statewide Attorney Registry, at <http://www.floridacapitalcases.state.fl.us/Application-Attorney-Registry.pdf> (last visited on Aug. 4, 2006).

<sup>65</sup> FLA. STAT. § 27.710(1) (2006).

registry of attorneys who are available for appointment as counsel in capital collateral proceedings.<sup>66</sup> As of July 2006, the registry contained 137 attorneys.<sup>67</sup>

c. Funding for the Capital Collateral Regional Counsel Offices and the Capital Collateral Registry

The State of Florida provides funding for the Capital Collateral Regional Counsel Offices and capital collateral registry attorneys.<sup>68</sup> In fiscal year 2005-2006, the Florida Legislature allocated \$3.9 million in general revenue funds and thirty-nine positions to CCRC-Middle and \$3.3 million in general revenue funds and thirty positions to CCRC-South.<sup>69</sup> In addition, the Florida Legislature appropriated \$2.2 million for registry attorneys.<sup>70</sup>

*B. Appointment, Qualifications, Workload Limitations, Training, Compensation, and Resources Available to Attorneys Handling Death Penalty Cases at Trial and on Direct Appeal*

1. Appointment of Counsel

Florida law provides that an accused charged with a capital felony is eligible for appointed counsel at trial and on direct appeal if s/he can establish that s/he is indigent.<sup>71</sup>

<sup>66</sup> *Id.*

<sup>67</sup> Commission on Capital Cases, Registry, at <http://www.floridacapitalcases.state.fl.us/c-registry-attorney.cfm> (last visited on Aug. 4, 2006); see also Jackie Hallifax, *Lawmaker Asks Court for Names of Bad Lawyers*, MIAMI HERALD, March 23, 2005 (noting of the 140 attorneys on the registry, only 80 of them have cases).

<sup>68</sup> The amount of funding allocated to the Capital Collateral Regional Counsel Offices has long been a problem in the State of Florida. For a discussion on this issue, see *infra* notes 392-399.

<sup>69</sup> Florida Legislature, Office of Program Policy Analysis and Government Accountability, Justice Administrative Commission, Capital Collateral Regional Counsels (Death Penalty Appeals), at <http://www.oppaga.state.fl.us/profiles/1025/> (last visited on Aug. 4, 2006). Funding for capital collateral counsel for the past five years has been as follows:

<i>Fiscal Year</i>	<i>2000-2001</i>	<i>2001-2002</i>	<i>2002-2003</i>	<i>2003-2004</i>	<i>2004-2005</i>
Northern	2,621,950	2,561,361	2,700,039	Privatized	Privatized
Middle	3,199,895	3,375,790	3,605,701	3,776,239	3,895,211
Southern	2,947,683	3,008,507	3,068,544	3,230,862	3,316,921
Registry	2,492,500	1,000,000	125,000	1,425,000	1,425,000

See E-mail from Victoria A. Montanaro, Justice Administrative Commission (2006) (on file with author); see also JUSTIFICATION REVIEW, *supra* note 42, at 3.

<sup>70</sup> JUSTIFICATION REVIEW, *supra* note 42.

<sup>71</sup> FLA. STAT. §§ 27.51, 27.52 (2006). To apply for appointed counsel, an individual must submit an application to the clerk of the court for a determination of indigent status. See FLA. STAT. § 27.52(1)(a) (2006). An individual is considered indigent if “[his/her] income is equal to or below 200 percent of the then-current federal poverty guidelines prescribed for the size of the household of the applicant by the United States Department of Health and Human Services or if the person is receiving Temporary Assistance for Needy Families–Cash Assistance, poverty-related veterans’ benefits, or Supplemental Security Income

In cases in which the accused is found to be indigent, the clerk of the court must notify the applicable public defender's office of the situation.<sup>72</sup> The public defender office is required to assume the defense of the accused as long as there is not a conflict of interest.<sup>73</sup> The public defender is then required to designate assistant public defenders as lead counsel and co-counsel.<sup>74</sup>

If the public defender office is unable to defend the accused due to a conflict of interest,<sup>75</sup> the public defender must file a motion with the court requesting withdrawal from representation and the appointment of private counsel.<sup>76</sup> The JAC has standing to contest any motion to withdraw due to a conflict of interest.<sup>77</sup>

The court must review the motion and may inquire or conduct a hearing into the adequacy of the public defender's representations regarding a conflict of interest without requiring the disclosure of any confidential communications.<sup>78</sup> If the court finds that the grounds for withdrawal are insufficient or the asserted conflict is not prejudicial to the indigent defendant, then the court must deny the motion.<sup>79</sup>

Additionally, section 27.5301(1)(c) of the Florida Statutes specifically precludes the court from granting "a withdrawal by the public defender based solely upon inadequacy of funding or excess workload of the public defender."<sup>80</sup> Prior to the adoption of section

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(SSI)." *See* FLA. STAT. § 27.52(2)(a)(1) (2006); *see also* FLORIDA LEGISLATURE, OFFICE OF PROGRAM POLICY ANALYSIS AND GOVERNMENT ACCOUNTABILITY, JUDICIAL SYSTEM ACHIEVES SAVINGS BY IMPLEMENTING RECOMMENDATIONS, REPORT NO. 04-08, at 3 (2004) [hereinafter JUDICIAL SYSTEM ACHIEVES SAVINGS] (noting that the minimum income level was recently decreased from 250 to 200 percent of the federal poverty guidelines). There is a presumption that the individual is not indigent "if s/he owns, or has equity in, any intangible or tangible personal property or real property or the expectancy of an interest in any such property having a net value of \$2,500 or more, excluding the value of the person's homestead and one vehicle having a net value not exceeding \$5,000." *See* FLA. STAT. § 27.52(2)(a)(2) (2006). An individual denied appointed counsel may seek review of the clerk's determination in the court having jurisdiction over the matter at the next scheduled hearing. *See* FLA. STAT. § 27.52(2)(e) (2006); *see also* FLA. STAT. § 27.52(4) (2006).

<sup>72</sup> FLA. STAT. § 27.52(2)(c)(1) (2006).

<sup>73</sup> FLA. STAT. §§ 27.52(2)(c)(2), 27.5303 (2006).

<sup>74</sup> FLA. R. CRIM. P. 3.112(e).

<sup>75</sup> "In determining whether . . . there is a conflict of interest, the public defender shall apply the standards contained in the Uniform Standards for Use in Conflict of Interest Cases found in appendix C to the Final Report of the Article V Indigent Services Advisory Board dated January 6, 2004." *See* FLA. STAT. § 27.5303(1)(d) (2006); ARTICLE V INDIGENT SERVICES ADVISORY BOARD, FINAL REPORT: RECOMMENDATIONS REGARDING QUALIFICATIONS, COMPENSATION, AND COST CONTAINMENT STRATEGIES FOR STATE-FUNDED DUE PROCESS SERVICES, INCLUDING COURT-REPORTERS, INTERPRETERS, AND PRIVATE COURT-APPOINTED COUNSEL, *at* app. C (2004).

<sup>76</sup> FLA. STAT. §§ 27.52(2)(c)(2), 27.5303(1)(a) (2006).

<sup>77</sup> FLA. STAT. § 27.5303(1)(a) (2006).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> FLA. STAT. § 27.5303(1)(c) (2006).

27.5303(1)(c), courts had the discretion to permit public defenders from withdrawing from cases based on excessive workload.<sup>81</sup>

In cases in which the court grants a motion to withdraw, the court must select one lead counsel to represent the accused<sup>82</sup> either from the circuit registry, which is compiled and maintained by each circuit's Indigent Services Committee, or through a competitive bidding process, which appears to exist in at least four judicial circuits.<sup>83</sup> The court should, but is not required to, appoint co-counsel upon written application and a showing of need by lead counsel.<sup>84</sup> The court must appoint lead counsel "in a rotating order in the order in which names appear on the applicable registry, unless the court makes a finding of good cause on the record for appointing an attorney out of order."<sup>85</sup> But, lead counsel has the right to select co-counsel from the registry of attorneys.<sup>86</sup> If a competitive bidding process is used, the registry is used "only when counsel obtained through that [bidding] process is unable to provide representation due to a conflict of interest or reasons beyond their control."<sup>87</sup>

The public defender or private counsel must be appointed when the defendant is "formally charged with the offense, or as soon as feasible after custodial restraint, or at the first appearance before a committing magistrate, whichever occurs earliest,"<sup>88</sup> and

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<sup>81</sup> See e.g., *In re Certification of Conflict in Motions to Withdraw*, 636 So.2d 18 (Fla. 1994); *Hatten v. State*, 561 So.2d 562 (Fla. 1990); *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*, 561 So. 2d 1130 (Fla. 1990).

<sup>82</sup> FLA. STAT. § 27.5303(1)(a) (2006); FLA. R. CRIM. P. 3.112(e).

<sup>83</sup> FLA. STAT. § 27.40(2) (2006). It appears that at least four judicial circuits, the First, Fifth, Eighteenth, and Nineteenth, have implemented a competitive bidding process in addition to an attorney registry. See *Procedures for Court Appointed Private Attorneys and Due Process Costs, In the Courts of the First Judicial Circuit of the State of Florida*, Admin. Order 2005-18 (July 1, 2005); *Conflict Contract Attorneys/Firms*, at [http://www.circuit5.org/ISC/CONFLICT\\_ATTORNEYS.pdf](http://www.circuit5.org/ISC/CONFLICT_ATTORNEYS.pdf) (last visited on Aug. 4, 2006) (stating that the Dependency Law Group is one of the contracting firms in all five counties that make up the Fifth Circuit); *Eighteenth Judicial Circuit's Indigent Services Committee Policies and Procedures for Private Court-Appointed Counsel in Criminal and Juvenile Delinquency Cases in Seminole County* (Dec. 2, 2005) (on file with author); *Eighteenth Judicial Circuit's Indigent Services Committee Policies and Procedures for Private Court-Appointed Counsel in Criminal and Juvenile Delinquency Cases in Brevard County* (Dec. 2, 2005) (on file with author); *In re: Conflict Counsel Approved for the Nineteenth Judicial Circuit for 2005/2006, In the Circuit Court of the Nineteenth Judicial Circuit in the State of Florida*, Admin. Order 2005-02 (July 1, 2005).

The First Judicial Circuit, and possibly the Nineteenth Judicial Circuit, however, have excluded capital cases for which the death penalty is being sought from the competitive bidding process and instead rely on the attorney registry for the appointment of counsel in these cases. See *Procedures for Court Appointed Private Attorneys and Due Process Costs, In the Courts of the First Judicial Circuit of the State of Florida*, Admin. Order 2005-18, at 6 (July 1, 2005); *In re: Conflict Counsel Approved for the Nineteenth Judicial Circuit for 2005/2006, In the Circuit Court of the Nineteenth Judicial Circuit in the State of Florida*, Admin. Order 2005-02 (July 1, 2005).

<sup>84</sup> See FLA. R. CRIM. P. 3.112(e).

<sup>85</sup> FLA. STAT. § 27.40(3)(b) (2006).

<sup>86</sup> FLA. R. CRIM. P. 3.112(e).

<sup>87</sup> FLA. STAT. § 27.42(2)(b) (2006); see, e.g., *In re: Conflict Counsel Approved for the Nineteenth Judicial Circuit for 2005/2006, In the Circuit Court of the Nineteenth Judicial Circuit in the State of Florida*, Admin. Order 2005-02 (July 1, 2005).

<sup>88</sup> FLA. R. CRIM. P. 3.111(a).

must represent the accused through all trial court proceedings and any appeals in the Florida Supreme Court, which includes the direct appeal.<sup>89</sup> However, in cases in which the defendant is represented by a public defender at trial, such public defender may request that the defendant's appeal be handled by the public defender's office that is designated by statute to handle appeals for the district in which the case is pending.<sup>90</sup> Additionally, on direct appeal, only one attorney may be compensated for his/her services, unless extraordinary circumstances necessitate the compensation of more than one attorney.<sup>91</sup>

Following the direct appeal to the Florida Supreme Court, it is the responsibility of the capital collateral regional counsel or court-appointed registry attorney to represent the death-sentenced inmate in all capital collateral proceedings.<sup>92</sup>

## 2. Qualifications and Workload Limitations of Public Defenders and Private Court-Appointed Attorneys

Rule 3.112 of the Florida Rules of Criminal Procedure notes that “[c]ounsel in death penalty cases [including appeals] should be required to perform at the level of an attorney reasonably skilled in the specialized practice of capital representation, zealously committed to the capital case, who has had adequate time and resources for preparation.”<sup>93</sup> In addition to this general requirement, rule 3.112 contains specific qualification requirements for trial counsel (both lead and co-counsel) and appellate counsel.<sup>94</sup> To date, a number of the Indigent Services Committees have adopted these qualification requirements as their own,<sup>95</sup> and at least three Indigent Services

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<sup>89</sup> FLA. STAT. § 27.5303(4)(a) (2006).

<sup>90</sup> FLA. STAT. § 27.51(4) (2006). Section 27.51(4) of the Florida Statutes makes the following designations: (1) public defender of the Second Judicial Circuit is assigned to handle appeals, if requested, for any public defender within the district comprising the First District Court of Appeal; (2) public defender of the Tenth Judicial Circuit is assigned to handle appeals, if requested, for any public defender within the district comprising the Second District Court of Appeal; (3) public defender of the Eleventh Judicial Circuit is assigned to handle any appeals, if requested, for any public defender within the district comprising the Third District Court of Appeal; (4) public defender of the Fifteenth Judicial Circuit is assigned to handle any appeals, if requested, for any public defender within the district comprising the Fourth District Court of Appeal; and (5) public defender of the Seventh Judicial Circuit is assigned to handle any appeals, if requested, for any public defender within the district comprising the Fifth District Court of Appeal. *Id.*

<sup>91</sup> FLA. R. CRIM. P. 3.112(e).

<sup>92</sup> FLA. STAT. § 27.51(5)(a) (2006).

<sup>93</sup> FLA. R. CRIM. P. 3.112(a), (c).

<sup>94</sup> FLA. R. CRIM. P. 3.112(f), (g).

<sup>95</sup> *See, e.g.*, In re: Attorneys Fees and Costs for Special Public Defenders, In the Second Judicial Circuit of Florida, Admin. Order 2001-02, at 3-4 (June 26, 2001); In re: Conflict Counsel and Due Process Costs, In the Circuit Court of the Fourth Judicial Circuit, Admin. Order 2004-8, at 3 (July 29, 2004); Twelfth Judicial Circuit Article V Indigent Services Committee, Policies and Procedures for Appointment of Counsel 8 (updated Aug. 15, 2006), *available at* [http://12circuit.state.fl.us/appointment\\_of\\_counsel.pdf](http://12circuit.state.fl.us/appointment_of_counsel.pdf) (last visited on Aug. 4, 2006); Case Categories and Minimum Qualifications for Due Process Counsel, In the Thirteenth Judicial Circuit Court for Hillsborough County, Florida, Admin. Order S-2005-159, at 8 (Dec. 19, 2005), *available at* <http://www.fljud13.org/AO/DOCS/2005-159.pdf> (last visited on Aug. 4, 2006); Application Process for Circuit-Wide Registries, Use and Maintenance of Registries, and Due Process Costs, In the Circuit Court of the Fourteenth Judicial Circuit of the State of Florida, Admin. Order 2004-00-13, at 4 (Aug. 19, 2004), *available at*

Committees have adopted continuing legal education requirements beyond the requirements of rule 3.112.<sup>96</sup>

a. Public Defenders and Private Court-Appointed Attorneys for Trial

Rule 3.112 of the Florida Rules of Criminal Procedure requires that lead trial counsel assignments be given only to public defenders and private court-appointed attorneys who:

- (1) are members of the Bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice*;
- (2) are experienced and active trial practitioners with at least five years of litigation experience in the field of criminal law;
- (3) have prior experience as lead counsel in no fewer than nine state or federal jury trials of serious and complex cases which were tried to completion, as well as prior experience as lead defense counsel or co-counsel in at least two state or federal cases tried to completion in which the death penalty was sought. In addition, of the nine jury trials which were tried to completion, the attorney should have been lead counsel in at least three cases in which the charge was murder; or alternatively, of the nine jury trials, at least one was a murder trial and an additional five were felony jury trials;
- (4) are familiar with the practice and procedure of the criminal courts of the jurisdiction;
- (5) are familiar with and experienced in the utilization of expert witnesses and evidence, including but not limited to psychiatric and forensic evidence;
- (6) have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases, including but not limited to the investigation and presentation of evidence in mitigation of the death penalty; and

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<http://www.jud14.flcourts.org/Administrative%20Orders/2004-00-13.pdf> (last visited July 21, 2006); Article V Indigent Services Committee, Seventeenth Judicial Circuit, Adoption of Court Appointed Attorney Registry, Attorney Qualification, Fees and Expenses 4-5 (Sept. 23, 2004), *available at* [http://www.17th.flcourts.org/ISC\\_ADOPTION\\_DOC\\_9-04\\_-\\_Probate\\_Revisions\\_with\\_addendum.pdf](http://www.17th.flcourts.org/ISC_ADOPTION_DOC_9-04_-_Probate_Revisions_with_addendum.pdf) (last visited on Aug. 4, 2006); Twentieth Judicial Circuit, Qualifications for Court-Appointed Attorneys (amended April 11, 2005), *at* [http://www.ca.cjis20.org/pdf/isc\\_qualifications.pdf](http://www.ca.cjis20.org/pdf/isc_qualifications.pdf) (last visited on Aug. 4, 2006).

<sup>96</sup> *See, e.g.*, Amended Resolution of the Article V Indigent Services Committee for the Ninth Judicial Circuit Governing the Appointment & Compensation of Private Court-Appointed Attorneys & Related Costs in Indigent Cases, ISC Res. No. ISC-04 (July 1, 2004) (Attachment A) (requiring lead trial counsel to have attended “within the previous 12 months, a minimum of ten hours of Florida Bar approved continuing legal education devoted to criminal law”); Tenth Judicial Circuit, Compensation and Qualifications for Court Appointed Attorneys in Criminal and Juvenile Delinquency Cases (May 1, 2006) (Attachment A) (requiring lead trial counsel to “attend a minimum of ten hours of Florida Bar approved continuing legal education devoted to criminal law in each Florida Bar reporting period”), *available at* <http://www.jud10.org/CourtAdmin/ConflictAttorney/attachmenta.conflictattorneycomp.criminalandjuvde.May2006.pdf> (last visited on Aug. 4, 2006); Twelfth Judicial Circuit Article V Indigent Services Committee, Policies and Procedures for Appointment of Counsel 10 (updated Aug. 15, 2006) (requiring appellate counsel to have taken “10 hours of criminal appellate law in the 12 preceding months; 12 hours defending capital cases in the 24 preceding months”), *available at* [http://12circuit.state.fl.us/appointment\\_of\\_counsel.pdf](http://12circuit.state.fl.us/appointment_of_counsel.pdf) (last visited on Aug. 4, 2006).

- (7) have attended within the last two years a continuing legal education program of at least twelve hours' duration devoted specifically to the defense of capital cases.<sup>97</sup>

Similarly, trial co-counsel assignments should only be given to public defenders and private court-appointed attorneys who:

- (1) are members of the Bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice*; and
- (2) qualify as lead counsel or meet the following requirements: (a) are experienced and active trial practitioners with at least three years of litigation experience in the field of criminal law; (b) have prior experience as lead counsel or co-counsel in no fewer than three state or federal jury trials of serious and complex cases which were tried to completion, at least two of which were trials in which the charge was murder; or alternatively, of the three jury trials, at least one was a murder trial and one was a felony jury trial; (c) are familiar with the practice and procedure of the criminal courts of the jurisdiction; (d) have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases, and (e) have attended within the last two years a continuing legal education program of at least twelve hours' duration devoted specifically to the defense of capital cases.<sup>98</sup>

In cases in which the public defender office is appointed to represent the defendant, the public defender must certify that the assistant public defenders assigned as lead counsel and co-counsel meet these qualification requirements.<sup>99</sup> If a private attorney is appointed to represent the defendant, s/he must immediately file a notice of appearance with the court indicating acceptance of the appointment<sup>100</sup> and certifying that s/he meets the qualification requirements of rule 3.112 of the Florida Rules of Criminal Procedure.<sup>101</sup> Private court-appointed attorneys also are responsible for complying with the terms of the contract for services, which includes complying with rule 3.112 and notifying the circuit Indigent Services Committee and the JAC of any change in their status, as failure to do so may result in termination of the contract and removal from the registry.<sup>102</sup>

In addition to the public defender's guarantee of the assistant public defenders' qualifications and the private attorney's personal guarantee of his/her qualifications, the Indigent Services Committees and the trial courts are responsible for ensuring compliance with these qualification requirements. Specifically, conflict committees for each circuit are responsible for approving qualified attorneys and removing unqualified attorneys from the registry.<sup>103</sup> Similarly, the trial court is required to conduct an inquiry

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<sup>97</sup> FLA. R. CRIM. P. 3.112(f).

<sup>98</sup> FLA. R. CRIM. P. 3.112(g).

<sup>99</sup> FLA. R. CRIM. P. 3.112(i).

<sup>100</sup> FLA. STAT. § 27.40(6) (2006).

<sup>101</sup> FLA. R. CRIM. P. 3.112(i).

<sup>102</sup> FLA. STAT. § 27.40(3)(a) (2006).

<sup>103</sup> FLA. R. CRIM. P. 3.112(d)(2).

into the counsel's "availability to provide effective assistance of counsel to the defendant."<sup>104</sup>

The trial court's inquiry should include "the number of capital cases or other cases being handled by the attorney and any other circumstances bearing on the attorney's readiness to provide effective assistance of counsel to the defendant in a timely fashion."<sup>105</sup> An appointment should not be made and an attorney should not accept such appointment if the attorney's caseload will prevent the attorney from providing effective legal representation.<sup>106</sup>

b. Public Defenders and Private Court-Appointed Counsel on Direct Appeal

Appellate counsel assignments should be given only to attorneys who:

- (1) are members of the Bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice*;
- (2) are experienced and active trial or appellate practitioners with at least five years of experience in the field of criminal law;
- (3) have prior experience in the appeal of at least one case where a sentence of death was imposed, as well as prior experience as lead counsel in the appeal of no fewer than three felony convictions in federal or state court, at least one of which was an appeal of a murder conviction; or alternatively, have prior experience as lead counsel in the appeal of no fewer than six felony convictions in federal or state court, at least two of which were appeals of a murder conviction;
- (4) are familiar with the practice and procedure of the appellate courts of the jurisdiction;
- (5) have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases;
- (6) have attended within the last two years a continuing legal education program of at least twelve hours' duration devoted specifically to the defense of capital cases.

c. Appointment of Counsel Who Is Not in Compliance with the Qualification Standards

An attorney who does not meet the qualification standards contained in rule 3.112 of the Florida Rules of Criminal Procedure may be appointed if the trial court determines that exceptional circumstances require such appointment.<sup>107</sup> In these cases, the trial court must enter an order "specifying, in writing, the exceptional circumstances requiring

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<sup>104</sup> FLA. R. CRIM. P. 3.112(j)(1).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> FLA. R. CRIM. P. 3.112(k); *see also In re Amendment to Florida Rules of Criminal Procedure - Rule 3.112 Minimum Standards for Attorneys in Capital Cases*, 759 So. 2d 610, 613 (1999) (noting that this provision was added because "it is possible that some counties in the state may not have enough lawyers available who meet the technical requirements of the standards").

deviation from the rule and the court’s explicit determination that counsel chosen will provide competent representation in accord with the policy concerns of [rule 3.112].”<sup>108</sup>

### 3. Training Requirements for Public Defenders and Private Court-Appointed Counsel and Training Sponsors

#### a. Training Requirements

The Florida Bar requires all attorneys to participate in a minimum of thirty hours of approved continuing legal education (CLE) every three years.<sup>109</sup> Five of the thirty hours must be in approved legal ethics, professionalism, substance abuse, or mental illness awareness.<sup>110</sup> The Florida Bar also offers voluntary board certification programs through which experienced criminal trial attorneys and criminal appellate attorneys can become “Board-Certified,” which is “the highest level of recognition given by the [Bar] for competency and experience within an area of law.”<sup>111</sup>

In addition to the general CLE requirements for all attorneys, trial and appellate counsel litigating death penalty cases are required to attend within the last two years a continuing legal education program involving twelve hours of capital defense training,<sup>112</sup> and they must certify that they have completed this training.<sup>113</sup>

#### b. Training Sponsors

A number of organizations in Florida sponsor training programs for defense attorneys,<sup>114</sup> but it appears that only a few organizations sponsor programs dedicated exclusively to the defense of capital cases. The Florida Public Defenders Association, Inc. (FPDA), for example, sponsors a training program called “Life Over Death,” which is a three-day program pertaining to the defense of capital cases.<sup>115</sup> The seminar is by invitation only but interested attorneys may request an invitation by e-mailing a member of the FPDA’s Death Penalty Steering Committee.<sup>116</sup> Additionally, the Commission on Capital Cases

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<sup>108</sup> FLA. R. CRIM. P. 3.112(k).

<sup>109</sup> RULES REGULATING THE FLORIDA BAR R. 6-10.3(b).

<sup>110</sup> *Id.*

<sup>111</sup> The Florida Bar, Professional Practice, Certification, *at* <http://www.floridabar.org/tfb/TFBMember.nsf/ED6E4BCB92A8FE1B852567090069F3C2/531C6693366E680985256B2F006C6A60?OpenDocument> (last visited on Aug. 4, 2006); *see also* RULES REGULATING THE FLORIDA BAR R. 6-8.3, 6-8.5.

<sup>112</sup> FLA. R. CRIM. P. 3.112(f)(7), (g)(2)(E), (h)(6).

<sup>113</sup> FLA. R. CRIM. P. 3.112(i).

<sup>114</sup> *See, e.g.,* The Florida Bar, Member Services, CLE Courses, *at* <http://www3.flabar.org/FBWEB/CLEReg.nsf/WCESearchResults?OpenForm> (last visited on Aug. 4, 2006); Florida Association of Criminal Defense Lawyers, Seminars & CLEs, *at* [http://www.facdl.org/Seminars&CLEs/Seminars\\_&\\_CLEs.html](http://www.facdl.org/Seminars&CLEs/Seminars_&_CLEs.html) (last visited on Aug. 4, 2006); Florida Public Defenders Association, Inc., Training Schedule, *at* [http://www.flpda.org/pages/training\\_schedule.htm](http://www.flpda.org/pages/training_schedule.htm) (last visited on Aug. 4, 2006).

<sup>115</sup> Florida Public Defenders Association, Inc., Life Over Death, *at* [http://www.flpda.org/pages/life\\_over\\_death.htm](http://www.flpda.org/pages/life_over_death.htm) (last visited on Aug. 4, 2006).

<sup>116</sup> *Id.*

annually offers both in-person and on-line continuing legal education courses for attorneys litigating capital cases.<sup>117</sup>

4. Compensation of and the Resources Available to Public Defenders and Private Court-Appointed Counsel

a. Salaries of and the Resources Available to Public Defenders and Assistant Public Defenders

The salaries of public defenders must be provided for in the General Appropriations Act and paid in equal monthly installments.<sup>118</sup> Most public defenders make approximately \$143,500 per year.<sup>119</sup> The salaries of assistant public defenders must be set by the public defender of the same judicial circuit in an amount not to exceed 100 percent of that public defender's salary.<sup>120</sup> The salaries of assistant public defenders vary from circuit to circuit based on the amount of money appropriated to the public defender's office,<sup>121</sup> but in each circuit, the starting salary for an assistant public defender is approximately \$38,700.<sup>122</sup> Attorneys handling death penalty cases, however, are paid on average between \$70,000 and \$80,000 per year.<sup>123</sup>

In addition to assistant public defenders, each public defender is authorized to employ "other staff and personnel," including investigators,<sup>124</sup> and has access to funds for expert witnesses "summoned to appear for an investigation, preliminary hearing, or trial in a case where the witnesses are summoned on behalf of an indigent defendant, and any other expert witnesses required in a court hearing by law or whomever the public defender deems necessary for performance of his[her] duties."<sup>125</sup> Each public defender office also has access to funds for mental health professionals who are appointed to evaluate the defendant and are "required [for] a court hearing."<sup>126</sup>

b. Compensation of and the Resources Available to Private Court-Appointed Counsel

All private court-appointed attorneys are compensated by the JAC<sup>127</sup> at an hourly rate established by each circuit's Indigent Services Committee. These hourly rates are to be

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<sup>117</sup> Commission on Capital Cases, Current On-Line Courses, at <http://www.floridacapitalcases.state.fl.us/c-cle.cfm> (last visited on Aug. 4, 2006).

<sup>118</sup> FLA. STAT. § 27.5301(1) (2006).

<sup>119</sup> Telephone Interview with Nancy Daniels, Public Defender, Florida Second Judicial Circuit (Apr. 5, 2006).

<sup>120</sup> FLA. STAT. § 27.5301(2) (2006).

<sup>121</sup> See *supra* note 43 (discussing the amount of money appropriated to each circuit's public defender's office).

<sup>122</sup> Telephone Interview with Nancy Daniels, Public Defender, Florida Second Judicial Circuit (Apr. 5, 2006).

<sup>123</sup> *Id.*

<sup>124</sup> FLA. STAT. § 27.53(1) (2006).

<sup>125</sup> FLA. STAT. § 29.006(3) (2006).

<sup>126</sup> FLA. STAT. § 29.006(4) (2006).

<sup>127</sup> FLA. STAT. § 27.5304(1) (2006).

attached to the contract for services that private attorneys must enter into with the JAC in order to be included on the circuit registry.<sup>128</sup> The contract contained on the JAC website specifically states that an attorney who signs the contract “agrees and acknowledges that the compensation to be paid pursuant to this Agreement shall be the sole, exclusive, and full compensation to which Attorney shall be entitled for cases Attorney is appointed to pursuant to this Agreement.”<sup>129</sup>

The hourly rates differ from circuit to circuit. Some circuits differentiate between lead counsel, co-counsel, and appellate counsel, while others provide the same fee for all attorneys. Similarly, some differentiate between out-of-court work and in-court work, while others provide the same fee for all work.

To the best of our knowledge, the fees established by each circuit’s Indigent Services Committee are as follows:

- (1) First Judicial Circuit - \$150 per hour for first chair private, court-appointed attorneys and \$100 per hour for second chair private, court-appointed attorneys;<sup>130</sup>
- (2) Second Judicial Circuit - \$115 per hour for lead counsel and \$100 per hour for co-counsel, and \$100 per hour for appellate counsel;<sup>131</sup>
- (3) Third Judicial Circuit - \$100 per hour for lead counsel and \$90 per hour for co-counsel;<sup>132</sup>
- (4) Fourth Judicial Circuit - \$90 per hour for lead counsel and co-counsel;<sup>133</sup>
- (5) Fifth Judicial Circuit - \$100 per hour for lead counsel and \$90 per hour for co-counsel, and \$80 per hour for appellate counsel;<sup>134</sup>
- (6) Sixth Judicial Circuit - \$100 per hour for trial and appellate counsel;<sup>135</sup>

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<sup>128</sup> See Justice Administrative Commission, Agreement for Attorney Services, at [http://www.justiceadmin.org/court\\_app\\_counsel/](http://www.justiceadmin.org/court_app_counsel/) (last visited on Aug. 4, 2006).

<sup>129</sup> *Id.* The contract is not currently available on the JAC website, but a new version is forthcoming. See Justice Administration Commission, Court Appointed Attorney – New Contract and Legislative Update, at [http://www.justiceadmin.org/court\\_app\\_counsel/New%20Attorney%20Contract%20-%20Website%20Notice.pdf](http://www.justiceadmin.org/court_app_counsel/New%20Attorney%20Contract%20-%20Website%20Notice.pdf) (last visited on Aug. 4, 2006).

<sup>130</sup> See Procedures for Court Appointed Private Attorneys and Due Process Costs, In the Courts of the First Judicial Circuit of the State of Florida, Admin. Order 2005-18, at 6, 13 (July 1, 2005), available at <http://www.firstjudicialcircuit.org/Zones/Org1/uploads/Administrative%20Order%202005-18.pdf> (last visited on Aug. 4, 2006). Although the First Judicial Circuit has established a competitive bidding process, capital cases are excluded from this process. *Id.*

<sup>131</sup> See In re: Attorneys Fees and Costs for Special Public Defenders, Second Judicial Circuit of the State of Florida, Admin. Order 2001-02, at 6 (June 26, 2001).

<sup>132</sup> See Court-Appointed Attorney Standards and Compensation, Third Judicial Circuit of the State of Florida, Admin. Order 2004-023, at 2 (Sept. 30, 2004).

<sup>133</sup> See Conflict Counsel and Due Process Costs, Fourth Judicial Circuit of the State of Florida, Admin. Order 2004-8, at 4-5 (July 29, 2004).

<sup>134</sup> See Third Amended Administrative Order Regarding Rates of Compensation for Court-Appointed Attorneys, In the Circuit Court of the Fifth Judicial Circuit of the State of Florida, Admin. Order A2004-19-A3 (Mar. 2, 2005).

<sup>135</sup> Fee Structure for the Sixth Judicial Circuit, Court Appointed Attorneys (May 5, 2006), at [http://www.jud6.org/Courtappointed/attorneys/Fee%20Structure%20approved%205\\_8\\_06%20effective%205\\_30\\_06.pdf](http://www.jud6.org/Courtappointed/attorneys/Fee%20Structure%20approved%205_8_06%20effective%205_30_06.pdf) (last visited on Aug. 4, 2006).

- (7) Seventh Judicial Circuit - A rate not to exceed \$125 per hour for both lead and co-counsel, and \$75 per hour for appellate counsel;<sup>136</sup>
- (8) Eighth Judicial Circuit - \$100 per hour for lead counsel and co-counsel;<sup>137</sup>
- (9) Ninth Judicial Circuit - \$120 per hour for lead counsel and \$100 per hour for co-counsel, and \$75 per hour for appellate counsel;<sup>138</sup>
- (10) Tenth Judicial Circuit - \$120 per hour for lead counsel and \$100 per hour for co-counsel, and \$100 per hour for appellate counsel;<sup>139</sup>
- (11) Eleventh Judicial Circuit - \$125 per hour for lead counsel and \$105 per hour for co-counsel, and \$105 per hour for appellate counsel;<sup>140</sup>
- (12) Twelfth Judicial Circuit - \$60 per hour for out-of-court work and \$75 per hour for in-court work;<sup>141</sup>
- (13) Thirteenth Judicial Circuit - \$90 per hour for lead counsel and co-counsel;<sup>142</sup>
- (14) Fourteenth Judicial Circuit - \$125 per hour for lead counsel;<sup>143</sup>
- (15) Fifteenth Judicial Circuit - \$125 per hour for lead counsel and \$90 per hour for co-counsel, and \$100 per hour for appellate counsel;<sup>144</sup>
- (16) Sixteenth Judicial Circuit - \$125 per hour;<sup>145</sup>

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<sup>136</sup> Rates of Compensation for Court-Appointed Attorneys, In the Circuit Court of Florida, Seventh Judicial Circuit in and for Flagler, Putnam, St. Johns and Volusia County, Admin. Order P-2005-138 (June 30, 2005), *available at* [www.circuit7.org/Indigent%20Services/CrtAppAttornies.htm](http://www.circuit7.org/Indigent%20Services/CrtAppAttornies.htm) (last visited July 21, 2006).

<sup>137</sup> Administrative Order 1.470(E), Court Appointed and Conflict Attorneys Registry and Compensation – Interim Order, Eighth Judicial Circuit, Aug. 13, 2004; *see also* Attorney Fees, Eighth Judicial Circuit Article V Indigent Services Committee, *at* <http://www.circuit8.org/indigent/attyfees04.htm> (last visited on Aug. 4, 2006).

<sup>138</sup> *See* Order Establishing Rate of Pay for Court Appointed Counsel in Indigent Cases in and for Orange and Osceola Counties amends 07-98-16, Ninth Judicial Circuit, Admin. Order 2000-9 (May 19, 2000).

<sup>139</sup> State of Florida Tenth Judicial Circuit, Compensation and Qualifications for Court Appointed Attorneys in Criminal and Juvenile Delinquency Cases, *at* [http://www.jud10.org/CourtAdmin/ConflictAttorney/atch\\_a\\_conflict\\_comp.crimi\\_juv\\_jan\\_06.doc](http://www.jud10.org/CourtAdmin/ConflictAttorney/atch_a_conflict_comp.crimi_juv_jan_06.doc) (last visited on Aug. 4, 2006).

<sup>140</sup> *See* Eleventh Judicial Circuit, Attachment “A”, at 3-5 *at* [http://jud11.flcourts.org/what%27s\\_new/AttachmentA.pdf](http://jud11.flcourts.org/what%27s_new/AttachmentA.pdf) (last visited on Aug. 4, 2006); *see also* Eleventh Judicial Circuit, Application for ISC Registry in Criminal and Juvenile Delinquency Cases, *at* [http://jud11.flcourts.org/attywheel/W006\\_final2.pdf](http://jud11.flcourts.org/attywheel/W006_final2.pdf) (last visited on Aug. 4, 2006) (noting \$10,000 maximum for pre-trial representation plus \$800 per diem for trial representation).

<sup>141</sup> *See* Attorney's Fees for Specially Appointed Public Defenders (Amends 94-06B.3), Twelfth Judicial District, Admin. Order 2004-14.3 (June 29, 2004), *available at* <http://12circuit.state.fl.us/Admin%20Orders/Section%203/04-14-3.pdf> (last visited on Aug. 4, 2006).

<sup>142</sup> *See* Fees and Expenses for Due Process Services, In the Thirteenth Judicial Circuit Court for Hillsborough County, Florida, Admin. Order S-2005-158 (Dec. 19, 2005), *available at* <http://www.fljud13.org/AO/DOCS/2005-158.pdf> (last visited on Aug. 4, 2006).

<sup>143</sup> Increase in Court Appointed Attorneys Rates; Adoption of Flat Rate for Guardianship, Baker and Marchman Cases; Inclusion of Examining Committee Members Rates; and Setting of an Effective Date, Fourteenth Judicial Circuit, Admin. Order 2005-00-03 (May 18, 2005), *available at* <http://www.jud14.flcourts.org/Administrative%20Orders/2005-00-03.pdf> (last visited on Aug. 4, 2006).

<sup>144</sup> Policies and Procedures, Indigent Services Committee, Fifteenth Judicial Circuit of Florida, at 23-24, *available at* [http://www.co.palm-beach.fl.us/cadmin/court\\_appointed\\_attorney\\_information/Indigent%20Services%20Committee%20Policie%20&%20Procedures%201-22-06.pdf](http://www.co.palm-beach.fl.us/cadmin/court_appointed_attorney_information/Indigent%20Services%20Committee%20Policie%20&%20Procedures%201-22-06.pdf) (last visited on Aug. 4, 2006).

- (17) Seventeenth Judicial Circuit - \$125 per hour for lead counsel and \$90 per hour for co-counsel, and \$100 per hour for appeal to Florida Supreme Court and \$90 per hour for appeal to the district court of appeals;<sup>146</sup>
- (18) Eighteenth Judicial Circuit - Brevard County—\$150 per hour for in-court work and \$90 per hour for out-of-court work for lead counsel; and \$100 per hour for in-court work and \$60 per hour for out-of-court work for co-counsel.<sup>147</sup> Seminole County—\$110 per hour for in-court and out-of-court work for lead counsel and co-counsel;<sup>148</sup>
- (19) Nineteenth Judicial Circuit - \$100 per hour for trial and appellate counsel;<sup>149</sup> and
- (20) Twentieth Judicial Circuit - \$3,500 per case for trial counsel, up to 20 hours, but if it is over 20 hours, then attorney is paid \$100 per hour up “to statutory maximum,” and \$100 per hour for appellate counsel, up “to the statutory maximum.”<sup>150</sup>

Regardless of the hourly rate, the compensation for private court-appointed counsel may not exceed \$3,500 for representation at the trial level and \$2,000 for representation on appeal.<sup>151</sup> The Florida Supreme Court, however, has found that courts may award attorney’s fees in excess of the statutory maximums “in extraordinary and unusual cases.”<sup>152</sup> The Court further found that “virtually every capital case fits within this standard and justifies the court’s exercise of its inherent power to award attorney’s fees in excess of the current statutory fee cap.”<sup>153</sup>

In addition to compensation for attorney’s fees, private court-appointed attorneys are entitled to compensation for “reasonable and necessary expenses.”<sup>154</sup> These expenses

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<sup>145</sup> Appointment, Compensation & Reimbursement for Special Public Defenders & Other Court Appointed Counsel, Sixteenth Judicial Circuit of Florida, Admin. Order 2.008/05-1 (Sept. 16, 2005), available at <http://www.clerk-of-the-court.com/Docs/2.0080501.pdf> (last visited on Aug. 4, 2006).

<sup>146</sup> See Appointment of and Compensation of Court Appointed Counsel, In the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida, Admin. Order III-04-D-2, at 2-3 (Oct. 7, 2004), available at <http://www.17th.flcourts.org/III-04-D-2.pdf> (last visited on Aug. 4, 2006); see also Adoption of Court Appointed Attorney Registry, Attorney Qualification, Fees and Expenses, Article V Indigent Services Committee, Seventeenth Judicial Circuit, Sept. 23, 2004, at 4-5, available at [http://www.17th.flcourts.org/ISC\\_ADOPTION\\_DOC\\_9-04\\_-\\_Probate\\_Revisions\\_with\\_addendum.pdf](http://www.17th.flcourts.org/ISC_ADOPTION_DOC_9-04_-_Probate_Revisions_with_addendum.pdf) (last visited on Aug. 4, 2006).

<sup>147</sup> See Eighteenth Judicial Circuit’s Indigent Services Committee Policies and Procedures for Private Court-Appointed Counsel in Criminal and Juvenile Delinquency Cases in Brevard County (Dec. 2, 2005).

<sup>148</sup> See Eighteenth Judicial Circuit’s Indigent Services Committee Policies and Procedures for Private Court-Appointed Counsel in Criminal and Juvenile Delinquency Cases in Seminole County (Dec. 2, 2005).

<sup>149</sup> See In re: Conflict Counsel Approved for the Nineteenth Judicial Circuit for 2005/2006, In the Circuit Court of the Nineteenth Judicial Circuit in the State of Florida, Admin. Order 2005-02 (July 1, 2005).

<sup>150</sup> Rates Adopted by Indigent Services Committee for Due Process Services Within the Twentieth Judicial Circuit (Feb. 13, 2006), available at <http://www.ca.cjis20.org/isc/rates.asp> (last visited on Aug. 4, 2006). Payment over the statutory maximums of \$3,500 for trial and \$2,000 for appeals requires a court order. *Id.*

<sup>151</sup> FLA. STAT. § 27.5304(3)(a)(4), (3)(a)(5) (2006).

<sup>152</sup> *Makemson v. Martin County*, 491 So. 2d 1109, 1115 (Fla. 1986).

<sup>153</sup> *White v. Board of County Commissioners of Pinellas County*, 537 So. 2d 1376, 1380 (Fla. 1989).

<sup>154</sup> FLA. STAT. § 27.5304(1) (2006).

include court reporting and transcription fees; the costs of expert witnesses “summoned to appear for an investigation, preliminary hearing, or trial in a case where the witnesses are summoned on behalf of an indigent, and any other expert witnesses approved by the court;” the costs of mental health professionals who are appointed to evaluate the defendant and are “required [for] a court hearing;” reasonable transportation and travel expenses; and “reasonable pretrial consultation fees and costs.”<sup>155</sup>

The procedures for retaining the assistance of and the hourly rates paid to investigators, mitigation specialists, and other types of experts vary from circuit to circuit. Apart from the Third Judicial Circuit,<sup>156</sup> each circuit’s procedures and hourly rates for these services are summarized to the best of our ability as follows:

(1) First Judicial Circuit

- Investigators - Court approval required,<sup>157</sup> \$50 per hour for first hour, \$12.50 per quarter hour thereafter, up to a maximum of \$500 for all case types unless amount in excess approved by order of the court.<sup>158</sup>
- Psychology/Competency Expert - Court approval required, except that counsel may retain a confidential expert for the purpose of conducting a competency evaluation without pre-approval,<sup>159</sup> \$175 per hour for first hour, \$42.50 for quarter hour thereafter, maximum of \$625 per case unless amount in excess approved by order of the court.
- Other Experts with a Doctorate Degree - Court approval required, \$200 per hour for first hour, \$50 per quarter hour thereafter, maximum of \$750 per case unless amount in excess approved by the court.<sup>160</sup>

(2) Second Judicial Circuit

- Investigator/Mitigation Specialist - No court approval required up to a cap of \$1,500.
- Psychologist - No court approval required up to the cap of \$1,500.<sup>161</sup>

(3) Fourth Judicial Circuit

- Investigator - No court approval required up to a maximum of \$500.
- Mental Health Professionals - No court approval required up to \$750.

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<sup>155</sup> FLA. STAT. § 29.007 (2006).

<sup>156</sup> It appears that the fees for investigative and expert services are detailed in Administrative Order 2002-022, but we were unable to obtain this administrative order. *See* Court-Appointed Attorney Standards and Compensation, In the Circuit Court of the Third Judicial Circuit, In and For the State of Florida, Admin. Order 2004-023, at 3 (Sept. 30, 2004).

<sup>157</sup> *See* Procedures for Court Appointed Private Attorneys and Due Process Costs, In the Courts of the First Judicial Circuit of the State of Florida, Admin. Order 2005-18, at 3 (July 1, 2005), *available at* <http://www.firstjudicialcircuit.org/Zones/Org1/uploads/Administrative%20Order%202005-18.pdf> (“Court appointed counsel must make a motion to the trial court and obtain a court order to obtain compensation for private investigation costs.”).

<sup>158</sup> *See id.*

<sup>159</sup> *See id.* at 2.

<sup>160</sup> *See id.* at 4-5.

<sup>161</sup> *See* In re: Attorneys Fees and Costs for Special Public Defenders, Second Judicial Circuit of the State of Florida, Admin. Order 2001-02, at 4 (June 26, 2001).

- Other Experts - Court approval required, rates are to be “consistent with current practice in [the] jurisdiction or rate guidelines established by further order of [the] Court.”<sup>162</sup>
- (4) Fifth Judicial Circuit
- Investigator/Mitigation Specialist - \$45 per hour, not to exceed a total of 100 hours for the guilt phase and 50 hours for the penalty phase.<sup>163</sup>
  - Psychological/Competency Evaluation - \$500 per evaluation.
  - Psychiatrist or Ph.D Hired to Perform Competency Evaluation - \$150 per hour for in-court work with a minimum of \$200, \$125 per hour for depositions, \$60 per hour while waiting to testify and for preparation prior to court appearance, \$125 per hour for preparation prior to appearance and consultation with attorney, and \$50 per hour for travel to the court.
  - Other Expert with Doctorate or Advanced Degree - \$125 per hour for in-court and out-of-court work, \$60 per hour while waiting to testify, and \$50 per hour for travel to the court.
  - Other Expert or Nurse Practitioner - \$75 per hour for in-court and out-of-court work, \$50 per hour while waiting to testify.<sup>164</sup>
- (5) Sixth Judicial Circuit
- Investigator - \$35 per hour,<sup>165</sup> no court approval necessary up to \$350.<sup>166</sup>
  - Psychological/Competency Evaluation - \$400 per evaluation.
  - Psychiatrist or Ph.D Hired to Perform Competency Evaluation - \$125 for in-court and out-of-court work, \$60 per hour while waiting to testify, \$50 per hour while traveling to court.
  - Other Expert with Doctorate or Advanced Degree - \$150 per hour for in-court and out-of-court work, \$60 per hour while waiting to testify, \$50 per hour while traveling to court.
  - Other Expert or Nurse Practitioner - \$75 per hour for in-court and out-of-court work, \$50 per hour while waiting to testify.<sup>167</sup>

<sup>162</sup> See Conflict Counsel and Due Process Costs, Fourth Judicial Circuit of the State of Florida, Admin Order 2004-8, at 7-8 (July 29, 2004).

<sup>163</sup> Third Amended Administrative Order Regarding Rates of Compensation for Court-Appointed Attorneys, Fifth Judicial Circuit’s Article V Indigent Services Committee’s Approved Rates of Compensation for Due Process Costs in Indigent Cases, Admin. Order A2004-19-A3 (March 2, 2005).

<sup>164</sup> See In re: Expert Fee Guidelines for Indigent Cases, In the Fifth Circuit of the State of Florida, Admin. Order A-2004-38 (Sept. 24, 2004).

<sup>165</sup> See Professional Fees, Criminal Cases, Juvenile Delinquency, Family Law and Juvenile Dependency Cases, In the Circuit Court of the Sixth Judicial Circuit of the State of Florida, Admin. Order 2004-051 (Aug. 2004), available at <http://www.jud6.org/LegalPractice/AOSAndRules/aos/aos2004/2004-051.htm> (last visited on Aug. 4, 2006).

<sup>166</sup> See Court Appointed Attorney Standards and Compensation, In the Circuit Court of the Sixth Judicial Circuit of the State of Florida, Admin. Order 2004-028 (June 2004), available at <http://www.jud6.org/LegalPractice/AOSAndRules/aos/aos2004/2004-028.htm> (last visited on Aug. 4, 2006).

<sup>167</sup> See Professional Fees, Criminal Cases, Juvenile Delinquency, Family Law And Juvenile Dependency Cases, In the Circuit Court of the Sixth Judicial Circuit of the State of Florida, Admin. Order 2004-051

- (6) Seventh Judicial Circuit
- Investigators - \$30 to \$50 per hour up to \$500 to \$1,500 per case.
  - Psychological Examinations - \$500 maximum.
  - Psychological Expert In-Court Testimony - \$150 per hour.
  - Other Experts - \$150 to \$200 per hour up to \$1,500 to \$2,000 per case.<sup>168</sup>
- (7) Eighth Judicial Circuit
- Investigators - Court approval required, \$30 to \$50 per hour up to \$500 to \$1,500 per case.
  - Psychologist Exams - Court approval required, \$300 to \$600 per exam.
  - Psychologist - \$150 to \$200 per hour.
  - Expert Witness Fees - Court approval required, \$150 to \$200 per hour.
  - Other Experts - \$75 to \$100 per hour.<sup>169</sup>
- (8) Ninth Judicial Circuit
- Investigator/Mitigation Specialist - \$45 per hour, up to 100 hours for guilt/innocence phase and up to 50 hours for the penalty phase.
  - Psychological Evaluations - \$350 per evaluation.
  - Medical Doctors and Psychologists - \$170 for the first hour or less and \$40 per quarter hour thereafter for in-court work, and \$160 for the first hour or less and \$40 per quarter hour thereafter for out-of-court work.
  - Other Experts - \$158 for the first hour or less and \$39.50 per quarter hour thereafter for in-court work, and \$131 for the first hour or less and \$32.75 per quarter hour thereafter for out-of-court work, up to 20 hours for all expert fees.<sup>170</sup>
- (9) Tenth Judicial Circuit

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(Aug. 2004), available at <http://www.jud6.org/LegalPractice/AOSAndRules/aos/aos2004/2004-051.htm> (last visited on Aug. 4, 2006).

<sup>168</sup> See Indigent Services Fees and Expenses, In the Circuit Court of the Seventh Judicial Circuit of the State of Florida, Admin. Order 2006-009, at addendum D (Jan. 27, 2006).

<sup>169</sup> Court Appointed and Conflict Attorneys Registry and Compensation – Interim Order, Eighth Judicial Circuit, Admin. Order 1.470(E) (Aug. 13, 2004), available at <http://www.circuit8.org/indigent/Admin%20Order%201.470E.pdf> (last visited on Aug. 4, 2006); see also Investigator Fees, Eighth Judicial Circuit Article V Indigent Services Committee, at <http://circuit8.org/indigent/Fee%20Schedule%20B.pdf> (last visited on Aug. 4, 2006); Expert Witnesses, Eighth Judicial Circuit Article V Indigent Services Committee, at <http://circuit8.org/indigent/Fee%20Schedule%20C.pdf> (last visited on Aug. 4, 2006).

<sup>170</sup> Amended Resolution of the Article V Indigent Services Committee for the Ninth Judicial Circuit Governing the Appointment & Compensation of Private Court-Appointed Attorneys & Related Costs in Indigent Cases, the Ninth Judicial Circuit of Florida, Attachment C, ISC Res. No. ISC-04, available at [http://www.justiceadmin.org/court\\_app\\_counsel/ao/09-circuit/9TH%20CIRCUIT%20RESOLUTION%20-%20ISC%20-%202004.pdf](http://www.justiceadmin.org/court_app_counsel/ao/09-circuit/9TH%20CIRCUIT%20RESOLUTION%20-%20ISC%20-%202004.pdf) (last visited on Aug. 4, 2006); Amended Resolution of the Article V Indigent Services Committee for the Ninth Judicial Circuit Governing the Appointment & Compensation of Private Court-Appointed Attorneys & Related Costs in Indigent Cases, the Ninth Judicial Circuit of Florida, ISC Resolution No. ISC-02, available at [http://www.justiceadmin.org/court\\_app\\_counsel/ao/09-circuit/9TH%20CIRCUIT%20RESOLUTION%20-%20ISC%20-%202002.pdf](http://www.justiceadmin.org/court_app_counsel/ao/09-circuit/9TH%20CIRCUIT%20RESOLUTION%20-%20ISC%20-%202002.pdf) (last visited on Aug. 4, 2006).

- Investigator - Maximum rate of \$50 per hour for a maximum of 15 hours per case.<sup>171</sup>
- Psychiatrist - \$200 per hour for exam, \$200 per hour for in-court and out-of-court work, \$150 per hour while waiting to testify, \$150 per hour while traveling, \$2000 maximum allowed per case.
- Psychologist - \$120 per hour for exam, \$150 per hour for in-court work, \$75 for out-of-court work, \$75 per hour while waiting to testify, \$75 per hour while traveling; \$2000 maximum allowed per case.
- Medical Doctor - \$200 per hour for exam, \$200 for in-court work, \$125 for out-of-court work, \$75 per hour while waiting to testify, \$75 per hour while traveling; \$2000 maximum allowed per case.
- Other Pre-Trial Expert - \$100 per hour for exam, \$100 per hour for in-court work, \$75 per hour for out-of-court work, \$50 per hour while waiting to testify, \$50 per hour while traveling; \$1000 maximum allowed per case.<sup>172</sup>

(10) Eleventh Judicial Circuit

- Investigator - \$50 per hour for in-court and \$40 for out-of-court work, court approval not required up to \$1500.
- Psychological/Competency Evaluations - Between \$300 to \$400 per evaluation depending on type of evaluation, \$150 per hour for in-court work, \$75 per hour while waiting to testify and traveling to court, and \$100 per hour for out-of-court preparation.
- Medical Doctor or Other Expert with a Doctorate Degree - \$150 per hour for in-court, crime-scene, testing and review of records time; \$75 per hour while waiting to testify and traveling to court; and \$100 per hour for court preparation time.
- Other Pre-Trial Expert - \$75 per hour for in-court work, \$50 per hour for out-of-court work, and \$25 per hour while waiting to testify.<sup>173</sup>

(11) Twelfth Judicial Circuit

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<sup>171</sup> Compensation and Qualifications for Court Appointed Attorneys in Criminal and Juvenile Delinquency Cases, Attachment A, at [http://www.jud10.org/CourtAdmin/ConflictAttorney/atch\\_a\\_conflict\\_comp.crimi\\_juv\\_jan\\_06.doc](http://www.jud10.org/CourtAdmin/ConflictAttorney/atch_a_conflict_comp.crimi_juv_jan_06.doc) (last visited on Aug. 4, 2006).

<sup>172</sup> In re: Costs Associated With Due Process Services and the Representation of Indigent Persons When Counsel Is Appointed by the Court, Exhibit D, In The Circuit Court of the Tenth Judicial Circuit in and for Hardee, Highlands and Polk Counties, Florida, Admin. Order 1-38.0 (Aug. 24, 2004), available at [http://www.jud10.org/AdministrativeOrders/orders/Section1/Exhibits\\_1-38.1/1-38-1\\_ExhD.pdf](http://www.jud10.org/AdministrativeOrders/orders/Section1/Exhibits_1-38.1/1-38-1_ExhD.pdf) (last visited on Aug. 4, 2006).

<sup>173</sup> In re: The Amendment and Rescission of Administrative Orders Affected by the Article V Indigent Services Committee's Attachment "A," Admin. Order 04-42 (Sept. 29, 2004), available at [http://reports.jud11.flcourts.org/Administrative\\_Orders/1-04-42-Amendment%20Rescission%20of%20AO%20Affected%20by%20Article.pdf](http://reports.jud11.flcourts.org/Administrative_Orders/1-04-42-Amendment%20Rescission%20of%20AO%20Affected%20by%20Article.pdf) (last visited on Aug. 4, 2006); Attachment "A", Eleventh Judicial Circuit, at [http://jud11.flcourts.org/what%27s\\_new/AttachmentA.pdf](http://jud11.flcourts.org/what%27s_new/AttachmentA.pdf) (last visited on Aug. 4, 2006); Memorandum Re: Procedures in Court Appointed Cases, Administrative Office of the Courts, Eleventh Judicial Circuit, at <http://jud11.flcourts.org/attywheel/SAPD%20Procedures%20in%20Court%20Appointed%20Cases.pdf> (last visited on Aug. 4, 2006).

- Investigator - \$40 per hour, not to exceed \$800 per case.
  - Psychological Examinations - \$150 per exam.
  - Psychologist Testifying - \$150 per hour for the first hour and \$37.50 for each quarter hour thereafter.
  - Medical Doctor Testifying - \$175 per hour for the first hour and \$37.50 for each quarter hour thereafter.
  - Medical Doctors Out of Court - \$100 per hour.
  - Other Experts Appointed by the Court - Fees set by the presiding judge, not to exceed \$150 per hour.<sup>174</sup>
- (12) Thirteenth Judicial Circuit
- Investigator - Fees cannot exceed \$1,000 without prior court approval.
  - Competency Evaluation - \$400 per evaluation.
  - Psychiatrists and Medical Doctors - \$200 per mental health evaluation.
  - Laypersons - \$100 per mental health evaluation.
  - Forensic Professional Expert - Fees cannot exceed \$2,500 without prior court approval.<sup>175</sup>
- (13) Fourteenth Judicial Circuit
- Expert Witnesses - Court approval not required, \$150 per hour, not to exceed \$1500 per case, but if fees exceed \$15 per hour or \$1500 per case, approval must be obtained by the court.<sup>176</sup>
- (14) Fifteenth Judicial Circuit
- Court approval required for (a) any cost which alone, or together will exceed \$500; (b) any cost for investigative services, engagement of experts to serve as witnesses or consultants.<sup>177</sup>
- (15) Sixteenth Judicial Circuit
- “Compensation will be negotiated on a case-by-case basis,” but flat fees are to be paid to the following experts: Medical Doctor, including Psychiatrist, should be paid \$450 per preliminary medical or psychiatric examination together with report and Psychologist should be paid \$350 for a preliminary evaluation with report.<sup>178</sup>
- (16) Seventeenth Judicial Circuit:
- Investigator - \$38 per hour, up to \$840 per case.

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<sup>174</sup> Policies and Procedures for Appointment of Counsel, Twelfth Judicial Circuit Article V Indigent Services Committee (Oct. 1, 2004), at [http://12circuit.state.fl.us/appointment\\_of\\_counsel.pdf](http://12circuit.state.fl.us/appointment_of_counsel.pdf) (last visited on Aug. 4, 2006).

<sup>175</sup> See Fees and Expenses for Due Process Services, In the Thirteenth Judicial Circuit Court for Hillsborough County, Florida, Admin. Order S-2005-158 (Dec. 19, 2005).

<sup>176</sup> Indigent Services Committee Guidelines, Fourteenth Judicial Circuit (Mar. 1, 2006), at <http://www.jud14.flcourts.org/Registries/Indigent%20Services%20Committee%20Guidlines.pdf> (last visited on Aug. 4, 2006); Application Process for Circuit-Wide Registries, Use and Maintenance of Registries, and Due Process Costs, Fourteenth Judicial Circuit, Admin. Order 2004-00-13 (Aug. 19, 2004).

<sup>177</sup> In re: Court Appointed Attorneys- Registry and Compensation, In the Circuit Court for the Fifteenth Judicial Circuit in the State of Florida, Admin. Order 4.018-6/04 (June 17, 2004).

<sup>178</sup> In re: Fees, Costs, and Procedures for the Court, Court Staff, and Court-Appointed Counsel, In the Circuit Court of the Sixteenth Judicial Circuit in the State of Florida, Admin. Order 2.053 (Sept. 15, 2005).

- Psychological (Competency) Exams - \$250 per exam.
  - Psychological Expert - \$140 per hour for in-court work.
  - Medical Doctor - \$150 per hour for in-court work and \$130 per hour for out-of-court work.
  - Expert Witness - \$150 per hour for in-court work and \$110 per hour for out-of-court work.
  - Other Pre-Trial Expert - \$100 per hour for in-court work and \$77 per hour for out-of-court work.<sup>179</sup>
- (17) Eighteenth Judicial Circuit
- Investigator/Mitigation Specialist - \$50 per hour, not to exceed 100 hours for guilt/innocence phase and 50 hours for the penalty phase.
  - Psychological/Competency Evaluation - \$150 per hour of evaluation, \$200 per hour for in-court testimony, and \$75 per hour while waiting to testify or for travel time.
  - Medical Doctor - \$175 for the first hour or less of in-court work and \$42.50 per quarter hour thereafter and \$175 for the first hour of out-of-court work and \$36.25 per quarter hour thereafter, \$85 per hour while waiting to testify in court, and \$72.50 per hour for travel time.
  - Other Expert - \$158 for the first hour or less for in-court work and \$39.50 per quarter hour thereafter and \$131 for the first hour or less of out-of-court work and \$32.75 per quarter hour thereafter, \$79 per hour while waiting to testify in court, and \$65.50 per hour for travel time.
  - For Medical Doctors and Other Experts - 20 hours is the maximum number of hours that will be paid for these fees, unless the court determines that extraordinary circumstances exist.<sup>180</sup>
- (18) Nineteenth Judicial Circuit
- Investigator - A rate not to exceed \$50 per hour.
  - Non-Mental Health Experts - A rate not to exceed \$150 per hour.<sup>181</sup>
- (19) Twentieth Judicial Circuit
- Investigator - A rate not to exceed \$100 per hour.
  - Psychological Exams - \$300 per exam.
  - Psychologist - \$200 per hour for in-court and out-of-court work.
  - Medical Doctor - A rate not to exceed \$400 per hour for in-court work and a rate not to exceed \$300 per hour for out-of-court work.
  - General Expert Witness - \$200 per hour.<sup>182</sup>

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<sup>179</sup> Seventeenth Judicial Circuit Article V Indigent Services Committee Adoption Of Court Appointed Attorney Registry, Attorney Qualification, Fees And Expenses, at [http://www.17th.flcourts.org/ISC\\_ADOPTION\\_DOC\\_9-04\\_-\\_Probate\\_Revisions\\_with\\_addendum.pdf](http://www.17th.flcourts.org/ISC_ADOPTION_DOC_9-04_-_Probate_Revisions_with_addendum.pdf) (last visited on Aug. 4, 2006).

<sup>180</sup> See Eighteenth Judicial Circuit's Indigent Services Committee Policies and Procedures for Private Court-Appointed Counsel in Criminal and Juvenile Delinquency Cases in Brevard County (Dec. 2, 2005); Eighteenth Judicial Circuit's Indigent Services Committee Policies and Procedures for Private Court-Appointed Counsel in Criminal and Juvenile Delinquency Cases in Seminole County (Dec. 2, 2005).

<sup>181</sup> See *In re: Conflict Counsel Approved for the Nineteenth Judicial Circuit for 2005/2006*, In the Circuit Court of the Nineteenth Judicial Circuit in the State of Florida, Admin. Order 2005-02 (July 1, 2005).

In circuits that use a competitive bidding process to appoint counsel in cases of a conflict of interest, the contract amounts vary from circuit to circuit and sometimes from county to county. For example, in Seminole County in the Eighteenth Judicial Circuit, the Indigent Services Committee offered “four capital criminal case contracts . . . at a rate of \$83,520 per year, to be paid at \$6,960 per month,” while in Brevard County in the Eighteenth Judicial Circuit, the Indigent Services Committee offered “two capital criminal case contracts . . . at the rate of \$97,000 per year, to be paid at \$8,083.33 per month.”<sup>183</sup>

#### i. Timeline for Applying for Compensation

Private attorneys appointed from the registry to represent an individual accused of a capital felony during his/her trial are entitled to compensation upon final disposition of the case.<sup>184</sup> If the attorney has, however, been providing legal services in the matter for more than one year, then the court may approve payment of not more than 80 percent of the fees earned, or costs and related expenses incurred, to date, or an amount proportionate to the maximum fees permitted based on the legal services provided to date.<sup>185</sup>

Private counsel appointed to represent a death-sentenced individual on direct appeal to the Florida Supreme Court may request payment from the JAC at the following intervals: (1) upon the filing of an appellate brief, including but not limited to, a reply brief; and (2) when the opinion of the appellate court is finalized.<sup>186</sup>

#### ii. Process for Obtaining Compensation

To obtain payment, private court-appointed counsel must follow the payment requirements set forth by the JAC and the relevant circuit Indigent Services Committee.<sup>187</sup> The JAC requires counsel to submit a copy of the order of appointment and the charging document to the JAC when the attorney is appointed.<sup>188</sup> Additionally, prior to filing a motion for an order approving payment of fees, costs, or related expenses, the counsel must deliver a copy of the intended billing together with supporting affidavits

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<sup>182</sup> Rates Adopted by Indigent Services Committee For Due Process Services Within the Twentieth Judicial Circuit (Feb. 13, 2006).

<sup>183</sup> Eighteenth Judicial Circuit’s Indigent Services Committee Policies and Procedures for Private Court-Appointed Counsel in Criminal and Juvenile Delinquency Cases in Brevard County (Dec. 2, 2005); Eighteenth Judicial Circuit’s Indigent Services Committee Policies and Procedures for Private Court-Appointed Counsel in Criminal and Juvenile Delinquency Cases in Seminole County (Dec. 2, 2005).

<sup>184</sup> FLA. STAT. § 27.5304(2) (2006).

<sup>185</sup> FLA. STAT. § 27.5304(2) (2006); *see also* FLA. STAT. § 27.5304(10) (2006) (Florida’s JAC has been statutorily mandated to develop a schedule of partial payment of fees for cases that are not resolved in six months, but it does not appear that the JAC has promulgated such schedule).

<sup>186</sup> FLA. STAT. § 27.5304(8) (2006).

<sup>187</sup> VICTORIA A. MONTANARO, JUSTICE ADMINISTRATIVE COMMISSION POLICIES AND PROCEDURES FOR PRIVATE COURT-APPOINTED COUNSEL 5 (2005).

<sup>188</sup> *Id.* at 3-4.

and all other necessary documentation to the JAC.<sup>189</sup> The JAC must “review the billings, affidavit, and documentation for completeness and compliance with contractual and statutory requirements.”<sup>190</sup>

Private court-appointed counsel may then file his/her motion for an order approving payment of his/her fees, costs, or related expenses along with the supporting affidavits and all other necessary documentation.<sup>191</sup> The motion must specify whether the JAC approves of or objects to any portion of the billing or the sufficiency of documentation.<sup>192</sup> If the JAC objects to the billing or documentation, the attorney must attach to the motion a letter from the JAC stating its objection.<sup>193</sup> The JAC has standing to appear before the court to contest any motion for an order approving payment of attorney’s fees, costs, or related expenses and may participate in a hearing on the motion by use of telephonic or other communication equipment unless ordered otherwise.<sup>194</sup>

*C. Appointment, Qualifications, Workload Limitations, Training, Compensation, and Resources Available to Attorneys Appointed During State Capital Collateral Proceedings*

1. Appointment of Counsel

“Upon the issuance of mandate affirming a judgment and sentence of death on direct appeal, the Supreme Court of Florida must at the same time issue an order appointing the appropriate office of the Capital Collateral Regional Counsel” to represent the death-sentenced inmate in his/her capital collateral proceedings.<sup>195</sup> Within thirty days of the issuance of the mandate, the capital collateral regional counsel must file a notice of appearance or a motion to withdraw based upon a conflict of interest or some other legal ground.<sup>196</sup> If the capital collateral regional counsel accepts the case by filing a notice of appearance, a “case team,” which includes “1 lead attorney, 1 second attorney, 1 investigator and ½ support position” will be assigned to the case.<sup>197</sup>

If the capital collateral regional counsel files a motion to withdraw within thirty days,<sup>198</sup> the judge must rule on the motion within fifteen days of the filing date and designate another regional counsel, if necessary.<sup>199</sup> If all regional counsels have a conflict of interest and cannot accept the case, or if the defendant was convicted and sentenced to

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<sup>189</sup> FLA. STAT. § 27.5304(2) (2006).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> FLA. R. CRIM. P. 3.851(b)(1); *see also* FLA. STAT. § 27.7001 (2006) (stating that “it is the intent of the Legislature to create [these statutes] to provide for the collateral representation of any person convicted and sentenced to death in this state”); FLA. STAT. § 27.702(1), (2) (2006).

<sup>196</sup> FLA. R. CRIM. P. 3.851(b)(2).

<sup>197</sup> CAPITAL COLLATERAL REGIONAL COUNSEL, MIDDLE AND SOUTHERN REGIONS, LONG RANGE PROGRAM PLAN FY 2006-2007 THROUGH 2010-2011 (2005).

<sup>198</sup> FLA. STAT. § 27.703(1) (2006).

<sup>199</sup> FLA. R. CRIM. P. 3.851(b)(3); FLA. STAT. § 27.703(1) (2006).

death in the Northern Region of Florida, which no longer has a Capital Collateral Regional Counsel Office, the judge must appoint an attorney from the statewide registry maintained by the Commission on Capital Cases.<sup>200</sup> “More than one attorney may not be appointed and compensated at any one time . . . to represent a person in post-conviction capital collateral proceedings. However, an attorney appointed . . . may designate another attorney to assist him or her if the designated attorney meets the [requisite] qualifications.”<sup>201</sup>

After being appointed to represent a death-sentenced inmate in a capital collateral proceeding, registry attorneys must enter into a contract with the State of Florida’s Chief Financial Officer.<sup>202</sup> The registry attorney also must immediately file a notice of appearance with the trial court indicating “acceptance of the appointment to represent the [inmate] throughout all post-conviction capital collateral proceedings, including federal habeas corpus proceedings, . . . or until released by order of the trial court.”<sup>203</sup> However, if the capital collateral regional counsel or registry attorneys are successful in obtaining retrial or resentencing, the case is returned to the trial court for appointment of local counsel, either a public defender or private counsel.<sup>204</sup>

## 2. Qualifications and Workload Limitations of Capital Collateral Regional Counsel and Capital Collateral Registry Attorneys

### a. Capital Collateral Regional Counsel

In order to be appointed as the regional counsel, the individual must be, and must have been for the preceding five years, a member in good standing of The Florida Bar or a similar organization in another state.<sup>205</sup> Similarly, all full-time assistant regional counsel, and public defenders and private counsel under contract with CCRC, must be members in good standing of The Florida Bar, with at least three years of experience in the practice of criminal law, and, prior to employment, must have participated in at least five felony jury trials, five felony appeals, or five capital post-conviction evidentiary hearings or any combination of at least five such proceedings.<sup>206</sup> Law school graduates who do not possess the qualifications of a full-time assistant regional counsel may be employed as members of the legal staff, but may not be designated as sole counsel.<sup>207</sup>

### b. Capital Collateral Registry Attorneys

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<sup>200</sup> FLA. STAT. §§ 27.701(2), 27.703(1), 27.710(5) (2006).

<sup>201</sup> FLA. STAT. § 27.710(6) (2006).

<sup>202</sup> FLA. STAT. § 27.710(4) (2006).

<sup>203</sup> FLA. STAT. § 27.711(2) (2006); FLA. STAT. 27.710(3) (2006) (stating that the attorneys must continue representing the inmate “until the sentence is reversed, reduced, or carried out or unless permitted to withdraw from representation by the trial court”).

<sup>204</sup> FLA. STAT. §§ 27.701, 27.711(11) (2006).

<sup>205</sup> FLA. STAT. § 27.701(1) (2006).

<sup>206</sup> FLA. STAT. § 27.704(1), (2) (2006).

<sup>207</sup> FLA. STAT. § 27.704(1) (2006).

Private attorneys on the registry are required to meet the minimum qualifications required of full-time assistant regional counsel, and public defenders and private counsel under contract with CCRC.<sup>208</sup> They also must certify on an application provided by the Executive Director of the Commission on Capital Cases that they meet these minimum requirements<sup>209</sup> and will comply with the continuing legal education requirements.<sup>210</sup> Additionally, the attorneys must certify that they are “counsel of record in no more than four [capital collateral proceedings].”<sup>211</sup> All attorneys, including the regional counsel and full-time assistant regional counsel, may not handle more than five capital collateral cases at one time.<sup>212</sup> However, following the closing of CCRC-North, the Florida Supreme Court found that former CCRC-North attorneys, who as registry attorneys

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<sup>208</sup> FLA. STAT. § 27.710(1), (2) (2006) (referencing the qualifications contained in § 27.704(2)). During the 2006 Legislature session, both the Senate and House introduced bills that, if passed, would have created additional qualification and training requirements for registry attorneys. *See* H.B. 325 (Fla. 2006); S.B. 360 (Fla. 2006). The requirements contained in H.B. 352 and S.B. 360 are identical and include the following:

To be eligible for court appointment as counsel in post-conviction capital collateral proceedings, an attorney must certify on an application provided by the executive director that he or she is a member in good standing of The Florida Bar and:

1. Is an active practitioner who has at least 5 years' experience in the practice of criminal law, is familiar with the production of evidence and the use of expert witnesses, including psychiatric and forensic evidence, and has demonstrated the proficiency necessary for representation in capital cases, including the investigation and presentation of mitigation evidence;
2. Has attended a minimum of 12 hours of continuing legal education programs within the previous 2 years which were devoted to the defense of capital cases and offered by The Florida Bar or another recognized provider of continuing legal education courses; and
3. a. Has tried at least nine state or federal jury trials to completion, two of which must have been capital cases and:
  - (I) Three of which must have been murder trials;
  - (II) One of which must have been a murder trial and five of which must have been other felony trials; or
  - (III) One of which must have included a post-conviction evidentiary hearing and five of which must have been other felony trials; orb. Has appealed one capital conviction and appealed:
  - (I) At least three felony convictions, one of which must have been a murder;
  - (II) At least three felony convictions and participated in one capital post-conviction evidentiary hearing; or
  - (III) At least six felony convictions, two of which must have been murders.

*See* H.B. 325 (Fla. 2006); S.B. 360 (Fla. 2006). However, neither H.B. 352 nor S.B. 360 was passed into law. Even if passed, the new requirements would still fall short of being in full compliance with the requirements contained in Guideline 5.1. *See infra* notes 308-328 and accompanying text.

<sup>209</sup> FLA. STAT. § 27.710(2) (2006).

<sup>210</sup> FLA. STAT. § 27.710(1) (2006); *see also infra* notes 220-223 and accompanying text discussing the continuing legal education requirements.

<sup>211</sup> FLA. STAT. § 27.710(3) (2006).

<sup>212</sup> FLA. STAT. § 27.711(9) (2006).

continued to represent their CCRC-North clients, were exempt from this limitation,<sup>213</sup> resulting in six former CCRC-North attorneys handling more than five cases at one time.<sup>214</sup>

c. Monitoring of Counsel Qualifications and Performance

The Commission on Capital Cases is responsible for receiving complaints regarding the practice of the Capital Collateral Regional Counsel Offices and registry counsel, and for referring the complaints to The Florida Bar, the Florida Supreme Court, or the Commission on Ethics.<sup>215</sup> Similarly, the court is responsible for monitoring the performance of assigned counsel to ensure that death-sentenced inmates are receiving quality representation.<sup>216</sup> The court is also required to receive and evaluate allegations that are made regarding the performance of counsel.<sup>217</sup> The State of Florida's Chief Financial Officer, the Department of Legal Affairs, the Executive Director of the Commission on Capital Cases, or any interested party may advise the court of any circumstance that could affect the quality of representation.<sup>218</sup>

3. Training Requirements for Capital Collateral Regional Counsel and Capital Collateral Registry Attorneys

Apart from the general CLE requirements for all attorneys, which are discussed above, there do not appear to be any training requirements for regional counsel or assistant regional counsel.<sup>219</sup> However, capital collateral registry attorneys are required to "have attended within the last year a continuing legal education program of at least 10 hours duration devoted specifically to the defense of capital cases, if available."<sup>220</sup> The failure to comply with this requirement may be cause for removal from the registry until the requirement is fulfilled.<sup>221</sup> Continuing legal education programs devoted specifically to the defense of capital cases offered by The Florida Bar or another provider and approved for credit by The Florida Bar may satisfy the training requirement.<sup>222</sup> Additionally, as

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<sup>213</sup> See COMMISSION ON CAPITAL CASES, FISCAL YEAR 2003-2004 REPORT PILOT PROJECT, TRANSFER OF RESPONSIBILITIES FROM CAPITAL COLLATERAL REGIONAL COUNSEL-NORTH TO THE STATEWIDE ATTORNEY REGISTRY (2004), available at <http://www.floridacapitalcases.state.fl.us/Publications/fiscal%20report%202004.pdf> (last visited on Aug. 4, 2006). (referencing *Peterka v. Florida*, No. SC02-1410 (Fla. Dec. 12, 2003) and *Rutherford v. Florida*, SC03-243 (Fla. Dec. 12, 2003); both of which found that "except in conflict cases, the four- and five-defendant limits were intended to apply to new, unassigned cases, not to already assigned cases with rule 3.850 or 3.851 motions or habeas corpus petitions pending").

<sup>214</sup> *Id.*

<sup>215</sup> FLA. STAT. § 27.709(2)(c) (2006).

<sup>216</sup> FLA. STAT. § 27.711(12) (2006).

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> Interview with Paul Norton, Administrative Service Director, CCRC-South (2005).

<sup>220</sup> FLA. STAT. §27.710(1) (2006).

<sup>221</sup> *Id.*

<sup>222</sup> FLA. STAT. §27.710(1) (2006).

indicated above, both the Florida Public Defenders Association and the Commission on Capital Cases offer continuing legal education programs on litigating capital cases.<sup>223</sup>

4. Compensation of and Resources Provided to Capital Collateral Regional Counsel and Capital Collateral Registry Attorneys

a. Salaries of and Resources Provided to Capital Collateral Regional Counsel

Regional counsel are paid by the state in equal monthly installments.<sup>224</sup> Assistant regional counsel must be compensated in an amount set by the regional counsel, which may not exceed 100 percent of the salary of that regional counsel.<sup>225</sup> The range of salaries for assistant regional counsel in CCRC-South, for example, is between \$45,000 and \$85,000.<sup>226</sup> In addition to hiring assistant regional counsel, each regional counsel is authorized to hire investigators,<sup>227</sup> and it appears that these offices have resources for experts.<sup>228</sup>

b. Compensation of and Resources Provided to Capital Collateral Registry Attorneys

i. Compensation of Capital Collateral Registry Attorneys

The Florida Statutes provide that private attorneys appointed from the registry should be paid \$100 per hour,<sup>229</sup> with a maximum of \$84,000 for all capital collateral proceedings.<sup>230</sup> Specifically, an attorney is entitled to compensation up to the following amounts, upon completion of the following duties: \$2,500, after accepting appointment and filing a notice of appearance; \$20,000, after timely filing in the trial court the defendant's motion for post-conviction relief; \$20,000, after the trial court issues a final order granting or denying the motion; \$20,000, after timely filing in the Florida Supreme Court the defendant's brief; \$10,000, after the trial court issues an order pursuant to a remand from the Florida Supreme Court; \$4,000, after the appeal of the trial court's denial of the capital defendant's motion for post-conviction relief; \$2,500, after filing a petition for writ of *certiorari* in the United States Supreme Court; \$5,000, after a death warrant is issued.<sup>231</sup> The hours billed by the lead attorney may include time devoted to the representation of the defendant by another attorney who has the requisite

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<sup>223</sup> See *supra* notes 115-117 and accompanying text.

<sup>224</sup> FLA. STAT. § 27.705(1) (2006).

<sup>225</sup> FLA. STAT. § 27.705(2) (2006).

<sup>226</sup> E-mail from Neal Dupree, Capital Collateral Regional Counsel for CCRC-South (April 13, 2006) (on file with author).

<sup>227</sup> FLA. STAT. § 27.704(1) (2006).

<sup>228</sup> See, e.g., FLA. R. CRIM. P. 3.851 (providing that "if the defendant intends to offer expert testimony of his or her mental status, the state shall be entitled to have the defendant examined by its own mental health expert"); see also FLA. STAT. § 27.711(6) (2006) (providing that an attorney in capital post-conviction proceedings "is entitled to a maximum of \$15,000 for miscellaneous expenses, such as . . . compensating expert witnesses").

<sup>229</sup> FLA. STAT. § 27.703(2) (2006).

<sup>230</sup> FLA. STAT. § 27.711(4)(a)-(h) (2006).

<sup>231</sup> *Id.*

qualifications and has been designated by the lead attorney to assist him/her.<sup>232</sup> However, section 27.711(3) of the Florida Statutes states that “the [above] fee and payment schedule . . . is the *exclusive means* of compensating a court-appointed attorney who represents a capital defendant.”<sup>233</sup>

In 1999, Mr. Mark Olive filed a complaint challenging the constitutionality of the statutory maximum fees in light of the compensation limitations imposed by section 27.711(3).<sup>234</sup> In 2002, the Florida Supreme Court, in *Olive v. Maas*,<sup>235</sup> found that based on the legislative history and staff analysis surrounding section 27.711 and in order to be consistent with the controlling law, capital collateral registry attorneys are authorized to compensation in excess of the statutory cap under “extraordinary or unusual circumstances.”<sup>236</sup> In an effort to clarify its decision, however, the Court noted that it does not “purport to hold that fees in excess of the statutory cap will always be awarded to registry attorneys in capital collateral proceedings.”<sup>237</sup>

Following the Court’s decision in *Olive*, the Florida Legislature added section 27.7002 of the Florida Statutes. Section 27.7002 prohibits the “use of state funds for compensation of [registry] counsel appointed . . . above [the statutory maximum];” and authorizes the Executive Director of the Commission on Capital Cases to “permanently remove from the registry of attorneys . . . any attorney who seeks compensation for services above the [statutory maximum],” or who “notifies any court, judge, state attorney, the Attorney General, or the Executive Director of the Commission on Capital Cases, that [s/he] cannot provide adequate or proper representation under the terms of [the fee schedules.]”<sup>238</sup> Shortly thereafter, Mr. Olive filed a three count amended complaint challenging, in Count I, the constitutionality of the sanction contained in section 27.7002 and seeking a declaratory judgment.<sup>239</sup>

On March 23, 2006, the Circuit Court of the Second Judicial Circuit granted Olive’s request for a declaratory judgment as to Count I, finding that “to preserve the constitutionality of section 27.7002, all of its provisions must be construed in a manner consistent with [] controlling law.”<sup>240</sup> Specifically, the court found as follows:

- (1) section 27.7002(5) must be construed to permit the use of state funds

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<sup>232</sup> FLA. STAT. § 27.711(4) (2006).

<sup>233</sup> FLA. STAT. § 27.711(3) (2006) (emphasis added).

<sup>234</sup> *Olive v. Maas*, 811 So. 2d 644, 650-51 (Fla. 2002).

<sup>235</sup> 811 So. 2d 644 (Fla. 2002).

<sup>236</sup> *Id.* at 653 (citing *Makemson v. Martin County*, 491 So. 2d 1109 (Fla. 1986)).

<sup>237</sup> *Id.* at 654.

<sup>238</sup> FLA. STAT. § 27.7002(5), (6) (2006).

<sup>239</sup> *Olive v. Maas*, 911 So. 2d 837, 839, 841 (Fla. 1st DCA 2005) (reversing and remanding the circuit court’s order “dismissing with prejudice his three count amended complaint seeking a declaration that the statute governing the statewide registry of private attorneys available for court appointment to represent death-row inmates in post[-]conviction proceedings (Registry Act) is unconstitutional”). Following the District Court of Appeal’s decision, Olive then moved for summary judgment. *See Olive v. Maas*, 03-CA-291 (Fla. Cir. Ct. 2d Jud. Cir. March 23, 2006).

<sup>240</sup> *Id.*

appropriated . . . for compensation of counsel above the statutory limits where trial courts have exercised their right to grant such fees in capital collateral cases; and

- (2) section 27.7002(6) must be construed to prohibit the Executive Director of the Commission on Capital Cases from permanently removing an attorney from the registry list merely for seeking compensation above the statutory limits, without other good cause for such removal.<sup>241</sup>

Both parties have since appealed the court's order.

## ii. Resources Provided to Capital Collateral Registry Attorneys

In addition to his/her fees, a registry attorney is entitled to one or more investigators to assist him/her in representing the death-sentenced inmate.<sup>242</sup> Upon approval by the court, the attorney is entitled to payment of \$40 per hour, up to a maximum of \$15,000, for the purpose of paying for investigative services.<sup>243</sup> Additionally, the attorney is entitled to a maximum of \$15,000 for miscellaneous expenses, such as the costs of preparing transcripts, compensating expert witnesses, and copying documents.<sup>244</sup> The attorney may be entitled to payment in excess of \$15,000, if the court finds that extraordinary circumstances exist.<sup>245</sup>

To obtain payment, a capital collateral registry attorney must deliver a copy of his/her intended billing, together with supporting affidavits and all other necessary documentation, to the Chief Financial Officer's named contract manager.<sup>246</sup> If the contract manager objects to any portion of the proposed billing, the objection and reasons for the objection must be communicated to the assigned counsel.<sup>247</sup> The attorney may then file his/her motion for an order approving payment of his/her fees, costs, or related expenses together with supporting affidavits and all other necessary documentation.<sup>248</sup> The motion must specify whether the Chief Financial Officer's contract manager objects to any portion of the billing or the sufficiency of documentation and, if so, the reason.<sup>249</sup> The Chief Financial Officer's contract manager has standing to file pleadings and appear before the court to contest any motion seeking an order approving payment.<sup>250</sup>

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<sup>241</sup> *Id.*

<sup>242</sup> FLA. STAT. § 27.711(5) (2006).

<sup>243</sup> *Id.*

<sup>244</sup> FLA. STAT. § 27.711(6) (2006).

<sup>245</sup> *Id.*

<sup>246</sup> FLA. STAT. § 27.711(13) (2006); *see also* Department of Financial Services, Instructions for Obtaining Capital Collateral Payment, *at* <http://www.floridacapitalcases.state.fl.us/Instructions%20for%20obtaining%20Capital%20Collateral%20Payment.doc> (last visited on Aug. 4, 2006).

<sup>247</sup> FLA. STAT. § 27.711(13) (2006).

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

*D. Appointment, Qualifications, Training, and Resources Available to Attorneys Handling Capital Federal Habeas Corpus Petitions*

Pursuant to section 3599 of Title 18 of the United States Code, a death-sentenced inmate petitioning for federal habeas corpus in one of Florida’s three federal judicial districts—Northern, Middle, and Southern—is entitled to appointed counsel and other resources if s/he “is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services.”<sup>251</sup> Each of Florida’s federal judicial districts has an Office of the Federal Public Defender, with multiple office locations throughout the district,<sup>252</sup> but these offices do not represent indigent death-sentenced inmates in capital federal habeas corpus proceedings.<sup>253</sup> Rather, section 27.111(2) and section 27.710(3) of the Florida Statutes require attorneys who are appointed to represent a death-sentenced inmate during capital collateral proceedings—which includes both capital collateral regional counsel and capital collateral registry attorneys—to represent the inmate through all capital collateral proceedings, including federal habeas corpus.<sup>254</sup> The Florida Statutes also reference the appropriate means of compensation for these attorneys by stating that “[w]hen appropriate, a court-appointed attorney must seek further compensation from the Federal Government, as provided in 18 U.S.C. [§] 3006A or other federal law.”<sup>255</sup>

Explaining the Florida Legislature’s rationale for requiring capital collateral regional counsel and capital collateral registry attorneys to continue with representing death-

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<sup>251</sup> 18 U.S.C. § 3599(a)(2) (2006); *see also* *McFarland v. Scott*, 512 U.S. 849, 856-57 (1994) (citing to 21 U.S.C. § 848(q)(4)(B), which has since been repealed).

<sup>252</sup> The Office of the Federal Public Defender in the Northern District of Florida has four divisions: Pensacola, Tallahassee, Gainesville, and Panama City. Office of the Federal Public Defender in the Northern District of Florida, Homepage, at <http://www.fpd-fln.org/> (last visited on Aug. 4, 2006). The Office of the Federal Public Defender for the Middle District of Florida is headquartered in Orlando and has division offices in Tampa, Jacksonville, Ft. Myers, and Ocala. Office of the Federal Public Defender in the Middle District of Florida, Homepage, at <http://flm.fd.org/> (last visited on July 27, 2006). The number of attorneys assigned to each office in the Middle District ranges from one to fifteen (including thirteen assistant federal public defenders and two research and writing specialists). *Id.* The Office of the Federal Public Defender in the Southern District of Florida has its main office in Miami, with branch offices in Fort Lauderdale, West Palm Beach, Fort Pierce, and Key West. Office of the Federal Public Defender in the Southern District of Florida, Homepage, at <http://fpdfls2.home.netcom.com/> (last visited on Aug. 4, 2006). The Southern District Office has “an approved staff of 123 employees, including 53 Assistant Federal Public Defenders”—twenty-five of the fifty-three are assigned to the Miami office. *Id.*; *see also* Assistant Federal Public Defenders and Assigned Duty Stations, at <http://fpdfls2.home.netcom.com/offices.htm> (last visited on Aug. 4, 2006).

<sup>253</sup> *See* Telephone Interview with Chet Kaufman, Assistant Federal Public Defender, Federal District Court for the Northern District of Florida, Tallahassee, FL (Apr. 11, 2006) (noting that the Office of the Federal Public Defender in the Northern District does not handle capital federal habeas cases); Email from Neal Dupree, Capital Collateral Regional Counsel, CCRC-South (April 13, 2006) (on file with author) (noting that Office of the Federal Public Defender in the Southern District is not responsible for handling state death penalty cases in federal habeas corpus proceedings).

<sup>254</sup> *See* FLA. STAT. §§ 27.711(2), 27.710(3) (2006); Neal Dupree, Capital Collateral Regional Counsel, CCRC-South (April 13, 2006) (on file with the author) (noting that CCRC-South represents clients throughout the state and federal court system, until the case is resolved in some manner).

<sup>255</sup> *See* FLA. STAT. § 27.711(3) (2006).

sentenced inmates throughout all capital collateral proceedings, the Executive Director of the Commission on Capital Cases stated as follows:

Prior to the enactment of the present statute (Florida Statute 27) pertaining to capital collateral representation in Florida, the Legislature elicited extensive testimony concerning appropriate representation of death row inmates. One of the main concerns was that some inmates did not have an attorney willing to pursue their case in federal court. The statute is the Legislature's attempt to ensure that every inmate on death row will be represented throughout the legal process.

When some of the attorneys on the Statewide Attorney Registry expressed concerns about federal court representation, the Commission created the Federal Registry to assist attorneys in finding a successor counsel. Federal courts have also called our office to inquire about the availability of qualified attorneys. The Commission does not track visits to its website, nor do we have an accurate count of how often the Federal Registry is accessed.<sup>256</sup>

Although the Commission on Capital Cases maintains the Federal Registry on its website, the extent to which the federal courts use the registry is unknown.

If capital collateral regional counsel or capital collateral registry attorneys, however, are unable to continue with the representation of the death-sentenced inmate for whatever reason, including, but not limited to, lack of qualifications to appear in federal court, section 3599 of Title 18 of the United States Code requires the appointment of at least one qualified attorney prior to the filing of a formal, legally sufficient federal habeas petition.<sup>257</sup> To be qualified for appointment, the attorney must "have been admitted to practice in the [United States Court of Appeals for the Eleventh Circuit Court] for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases."<sup>258</sup> For "good cause," the court may appoint another attorney "whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation."<sup>259</sup> Attorneys appointed pursuant to section 3599 are entitled to compensation at a rate of not more than \$125 per hour for both in-court and out-of-court work.<sup>260</sup>

In addition to counsel, the court may also authorize the appointed attorneys to obtain investigative, expert, or other services as are reasonably necessary for representation.<sup>261</sup>

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<sup>256</sup> Email from Roger Maas, Executive Director, Commission on Capital Cases (April 12, 2006) (on file with author).

<sup>257</sup> 18 U.S.C. § 3599(a)(2) (2006); *see also* *McFarland v. Scott*, 512 U.S. 849, 856-57 (1994).

<sup>258</sup> 18 U.S.C. § 3599(c) (2006).

<sup>259</sup> 18 U.S.C. § 3599(d) (2006).

<sup>260</sup> 18 U.S.C. § 3599(g)(1) (2006).

<sup>261</sup> 21 U.S.C. § 3599(f) (2006).

The fees and expenses paid for these services may not exceed \$7,500 in any case, unless the court authorizes payment in excess of the limit.<sup>262</sup>

*E. Appointment, Qualifications, Training, and Resources Available to Attorneys Representing Death-Sentenced Clemency Petitioners*

In the State of Florida, indigent death-sentenced inmates have a right to counsel in clemency proceedings,<sup>263</sup> which carries with it the right to “effective assistance of counsel.”<sup>264</sup> Florida law provides that if the indigent death-sentenced inmate “has applied for executive clemency,” s/he will be appointed a public defender or, in the case of a conflict of interest, a private attorney.<sup>265</sup> The Florida Rules of Executive Clemency (the Rules), however, do not require the inmate to file a clemency application to initiate clemency proceedings, as the Parole Commission is required to conduct an investigation in all cases in which the inmate has been sentenced to death.<sup>266</sup> In these cases, the Office of Executive Clemency<sup>267</sup> is charged with initiating the attorney appointment process by contacting the respective court.<sup>268</sup>

In cases in which the court appoints a public defender to represent an indigent death-sentenced inmate during clemency proceedings, s/he is compensated according to his/her respective salary,<sup>269</sup> and presumably has some degree of access to experts and/or investigators to prepare for the clemency proceedings.<sup>270</sup> Similarly, Florida provides that private attorneys appointed by the court may be compensated for both “fees and costs” associated with representing a death-sentenced inmate in clemency proceedings, but the attorney’s combined fees and costs may not exceed \$1,000.<sup>271</sup> The Florida Supreme Court has found that the \$1,000 limit for fees may be exceeded “when necessary to ensure effective representation.”<sup>272</sup> Florida law does not appear to

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<sup>262</sup> 21 U.S.C. § 3599(g)(2) (2006).

<sup>263</sup> See FLA. STAT. §§ 27.51(5)(a), 27.5303(4)(b) (2006); see also *Olive v. Maas*, 811 So. 2d 644, 652 (Fla. 2002) (quoting *Remeta v. State*, 559 So. 2d at 1132, 1135 (Fla. 1990) (“[I]t is clear that this state has established a right to counsel in clemency proceedings for death penalty cases and this statutory right necessarily carries with it the right to have effective assistance of counsel.”)); *Remeta*, 559 So. 2d at 1135 (stating “[w]e emphasize that this type of clemency proceeding is just part of the overall death penalty procedural scheme in this state. The circuit court in this instance had the responsibility to appoint counsel under this statutory right”). The right to counsel in clemency proceedings was originally based on section 925.035 of the Florida Statutes, which was repealed effective July 1, 2005. See 2003 Fla. Laws ch. 402 (H.B. 113-A (Fla. 2003)).

<sup>264</sup> See *Olive*, 811 So. 2d at 652; *Remeta*, 559 So. 2d at 1135.

<sup>265</sup> FLA. STAT. § 27.5303(4)(b) (2006); see also FLA. STAT. § 27.51(5)(a) (2006).

<sup>266</sup> FLA. RULES OF EXEC. CLEMENCY R. 15(B), available at <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 4, 2006).

<sup>267</sup> The Office of Executive Clemency is charged with “processing applications for executive clemency.” See Florida Parole Commission, Florida Board of Executive Clemency, at <https://fpc.state.fl.us/Clemency.htm> (last visited on Aug. 4, 2006).

<sup>268</sup> See E-mail from Mark Schlakman (April 7, 2006) (on file with the author).

<sup>269</sup> See, e.g., FLA. STAT. § 27.5301 (2006) (nothing that the salaries of public defenders shall be as provided in the General Appropriations Act and shall be paid in equal monthly installments).

<sup>270</sup> See, e.g., FLA. STAT. § 27.53(1) (2006)

<sup>271</sup> FLA. STAT. § 27.5304(3)(b) (2006).

<sup>272</sup> *Remeta v. State*, 559 So. 2d 1132, 1135 (Fla. 1990) (holding that “courts have the authority to exceed statutory fee caps to compensate court-appointed counsel for the representation of indigent, death-

specifically provide funds for investigators or experts to private court-appointed attorneys. In practice, however, the Florida Department of Corrections may provide limited funding for investigators or experts, but it is incumbent upon clemency counsel to seek authorization through the Director of Clemency Administration.

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sentenced prisoners in executive clemency proceedings when necessary to ensure effective representation”); *State v. Peek*, 441 So. 2d 158, 159 (1983) (noting that the legislature intended that during clemency proceedings the attorney should be paid reasonable costs in addition to a reasonable fee for services).

## II. ANALYSIS

### A. Recommendation # 1

**In order to ensure high quality legal representation for all individuals facing the death penalty, each death penalty jurisdiction should guarantee qualified and properly compensated counsel at every stage of the legal proceedings – pretrial (including arraignment and plea bargaining), trial, direct appeal, all *certiorari* petitions, state post-conviction and federal habeas corpus, and clemency proceedings. Counsel should be appointed as quickly as possible prior to any proceedings. At minimum, satisfying this standard requires the following (as articulated in Guideline 4.1 of the *ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases*):**

Under state and federal law, indigent defendants charged with or convicted of a capital offense in the State of Florida are guaranteed counsel at every stage of the legal proceedings. Florida law specifically provides counsel to indigent defendants charged with or convicted of a capital offense during pre-trial proceedings, at trial, on direct appeal and through all *certiorari* petitions, state capital collateral proceedings, and clemency proceedings.<sup>273</sup> Additionally, in line with federal law providing a death-sentenced inmate the right to appointed counsel for federal habeas corpus proceedings,<sup>274</sup> Florida law requires the attorney who is appointed during state capital collateral proceedings to represent the death-sentenced inmate through federal habeas corpus proceedings.<sup>275</sup>

In addition to providing counsel at every stage of the legal proceedings, it appears that indigent defendants charged with or convicted of a capital offense are appointed counsel prior to any proceeding, except possibly during clemency proceedings. Specifically, indigent defendants who are entitled to appointed counsel during pre-trial proceedings, at trial, and on direct appeal must be appointed counsel from the circuit public defender office, or in cases of a conflict of interest, from the circuit registry or through a competitive bidding process.<sup>276</sup> Counsel must be provided when the defendant is “formally charged with the offense, or as soon as feasible after custodial restraint, or at the first appearance before a committing magistrate, whichever occurs earliest.”<sup>277</sup> Similarly, indigent death-sentenced inmates must be appointed capital collateral counsel—either from the Capital Collateral Regional Counsel Office or from the statewide registry—“upon issuance of [a] mandate affirming a judgment and sentence of

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<sup>273</sup> See *supra* notes 71, 195 and 263-268 and accompanying text.

<sup>274</sup> See 18 U.S.C. § 3599(a)(2) (2006); *McFarland v. Scott*, 512 U.S. 849, 856-57 (1994) (citing 21 U.S.C. § 848(q)(4)(B), which has since been repealed).

<sup>275</sup> See FLA. STAT. § 27.711(2) (2006) (stating that appointed counsel must “represent the [inmate] throughout all post-conviction capital collateral proceedings, including federal habeas corpus proceedings, . . . or until released by order of the trial court”); FLA. STAT. § 27.710(3) (2006) (stating that appointed counsel must continue representing the inmate “until the sentence is reversed, reduced, or carried out or unless permitted to withdraw from representation by the trial court”).

<sup>276</sup> See FLA. STAT. § 27.40(2) (2006); see also FLA. STAT. §§ 27.52(2)(c)(2), 27.5303(1)(a) (2006).

<sup>277</sup> FLA. R. CRIM. P. 3.111(a).

death on direct appeal.”<sup>278</sup> If new counsel is appointed for federal habeas corpus proceedings, s/he must be appointed prior to the filing of a formal, legally sufficient habeas petition.<sup>279</sup>

However, even though the Office of Executive Clemency is charged with initiating the attorney appointment process, the Florida Rules of Executive Clemency do not specify when attorneys are actually appointed to represent death-sentenced inmates in clemency proceedings.<sup>280</sup> Thus, it is unclear whether death-sentenced inmates are appointed counsel before the proceedings begin.

- a. **At least two attorneys at every stage of the proceedings qualified in accordance with *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Guideline 5.1 (reproduced below as Recommendation #2), an investigator, and a mitigation specialist.**

State and federal law provide for the appointment of at least one attorney at every stage of the legal proceedings and provide access to an investigator and mitigation specialist at almost every stage of the legal proceedings. The qualification requirements for attorneys appointed in all legal proceedings will be discussed below under Recommendation #2.

### Appointment of Counsel

In cases in which the public defender is appointed to represent an indigent defendant at his/her capital trial, the public defender is required to designate both lead counsel and co-counsel.<sup>281</sup> Similarly, in capital trials in which the defendant is not represented by the public defender, rule 3.112(e) of the Florida Rules of Criminal Procedure states that the “court must appoint lead counsel and, upon written showing of need by lead counsel, should appoint co-counsel.”<sup>282</sup> Although rule 3.112(e) provides that two attorneys “should” be appointed in certain cases, it leaves “the ultimate decision to the discretion of the trial judge,” and a trial judge’s refusal to appoint co-counsel has not been recognized as a ground for relief from conviction or sentence.<sup>283</sup>

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<sup>278</sup> See FLA. R. CRIM. P. 3.851(b)(1).

<sup>279</sup> See *McFarland*, 512 U.S. at 856-57.

<sup>280</sup> In these cases, the Office of Executive Clemency is charged with initiating the attorney appointment process by contacting the respective court. See E-mail from Mark Schlakman, April 7, 2006 (on file with the author).

<sup>281</sup> FLA. R. CRIM. P. 3.112(e).

<sup>282</sup> *Id.*

<sup>283</sup> *In re* Amendment to Florida Rules of Criminal Procedure—Rule 3.112 Minimum Standards for Attorneys in Capital Cases, 820 So. 2d 185, 190 (Fla. 2002); see also *Armstrong v. State*, 642 So. 2d 730, 737 (Fla. 1994) (trial judge’s refusal to appoint co-counsel was within his discretion despite lead counsel’s contention that the case was especially complex); *Ferrel v. State*, 653 So. 2d 367, 369-70 (Fla. 1995) (defendant was not denied effective assistance of counsel when the trial court refused counsel’s request for co-counsel because the decision was within the discretion of the judge in light of the complexity of the case); *Lowe v. State*, 650 So. 2d 969, 974-975 (Fla. 1994) (despite local practice of appointing two attorneys to similar cases, the decision whether to appoint co-counsel is not a right but rather is subject to the trial court’s discretion).

In proceedings following the capital trial, two attorneys do not appear to be routinely appointed. In fact, except under extraordinary circumstances, only one attorney may be compensated for representing a death-sentenced inmate on direct appeal.<sup>284</sup> Similarly, only one capital collateral registry attorney may be appointed and compensated at any one time to represent a death-sentenced inmate in collateral proceedings.<sup>285</sup> However, the appointed registry attorney may designate another attorney to assist him/her.<sup>286</sup> Additionally, it appears that the Capital Collateral Regional Counsel Offices assign two attorneys to each capital collateral case, as these offices have “case teams,” which include “1 lead attorney, 1 second attorney, 1 investigator and ½ support position.”<sup>287</sup>

Similarly, indigent death-sentenced inmates seeking federal habeas corpus relief must be represented by “one or more attorneys.”<sup>288</sup> However, in March 2003, the Executive Director of the Commission on Capital Cases stated that of the 133 lawyers signed up for the registry, only 15 or 20 “are willing or able to go to federal court,”<sup>289</sup> leaving open the question of whether there are sufficient attorneys to handle federal habeas corpus cases in the State of Florida.

#### Access to Investigators and Mitigation Specialists

Attorneys appointed to represent an indigent defendant charged with or convicted of a capital offense appear to have access to investigators and mitigation specialists at trial, during state capital collateral proceedings, during federal habeas corpus proceedings, and possibly during clemency proceedings.<sup>290</sup> The procedures for obtaining such experts will be discussed below under Subsection c.

- b. At least one member of the defense should be qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments. Investigators and experts should not be chosen on the basis of cost of services, prior work for the prosecution, or professional status with the state.**

The State of Florida does not require at least one member of the defense team to be qualified by training and experience to screen individuals for the presence of mental or

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<sup>284</sup> FLA. R. CRIM. P. 3.112(e).

<sup>285</sup> See FLA. STAT. § 27.710(6) (2006); see also Fla. Dep’t of Fin. Servs. v. Freeman, 921 So. 2d 598, 603 (Fla. 2006) (Pariente, C.J., concurring) (stating “only one registry attorney, often a solo practitioner, is assigned to each case”).

<sup>286</sup> See FLA. STAT. § 27.710(6) (2006).

<sup>287</sup> CAPITAL COLLATERAL REGIONAL COUNSEL, MIDDLE AND SOUTHERN REGIONS, LONG RANGE PROGRAM PLAN FY 2006-2007 THROUGH 2010-2011, at 8 (2005).

<sup>288</sup> See *supra* note 257 and accompanying text.

<sup>289</sup> *Panel Told Closing CCRCs Would Cause Delays*, FLA. B. NEWS, March 15, 2003. We note that the website of the Commission on Capital Cases contains a “Federal Registry” of over eighty attorneys, but it is unclear whether the registry is used by the federal courts to appoint counsel in cases in which the state post-conviction registry attorneys are unable to represent their clients in federal court. See Federal Registry, Commission on Capital Cases, at <http://www.floridacapitalcases.state.fl.us/c-federal-registry.cfm> (last visited on Aug. 18, 2006).

<sup>290</sup> See *supra* notes 154-155, 227-228, 261-262 and accompanying text.

psychological disorders or impairments. However, rule 3.112 of the Florida Rules of Criminal Procedure does require lead trial counsel to be “familiar with and experienced in the utilization of expert witnesses and evidence, including but not limited to psychiatric and forensic evidence.”<sup>291</sup> Additionally, The Florida Bar requires all attorneys to participate in at least five hours of approved continuing legal education on legal ethics, professionalism, substance abuse, or mental illness awareness.<sup>292</sup> The Florida Rules of Criminal Procedure and the Florida Statutes also require trial, appellate, and certain capital collateral attorneys to undergo training on defending a capital case.<sup>293</sup>

When fulfilling these continuing legal education and training requirements, it is conceivable that an attorney could receive training on screening individuals for the presence of mental or psychological disorders or impairments. In fact, continuing legal education courses on mental disorders are available in the State of Florida. For example, on June 16, 2006, the Commission on Capital Cases offered a seminar on mental retardation and the agenda contained a presentation on diagnosing and evaluating mental retardation and another presentation on investigating mental retardation.<sup>294</sup> However, despite the availability of courses on mental retardation, the State of Florida does not require any of these attorneys or any other members of the defense team to participate in training on this specific issue.

- c. A plan for defense counsel to receive the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high quality legal representation at every stage of the proceedings. The plan should specifically ensure provision of such services to private attorneys whose clients are financially unable to afford them.**
  - i. Counsel should have the right to seek such services through *ex parte* proceedings, thereby protecting confidential client information.**
  - ii. Counsel should have the right to have such services provided by persons independent of the government.**
  - iii. Counsel should have the right to protect the confidentiality of communications with the persons providing such services to the same extent as would counsel paying such persons from private funds.**

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<sup>291</sup> FLA. R. CRIM. P. 3.112(f)(5).

<sup>292</sup> RULES REGULATING THE FLORIDA BAR R. 6-10.3(b), *at* <http://www.floridabar.org/divexe/rrtfb.nsf/FV?Openview&Start=1&Expand=6#6> (last visited on Aug. 4, 2006).

<sup>293</sup> FLA. R. CRIM. P. 3.112(f)(7), (g)(2)(E), (h)(6) (requiring all trial and appellate attorneys handling death penalty cases to have at least twelve hours of “capital defense training”); Interview with Paul Norton, Administrative Service Director, CCRC-South (2005); FLA. STAT. § 27.710(1) (2006) (requiring capital collateral registry attorneys—but not capital collateral regional counsel—to have at least ten hours of training devoted to “the defense of capital cases”).

<sup>294</sup> Commission on Capital Cases, Homepage, *at* <http://www.floridacapitalcases.state.fl.us/> (last visited on Aug. 4, 2006); Commission on Capital Cases, 7th Annual Capital Cases Seminar, Agenda (June 16, 2006) *at* <http://www.floridacapitalcases.state.fl.us/images-new/06-seminar-agenda.pdf> (last visited on Aug. 4, 2006).

In the State of Florida, attorneys representing defendants charged with or convicted of a capital offense have access to investigators and experts through all legal proceedings, except possibly during clemency proceedings, and the costs associated with retaining investigators and experts are covered by state funds.

### Public Defenders and Private Court-Appointed Attorneys

Public defenders and assistant public defenders who are appointed to represent a defendant charged with a capital felony are not required to seek funds from the court in order to hire necessary investigators or experts. Rather, all public defenders' offices are authorized to employ investigators and have access to funds for "witnesses, including expert witnesses, summoned to appear for an investigation, preliminary hearing, or trial in a case when the witnesses are summoned on behalf of an indigent defendant, and any other expert witnesses required in a court hearing by law or whomever the public defender deems necessary for the performance of [his/her] duties to investigators."<sup>295</sup> The public defenders' offices also have access to funds for mental health professionals appointed to evaluate the defendant and are "required [for] a court hearing."<sup>296</sup>

In cases in which the public defender is unable to represent the defendant due to a conflict of interest, private court-appointed attorneys are entitled to compensation for "reasonable and necessary expenses,"<sup>297</sup> which include, but are not limited to: (1) the costs of expert witnesses "summoned to appear for an investigation, preliminary hearing, or trial in a case where the witnesses are summoned on behalf of an indigent; and (2) any other expert witnesses approved by the court" and the costs of mental health professionals who are appointed to evaluate the defendant and "required in a court hearing."<sup>298</sup> However, each circuit's Indigent Services Committee has established different hourly rates and case maximums for investigators and experts<sup>299</sup> and different procedures for retaining investigators and experts.

In some circuits, private court-appointed attorneys are required to obtain approval from the Indigent Services Committee<sup>300</sup> or from the court before retaining an investigator or expert, while in other circuits the attorneys are authorized to retain the services of an investigator and expert for up to a certain amount of services without obtaining court approval.<sup>301</sup> In circuits in which the attorneys have to obtain court approval, it appears

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<sup>295</sup> FLA. STAT. § 29.006(3) (2006).

<sup>296</sup> FLA. STAT. § 29.006(4) (2006).

<sup>297</sup> FLA. STAT. § 27.5304(1) (2006).

<sup>298</sup> FLA. STAT. § 29.007 (2006).

<sup>299</sup> See *supra* notes 160-182 for the different hourly rates and *infra* notes 438-444 for a discussion on the compensation of investigators and experts.

<sup>300</sup> Justin B. Shane, *Money Talks: An Indigent Defendant's Right to an Ex Parte Hearing for Expert Funding*, 17 CAP. DEF. J. 347, 361 (2005) (noting that Florida's court-appointed attorneys normally request expert funds from their circuit's indigent services committee).

<sup>301</sup> See, e.g., Procedures for Court Appointed Private Attorneys and Due Process Costs, In the Courts of the First Judicial Circuit of the State of Florida, Admin. Order 2005-18 (July 1, 2005); In re: Conflict Counsel and Due Process Costs, In the Circuit Court of the Fourth Judicial Circuit, Admin. Order 2004-8 (July 29, 2004).

that in certain instances these requests, such as a request for mental health experts, can and should be handled in *ex parte* proceedings.<sup>302</sup>

Despite the fact that in some circuits attorneys are required to request approval for funds for investigators and experts, it appears that once these attorneys obtain approval, they are authorized to hire investigators and experts of their choosing, which include those independent from the government.

It is unclear, however, whether these compensation procedures apply to investigators and experts who are retained by attorneys selected through a competitive bidding process.

#### Capital Collateral Regional Counsel and Capital Collateral Registry Attorneys

Similar to public defenders, capital collateral regional counsel, who are appointed to represent a defendant convicted of a capital felony during capital collateral proceedings, are not required to seek funds from the court in order to hire necessary investigators or experts. Rather, each Capital Collateral Regional Office is authorized to hire investigators and it appears that these offices have resources for experts.<sup>303</sup>

Additionally, capital collateral registry attorneys also may retain the services of investigators and experts. However, the investigators and experts are entitled to payment only upon the approval of the trial court.<sup>304</sup>

#### Attorneys Representing Death-Sentenced Inmates During Federal Habeas Corpus and Clemency Proceedings

Indigent death-sentenced inmates petitioning for federal habeas corpus relief may request and the court may authorize inmates' attorneys to obtain investigative, expert, or other necessary services on behalf of the inmate.<sup>305</sup> The fees for these services may not exceed \$7,500 in any case, unless payment in excess of the limit is certified by the court.<sup>306</sup>

Similarly, in cases in which the court appoints a public defender to represent an indigent death-sentenced inmate during clemency proceedings, presumably s/he will have some degree of access to experts and/or investigators to prepare for the clemency proceedings.<sup>307</sup> Recent trends suggest that there is less reliance today upon public defenders for these purposes than had been the case in the past. Rather, private attorneys

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<sup>302</sup> See FLA. R. CRIM. P. 3.216(a); *State v. Hamilton*, 448 So. 2d 1007, 1008-09 (Fla. 1984) (noting that “in many instances the basis for the request for such an expert is founded on communications between the appointed lawyer and his client. Any inquiry into those communications would clearly violate the basic attorney-client privilege”); *State v. Nolasco*, 803 So. 2d 757, 758 (Fla. 3d DCA 2001) (noting that a request for experts is heard in a quasi *ex parte* proceeding); see also Shane, *supra* note 300, at 361 (noting that Florida’s court-appointed attorneys who apply to courts for funding generally do so *ex parte*).

<sup>303</sup> See *supra* notes 227-228 and accompanying text.

<sup>304</sup> FLA. STAT. 27.711(5), (6) (2006).

<sup>305</sup> See *supra* note 261 and accompanying text.

<sup>306</sup> See *supra* note 262 and accompanying text.

<sup>307</sup> See, e.g., FLA. STAT. § 27.53(1) (2006).

are commonly appointed in these cases, but Florida law does not appear to specifically provide funds for investigators or experts to these attorneys. However, the Florida Department of Corrections may provide limited funding for investigators or experts, but it is incumbent upon clemency counsel to seek authorization from the Director of Clemency Administration.

### Conclusion

In conclusion, under state and federal law, individuals charged with or convicted of a capital felony must be appointed counsel and provided with resources for investigators and experts at every stage of the legal proceedings, except possibly during clemency proceedings. Although death-sentenced inmates are provided with clemency counsel, it is unclear whether such attorneys are provided with the necessary resources to retain investigators and experts. Additionally, the State of Florida does not require the appointment of two attorneys at every stage of the legal proceedings. Lastly, the State of Florida does not require any member of the defense team to be qualified by experience or training to screen for mental or psychological disorders or defects. Based on this information, the State of Florida is only in partial compliance with Recommendation #1.

#### *B. Recommendation # 2*

##### **Qualified Counsel (Guideline 5.1 of the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases)**

- a. **The jurisdiction should develop and publish qualification standards for defense counsel in capital cases. These standards should be construed and applied in such a way as to further the overriding goal of providing each client with high quality legal representation.**
- b. **In formulating qualification standards, the jurisdiction should insure:**
  - i. **That every attorney representing a capital defendant has:**
    - (a) **obtained a license or permission to practice in the jurisdiction;**
    - (b) **demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases;**  
**and**
    - (c) **satisfied the training requirements set forth in Guideline 8.1.**
  - ii. **That the pool of defense attorneys as a whole is such that each capital defendant within the jurisdiction receives high quality legal representation. Accordingly, the qualification standards should insure that the pool includes sufficient numbers of attorneys who have demonstrated:**
    - (a) **substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases;**
    - (b) **skill in the management and conduct of complex negotiations and litigation;**
    - (c) **skill in legal research, analysis, and the drafting of litigation documents;**
    - (d) **skill in oral advocacy;**

- (e) **skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;**
- (f) **skill in the investigation, preparation, and presentation of evidence bearing upon mental status;**
- (g) **skill in the investigation, preparation, and presentation of mitigating evidence; and**
- (h) **skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.**

In 1999, the Florida Supreme Court adopted rule 3.112 of the Florida Rules of Criminal Procedure providing minimum qualification standards for attorneys handling death penalty cases at trial and on appeal.<sup>308</sup> Since then a number of Indigent Services Committees have adopted the standards as their own and in certain circuits the Committees have adopted additional continuing legal education requirements.

Rule 3.112, however, does not apply to attorneys handling death penalty cases during capital collateral proceedings. Rather, the qualification standards for these attorneys are governed by the Florida Statutes. Neither the Florida Rules of Criminal Procedure nor the Florida Statutes appear to include qualification standards for attorneys handling death penalty cases during clemency proceedings.

#### Qualifications for Attorneys Handling Death Penalty Cases at Trial and on Appeal

The qualification standards contained in rule 3.112 differ for trial attorneys and appellate attorneys and for lead trial counsel and co-counsel, but apply to all attorneys handling death penalty cases at trial and on appeal, including public defenders and private court-appointed attorneys.<sup>309</sup> Private court-appointed attorneys must personally certify that they meet the qualification requirements and the public defender must certify on behalf of the designated assistant public defenders that each attorney meets the qualification requirements.<sup>310</sup>

As required by Guideline 5.1, rule 3.112 relies not only on quantitative measures of experience to determine whether an attorney is qualified to serve as lead trial counsel or co-counsel, or appellate counsel, but it also requires these attorneys to have “demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.”<sup>311</sup> Rule 3.112 requires all attorneys handling death penalty cases at trial and on appeal to “perform at the level of an attorney reasonably skilled in the specialized practice of capital representation, zealously committed to the capital case.”<sup>312</sup>

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<sup>308</sup> *In re* Amendment to Florida Rules of Criminal Procedure—Rule 3.112 Minimum Standards for Attorneys in Capital Cases, 759 So. 2d 610, 612 (Fla. 1999); FLA. R. CRIM. P. 3.112.

<sup>309</sup> *Id.*

<sup>310</sup> FLA. R. CRIM. P. 3.112(i).

<sup>311</sup> FLA. R. CRIM. P. 3.112(f)(6).

<sup>312</sup> FLA. R. CRIM. P. 3.112(a).

Rule 3.112 also contains specific qualification requirements for lead trial counsel and co-counsel and appellate counsel. The qualification requirements for lead trial counsel are more expansive than the requirements for co-counsel at trial and lead counsel on appeal, but still only include some of the requirements contained in Guideline 5.1. For example, in addition to requiring a certain number of years of experience and a demonstrative proficiency level, rule 3.112 requires lead trial attorneys to be members of The Florida Bar, be familiar with the practice and procedure of the criminal courts of the jurisdiction, and be familiar with and experienced in the utilization of expert witnesses and evidence, including but not limited to psychiatric and forensic evidence.<sup>313</sup> However, rule 3.112 does not require lead trial attorneys to have demonstrated skills in all of the areas contained in Guideline 5.1, such as legal research, analysis and writing. The training required by rule 3.112 also falls short of the requirements of Guideline 5.1 (which will be discussed in detail under Recommendation #5). Given that the qualification requirements are more expansive for lead trial counsel than for co-counsel at trial and lead appellate counsel, rule 3.112 also does not require these attorneys to have demonstrated skills in all of the areas contained in Guideline 5.1.<sup>314</sup>

Prior to the adoption of rule 3.112, the Florida Supreme Court saw a number of cases involving unqualified defense attorneys. On this issue, Justice Anstead of the Florida Supreme Court has stated:

The undisputed facts in this case present a blatant example of counsel's failure to investigate and prepare a penalty phase defense. Once again, we have a lawyer appointed who had absolutely no experience in capital cases. Now, there are many resourceful and talented lawyers who, although lacking specific experience, would be able to learn the system and do an outstanding job of investigating and preparing a defense. However, in this case we have an inexperienced lawyer who has conceded that he was unprepared and, in his words "caught with [his] pants down," because he had erroneously assumed that the trial court would grant a lengthy continuance between the guilt phase and the penalty phase of the proceedings.<sup>315</sup>

Despite this questionable representation and others like it, the National Law Journal found that between 1984, when the United States Supreme Court decided *Strickland v. Washington*,<sup>316</sup> and 1990, the Florida Supreme Court found ineffective assistance of counsel in only nine death penalty habeas corpus petitions.<sup>317</sup>

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<sup>313</sup> *Id.*

<sup>314</sup> Additionally, in exceptional circumstances, the trial court may appoint an attorney at trial or on appeal who does not even meet the qualification requirements contained in Rule 3.112, as long as the court determines that the counsel chosen will provide competent representation in compliance with Rule 3.112. *See* FLA. R. CRIM. P. 3.112(k).

<sup>315</sup> *Van Poyck v. State*, 694 So. 2d 686, 699-700 (Fla. 1997) (Anstead, J., concurring in part and dissenting in part).

<sup>316</sup> 466 U.S. 668 (1984) (articulating the test for finding "ineffective assistance of counsel").

<sup>317</sup> Marianne Lavelle & Marcia Coyle, *Fatal Defense, Effective Assistance: Just a Nominal Right?*, NAT'L L. J., June 11, 1990.

## Qualification Requirements for Attorneys Handling Death Penalty Cases During Capital Collateral Proceedings

Full-time assistant regional counsel and capital collateral registry attorneys are not required to have demonstrated skills in all of the areas contained in Guideline 5.1. In fact, these attorneys are only required to be members in good standing of The Florida Bar with at least three years of experience in the practice of criminal law; and prior to employment, they must have participated in at least five felony jury trials, five felony appeals, or five capital post-conviction evidentiary hearings or any combination of at least five such proceedings.<sup>318</sup> Capital collateral registry attorneys are also required to certify on an application provided to the Executive Director of the Commission on Capital Cases that they meet these minimum requirements,<sup>319</sup> as well as the continuing legal education requirements, which are discussed below.

The qualifications of some capital collateral registry attorneys are questionable and the performance of these attorneys has been criticized on a number of occasions. The Executive Director of the Commission on Capital Cases has noted that while on average, registry attorneys have more experience than capital collateral regional counsel, most of their work has been in trials, not appeals.<sup>320</sup> A newspaper article in 2000 reported that one lawyer, who prior to signing up for the registry had been involved in capital trials, admitted that he was not qualified to handle post-conviction appeals.<sup>321</sup> He specifically stated, “It was a terrible mistake for me to get involved, and a lot of other lawyers I know who are messing with this are having a rough time of it.”<sup>322</sup>

This lack of appellate experience may account for the questionable performance of some registry attorneys. For example, a number of registry attorneys have missed state post-conviction and federal habeas corpus filing deadlines possibly precluding their clients from having their claims heard.<sup>323</sup> Specifically, registry attorneys in at least twelve separate cases filed their clients’ state post-conviction motions or federal habeas corpus petitions between two months to three years after the applicable filing deadline.<sup>324</sup>

Performance like this has led two Florida Supreme Court Justices to publicly comment on the quality, or lack thereof, of registry attorneys. Justice Cantero has stated that the

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<sup>318</sup> FLA. STAT. §§ 27.704(1), (2), 27.710(1), (2) (2006); *see also* Jim Ash, *Privatizing Death Cases Saving State Money, So Far*, PALM BEACH POST, Jan. 20, 2004 (noting that “[t]o qualify for the state registry, attorneys need only minimal experience . . . . In comparison, most Capital Collateral Regional Counsel attorneys have been trying these complicated cases for years.”).

<sup>319</sup> FLA. STAT. § 27.710(2) (2006).

<sup>320</sup> Gary Blankenship, *Registry Lawyers Defended at Committee Meeting*, FLA. B. NEWS, April 1, 2005.

<sup>321</sup> Jo Becker, *System May Be Slowing*, ST. PETERSBURG TIMES, July 17, 2000, *available at* [www.sptimes.com/News/071700/news\\_pf/State/System\\_may\\_be\\_slowing.shtml](http://www.sptimes.com/News/071700/news_pf/State/System_may_be_slowing.shtml) (last visited on Aug. 4, 2006).

<sup>322</sup> *Id.*

<sup>323</sup> *See, e.g.*, Death Appeals Not Quite Dead, DAILY BUS. REV., April 30, 2003, *available at* [http://www.fadp.org/news/bizrev\\_5\\_20.html](http://www.fadp.org/news/bizrev_5_20.html) (last visited on Aug. 4, 2006) (discussing several problems with registry counsel).

<sup>324</sup> *See* Amicus Curiae Brief of the American Civil Liberties Union and the ACLU of Florida in Support of Petitioner, *Lawrence v. Florida*, at 15-19 (U.S. Sup. Ct. 2006) (No. 05-8820).

representation provided by some registry attorneys is “[s]ome of the worst lawyering” he has ever seen.<sup>325</sup> Specifically, “some of the registry counsel have little or no experience in death penalty cases. They have not raised the right issues . . . [and] [s]ometimes they raise too many issues and still haven’t raised the right ones.”<sup>326</sup> Chief Justice Barbara Pariente reiterated the concerns of Justice Cantero by stating that “[a]s for registry counsel, we have observed deficiencies and we would definitely endorse the need for increased standards for registry counsel, as well as a continuing system of screening and monitoring to ensure minimum levels of competence.”<sup>327</sup> The questionable performance of these attorneys, as well as the lack of requisite qualifications, is particularly troublesome in light of the fact that death-sentenced inmates do not have a state or federal constitutional right to assert a claim of ineffective assistance of state post-conviction counsel.<sup>328</sup>

The performance of these attorneys has also led many legal experts as well as some Democratic and Republican Legislators to criticize the closure of CCRC-North Office in 2003.<sup>329</sup> In fact, many legal experts, including Justice Cantero and the Executive Director of the Commission on Capital Cases, have cautioned against proposals to eliminate the two other CCRC Offices.<sup>330</sup>

In conclusion, although the State of Florida has established qualification standards for attorneys handling death penalty cases at the various stages of the proceedings, except during clemency proceedings, the standards only require these attorneys to possess some of the qualification standards contained in Guideline 5.1. The State of Florida, therefore, is only in partial compliance with Recommendation #2.

In light of the aforementioned problems with capital collateral registry attorneys, the Florida Death Penalty Assessment Team makes the following recommendation: The State of Florida should adopt qualification standards for capital collateral registry attorneys and attorney monitoring procedures that are consistent with the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (ABA Guidelines). In the alternative, it should reinstitute the Capital Collateral Regional Counsel Office in the Northern Region of Florida, thereby eliminating reliance on registry counsel in non-conflict cases.

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<sup>325</sup> Marc Caputo, *Justice Blasts Lawyers Over Death Row Appeals*, MIAMI HERALD, Jan. 28, 2005; Hallifax, *supra* note 67.

<sup>326</sup> Caputo, *supra* note 325.

<sup>327</sup> Gary Blankenship, *supra* note 320.

<sup>328</sup> *Zack v. State*, 911 So. 2d 1190, 1203 (Fla. 2005) (stating “[t]his Court has stated that ‘claims of ineffective assistance of post-conviction counsel do not present a valid basis for relief’”).

<sup>329</sup> See Carl Jones, *State Officials Appeal to Florida Supreme Court on Attorney Fee Caps*, DAILY BUS. REV., May 15, 2006 (reporting that while the Governor “argues that private lawyers are better and cheaper . . . [,] many legal experts, Democrats in the Legislature and some Republican Legislators disagree . . . . State Senator Victor Cris, R-Tampa, a member of the Commission on Capital Cases . . . criticized the 2003 switch from the statewide [CCRC] system to the mixed system using both state-employed and registry lawyers. ‘We had a system that wasn’t broke and was functioning well before we went into this private counsel.’”).

<sup>330</sup> Jan Pudlow, *Justice Rips Shoddy Work of Private Capital Case Lawyers*, FLA. B. NEWS, March 1, 2005; *Death Appeals Not Quite Dead*, *supra* note 323.

C. Recommendation # 3

**The selection and evaluation process should include:**

- a. **A statewide independent appointing authority, not comprised of judges or elected officials, consistent with the types of statewide appointing authority proposed by the ABA (see, American Bar Association Policy Recommendations on Death Penalty Habeas Corpus, paragraphs 2 and 3, and Appendix B thereto, proposed section 2254(h)(1), (2)(I), reprinted in 40 Am. U. L. Rev. 1, 9, 12, 254 (1990), or ABA Death Penalty Guidelines, Guideline 3.1 Designation of a Responsible Agency), such as:**
  - i. **A defender organization that is either:**
    - (a) **a jurisdiction-wide capital trial office, relying on staff attorneys, members of the private bar, or both to provide representation in death penalty cases; or**
    - (b) **a jurisdiction-wide capital appellate and/or post-conviction defender office, relying on staff attorneys, members of the private bar, or both to provide representation in death penalty cases; or**
  - ii. **An “Independent Authority,” that is, an entity run by defense attorneys with demonstrated knowledge and expertise in capital representation.**

The State of Florida does not vest in one statewide independent appointing authority the responsibility for training, selecting, and monitoring attorneys who represent indigent defendants charged with or convicted of a capital felony. Rather, this responsibility is divided among a number of different entities: (1) the twenty public defenders’ offices, (2) the twenty Indigent Services Committees, (3) the Capital Collateral Regional Counsel Offices, (4) the Commission on Capital Cases, and (5) the judiciary.

Of these entities, the public defenders’ offices and the Capital Collateral Regional Counsel Offices are the only entities wholly independent of the judiciary. The public defenders’ offices and the Capital Collateral Regional Counsel Offices are directed by attorneys (the public defender or the regional counsel), and the offices rely on assistant public defenders and assistant regional counsel to represent indigent defendants charged with or convicted of a capital felony, except in cases of a conflict of interest.<sup>331</sup> Although the public defenders’ offices are independent of the judiciary, all circuit public defenders are elected officials, who serve for a term of four years before being subject to reelection.<sup>332</sup>

In contrast, the Indigent Services Committees and the Commission on Capital Cases include at least one judge. Each Indigent Services Committee includes the chief judge of the circuit or his/her designee, the public defender of the circuit or designee from within the office, an experienced private criminal defense attorney, and an experienced civil trial attorney, who are all responsible for managing the appointment and compensation of private court-appointed counsel in cases of a conflict of interest.<sup>333</sup> Similarly, the

<sup>331</sup> See *supra* notes 20-24, 55-58 and accompanying text.

<sup>332</sup> FLA. CONST. art. V, § 18; FLA. STAT. § 27.50 (2006).

<sup>333</sup> See *supra* note 26 and accompanying text.

Commission on Capital Cases includes not only judges but also elected officials, who are responsible for reviewing the administration of justice in capital post-conviction proceedings.<sup>334</sup>

The specific responsibilities of the Commission on Capital Cases and the Indigent Services Committees as well as the public defenders' offices, the Capital Collateral Regional Counsel Offices, and the judiciary with regard to the training, selection, and monitoring of counsel will be discussed in detail in Subparts b and c.

**b. Development and maintenance, by the statewide independent appointing authority, of a roster of eligible lawyers for each phase of representation.**

As indicated above, the State of Florida does not vest in one statewide independent appointing authority the responsibility for developing and maintaining a registry of attorneys. Rather, a number of different entities—all of which include at least one judge—are responsible for developing and maintaining the twenty-one registries in existence throughout the State of Florida. Each of Florida's twenty Indigent Services Committees is responsible for compiling and maintaining its circuit registry, which includes approving qualified attorneys and removing unqualified attorneys from the registry.<sup>335</sup> When compiling and maintaining the registry, each committee is encouraged to consult experienced criminal defense attorneys.<sup>336</sup>

The Executive Director of the Commission on Capital Cases is responsible for compiling and maintaining the remaining registry, which is a statewide registry of private attorneys who are qualified to handle capital collateral cases.<sup>337</sup> The Commission on Capital Cases also compiles a "Federal Registry," but the extent to which this registry is used by federal judges to appoint attorneys in capital federal habeas cases is unknown.

**c. The statewide independent appointing authority should perform the following duties:**

As indicated above, the State of Florida does not vest in one statewide independent appointing authority the responsibility for training, selecting, and monitoring attorneys who represent indigent defendants charged with or convicted of a capital felony. Rather, this responsibility is divided among the public defenders' offices, the Indigent Services Committees, the Capital Collateral Regional Counsel Offices, the Commission on Capital Cases, and the judiciary.

**i. Recruit and certify attorneys as qualified to be appointed to represent defendants in death penalty cases;**

The recruitment and certification of attorneys handling death penalty cases vary from stage to stage of the death penalty proceedings. The Florida Bar does provide a uniform

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<sup>334</sup> See *supra* note 14 and accompanying text.

<sup>335</sup> See *supra* notes 28-31 and accompanying text.

<sup>336</sup> See *supra* note 31 and accompanying text.

<sup>337</sup> See *supra* notes 59-61 and accompanying text.

voluntary board certification program through which any experienced criminal trial attorney or criminal appellate attorney can become “Board-Certified,”<sup>338</sup> but the certification is not specific to death penalty cases and is not required for appointment to such cases.

### Public Defenders and Attorneys at Trial and on Appeal

Each circuit’s public defender is charged with recruiting and hiring attorneys to represent indigent individuals charged with or convicted of a capital felony except in cases of a conflict of interest.<sup>339</sup> In cases where a public defender’s office is appointed to handle a capital case, the public defender must designate two attorneys<sup>340</sup> and certify that those attorneys meet the qualification requirements for death penalty cases.<sup>341</sup> On the other hand, in cases in which a private attorney is appointed from the registry to handle a death penalty case, the private attorney must personally certify that s/he meets the qualification requirements for death penalty cases.<sup>342</sup>

In cases in which a private attorney accepts a capital case contract through a circuit’s competitive bidding process, however, it is unclear who certifies the attorney as qualified to handle death penalty cases.

### Capital Collateral Regional Counsel and Capital Collateral Registry Attorneys

Each regional counsel may hire assistant regional counsel to handle death penalty cases during capital collateral proceedings. Although these attorneys are required to meet certain qualification requirements, such as having participated in at least five felony jury trials, five felony appeals, or five capital post-conviction evidentiary hearings, or any combination of at least five such cases;<sup>343</sup> it does not appear that the regional counsel or full-time assistant regional counsels are required to certify that they comply with the qualification requirements.

In terms of capital collateral registry counsel, the Executive Director of the Commission on Capital Cases plays a large role in recruiting these attorneys. The Executive Director is required to “send an application to each attorney identified by the chief judge so that the attorney may register for appointment as counsel in post[-]conviction capital collateral proceedings.”<sup>344</sup> Additionally, the Executive Director may advertise in legal

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<sup>338</sup> The Florida Bar, Professional Practice, Certification, at <http://www.floridabar.org/tfb/TFBMember.nsf/ED6E4BCB92A8FE1B852567090069F3C2/531C6693366E680985256B2F006C6A60?OpenDocument> (last visited on Aug. 4, 2006); *see also* RULES REGULATING THE FLORIDA BAR R. 6-8.3, 6-8.5 *at* <http://www.floridabar.org/divexe/rrtfb.nsf/FV?Openview&Start=1&Expand=6#6> (last visited on Aug. 4, 2006).

<sup>339</sup> *See supra* note 8 and accompanying text.

<sup>340</sup> FLA. R. CRIM. P. 3.112(e).

<sup>341</sup> FLA. R. CRIM. P. 3.112(i).

<sup>342</sup> *See supra* note 32 and accompanying text.

<sup>343</sup> FLA. STAT. § 27.704(1) (2006).

<sup>344</sup> FLA. STAT. § 27.710(1) (2006).

publications and other appropriate media for qualified attorneys interested in registering for appointment as counsel in capital collateral proceedings.<sup>345</sup> Once recruited, registry attorneys must certify on the registry application provided by the Executive Director that they are in compliance with the qualification requirements<sup>346</sup> and will comply with the continuing legal education requirements, which will be discussed below.

We note that even though the judiciary is responsible for monitoring the qualifications and performance of all attorneys handling death penalty cases, including public defenders and capital collateral regional counsel, judges are not required to certify these attorneys as qualified to handle the cases.<sup>347</sup>

**ii. Draft and periodically publish rosters of certified attorneys;**

As indicated above, each Indigent Services Committee compiles and maintains a registry of attorneys qualified and certified to handle death penalty cases at trial and on appeal, and the Executive Director of the Commission on Capital Cases compiles and maintains a registry of attorneys qualified and certified to handle death penalty cases during capital post-conviction proceedings. A number of these registries, but not all, are available to the public on the websites of the circuit courts, Indigent Services Committees, and the Commission on Capital Cases.<sup>348</sup>

**iii. Draft and periodically publish certification standards and procedures by which attorneys are certified and assigned to particular cases;**

The Florida Supreme Court and the Florida Legislature—rather than a statewide independent appointing authority—have adopted qualification and certification standards for the majority of the attorneys handling death penalty cases. The Florida Supreme Court adopted rule 3.112 of the Florida Rules of Criminal Procedure, which includes qualification standards for lead and co-counsel and appellate counsel in death penalty cases as well as certification procedures for these attorneys.<sup>349</sup>

Similarly, the Florida Legislature has adopted qualification standards for both capital collateral regional counsel and capital collateral registry attorneys, but certification procedures only for capital collateral registry attorneys.<sup>350</sup>

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<sup>345</sup> *Id.*

<sup>346</sup> *See supra* note 62 and accompanying text.

<sup>347</sup> FLA. R. CRIM. P. 3.112(j)(1); FLA. STAT. § 27.711(11), (12) (2006).

<sup>348</sup> *See, e.g.*, Thirteenth Judicial Circuit, Due Process Counsel Registry for Capital First-Degree Murder, at <http://www.fljud13.org/indweb/docs/Capital%20First-Degree%20Murder.pdf> (last visited on Aug. 4, 2006); Commission on Capital Cases, Registry of Attorneys, at <http://www.floridacapitalcases.state.fl.us/c-registry-attorney.cfm> (last visited on Aug. 4, 2006).

<sup>349</sup> FLA. R. CRIM. P. 3.112

<sup>350</sup> *See supra* notes 205-206, 208-209 and accompanying text.

**iv. Assign attorneys who will represent the defendant at each stage of every case, except to the extent that the defendant has private attorneys;**

The responsibility for assigning attorneys to represent indigent defendants in death penalty cases is divided among the public defenders' offices, the Indigent Services Committees, the Capital Collateral Regional Counsel Offices, and the judiciary, rather than a statewide independent appointing authority. In a case in which the public defender's office or the Capital Collateral Regional Counsel Office is appointed to represent an indigent defendant, it appears that the public defender and the regional counsel are responsible for assigning attorneys to the case.<sup>351</sup>

On the other hand, when a conflict of interest arises in a circuit that uses a competitive bidding process, it appears that the Indigent Services Committee decides who should receive the contract.<sup>352</sup> However, in circuits that use only a registry of attorneys, it appears that the judiciary is responsible for appointing counsel from the registry in a rotating order.<sup>353</sup> Similarly, when a conflict of interest arises during capital collateral proceedings or when the defendant is convicted and sentenced to death in the Northern Region of Florida, which no longer has a CCRC Office, it appears that the judiciary is responsible for appointing counsel from the statewide registry maintained by the Commission on Capital Cases.<sup>354</sup>

**v. Monitor the performance of all attorneys providing representation in capital proceedings;**

The responsibility for monitoring the qualifications and performance of counsel is also divided among a number of entities: the Indigent Services Committees, the Commission on Capital Cases, and the judiciary. As each Indigent Services Committee, or its designee, creates and maintains its circuit's registry, it is also responsible for monitoring attorneys' compliance with the qualification requirements.<sup>355</sup> Similarly, the Commission on Capital Cases is responsible for monitoring the qualifications of capital collateral registry attorneys,<sup>356</sup> but it is also responsible for receiving complaints regarding the practice of the Capital Collateral Regional Counsel Offices and capital collateral registry attorneys.<sup>357</sup>

Additionally, Florida courts are required to monitor the workload and performance of attorneys handling death penalty cases. Specifically, courts are required to conduct an inquiry into private court-appointed counsel's "availability to provide effective assistance of counsel to the defendant."<sup>358</sup> An appointment should not be made to an attorney

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<sup>351</sup> See *supra* notes 74, 197 and accompanying text.

<sup>352</sup> See *supra* note 83 and accompanying text.

<sup>353</sup> See *supra* note 85 and accompanying text.

<sup>354</sup> See *supra* note 200 and accompanying text.

<sup>355</sup> See *supra* note 29 and accompanying text.

<sup>356</sup> See *supra* note 209 and accompanying text.

<sup>357</sup> See *supra* note 215 and accompanying text.

<sup>358</sup> See *supra* notes 104-105 and accompanying text.

whose caseload would prevent the attorney from providing effective legal representation.<sup>359</sup>

Similarly, courts must “monitor the performance of assigned counsel [during capital collateral proceedings] to ensure that the capital defendant is receiving quality representation,”<sup>360</sup> and must receive and evaluate allegations that are made regarding the performance of counsel.<sup>361</sup>

According to a March 2003 article in *The Florida Bar News*, however, the judiciary’s ability to successfully monitor attorneys on the statewide registry is questionable. Specifically, First District Court of Appeal Judge Charles Miner is quoted as saying that while the Commission on Capital Cases “can ride herd over CCRC lawyers,” with private lawyers “the best we can do if it looks like they are stalling on a case is contact the chief judge who may or may not do anything.”<sup>362</sup> The Executive Director of the Commission on Capital Cases has acknowledged the problems with monitoring registry counsel by stating that “there [is] an inability to directly control the lawyers, to make sure the cases are being worked.”<sup>363</sup> Similarly, testimony to the Commission on Capital Cases from a registry attorney also confirms that there is little or no oversight of registry attorneys, so that the State of Florida is “handing out funding with no accountability.”<sup>364</sup>

**vi. Periodically review the roster of qualified attorneys and withdraw certification from any attorney who fails to provide high quality legal representation consistent with these Guidelines;**

The Indigent Services Committees and the Commission on Capital Cases are responsible for compiling and monitoring Florida’s registries, which includes the authority to remove attorneys from the registries. Each Indigent Services Committee may remove from its registry any attorney who fails to comply with “the terms of the contract for services,”<sup>365</sup> which includes compliance with the qualification standards contained in rule 3.112 of the Florida Rules of Criminal Procedure. Similarly, it appears that the Executive Director of the Commission on Capital Cases may remove from the statewide registry any attorney who fails to comply with the qualification and training requirements,<sup>366</sup> and any attorney who seeks compensation in excess of the statutory caps.<sup>367</sup>

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<sup>359</sup> See *supra* note 106 and accompanying text.

<sup>360</sup> See FLA. STAT. § 27.711(12) (2006).

<sup>361</sup> *Id.*

<sup>362</sup> Jan Pudlow, *The Pros and Cons of Privatizing Death Penalty Appeals*, FLA. B. NEWS, March 1, 2003.

<sup>363</sup> *Death Appeals Not Quite Dead*, *supra* note 323.

<sup>364</sup> Jan Pudlow, *Justice Rips Shoddy Work of Private Capital Case Lawyers*, FLA. B. NEWS, March 1, 2005.

<sup>365</sup> See FLA. STAT. § 27.40 (2006).

<sup>366</sup> See FLA. STAT. § 27.710(1) (2006).

<sup>367</sup> See FLA. STAT. § 27.7002(6) (2006); see also *supra* notes 234-241 and accompanying text for a discussion of the *Olive* case.

**vii. Conduct, sponsor, or approve specialized training programs for attorneys representing defendants in death penalty cases; and**

The Commission on Capital Cases is the only entity involved in the attorney appointment/monitoring process that sponsors training programs for attorneys representing capital defendants.<sup>368</sup> In addition to the Commission, however, the Florida Public Defenders Association, Inc. also sponsors similar programs.<sup>369</sup>

**viii. Investigate and maintain records concerning complaints about the performance of attorneys providing representation in death penalty cases and take appropriate corrective action without delay.**

Trial and appellate courts are responsible for monitoring attorneys' performance in death penalty cases, receiving complaints about the performance of attorneys, and taking corrective action. In capital collateral proceedings, the courts are explicitly required to receive and evaluate allegations that are made by the Chief Financial Officer, the Department of Legal Affairs, the Executive Director of the Commission on Capital Cases, or any interested party regarding the performance of counsel.<sup>370</sup>

When judges receive information indicating a "substantial likelihood" that any attorney has committed a violation of the Florida Rules of Professional Conduct, the Florida Code of Judicial Conduct specifically advises judges to "take appropriate action."<sup>371</sup> Appropriate action includes: "direct communication with the . . . [attorney] who has committed the violation, or other direct action if available, and reporting the violation to the appropriate authority or other agency."<sup>372</sup> If the misconduct is minor, the judge may "address the problem solely by direct communication" with the offending attorney.<sup>373</sup> However, if an attorney's violation of the Florida Rules of Professional Conduct raises a "substantial question as to the [attorney's] honesty or fitness as a[n] [attorney]," the judge must report the violation to The Florida Bar.<sup>374</sup> The Florida Supreme Court echoed these reporting rules, holding that "[w]hen there is overzealousness or misconduct on the part of either the prosecutor or defense lawyer it is proper for either the trial or appellate courts to exercise their supervisory powers by registering their disapproval, or, in appropriate cases, referring the matter to The Florida Bar for disciplinary investigation."<sup>375</sup>

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<sup>368</sup> See *supra* note 117 and accompanying text.

<sup>369</sup> See *supra* note 115 and accompanying text.

<sup>370</sup> See *supra* note 216 and accompanying text.

<sup>371</sup> FLA. CODE OF JUD. CONDUCT CANON 3(D)(2). For examples of how defense counsel and prosecutors can violate the Rules Regulating The Florida Bar, see FLA. R. PROF'L CONDUCT R. 4-1.1 (requiring lawyers to provide competent representation to their clients), and FLA. R. PROF'L CONDUCT R. 4-3.8 (highlighting the special responsibilities of a prosecutor, including the disclosure of evidence to defense counsel).

<sup>372</sup> FLA. CODE OF JUD. CONDUCT CANON 3(D) cmt.

<sup>373</sup> *Id.*

<sup>374</sup> *Id.*

<sup>375</sup> *State v. Murray*, 443 So. 2d 955, 956 (Fla. 1984) (citing *Arango v. State*, 437 So. 2d 1099 (Fla. 1983)); *Jackson v. State*, 421 So. 2d 15 (Fla. 3d DCA 1982).

The Florida Standards for Imposing Lawyer Sanctions also emphasize that judges have an “obligation to report unethical conduct to the disciplinary agencies.”<sup>376</sup> These standards also refer to the judge’s authority to use contempt citations and “other mechanisms” to discipline attorneys.<sup>377</sup>

There are a number of appellate decisions that reference the reporting of an attorney to the Bar for trial misconduct in both capital and non-capital cases.<sup>378</sup> However, at least one appellate court has questioned the efficacy of The Florida Bar’s disciplinary efforts.<sup>379</sup> Additionally, it is questionable whether an elected state attorney or public defender can even be removed from office by The Florida Bar for trial misconduct because they are constitutional officers and the specific method for their removal expressed in the Florida Constitution does not involve that sanction being carried out by the Bar.<sup>380</sup>

In addition to the judiciary, the Commission on Capital Cases is responsible for receiving complaints about the performance of capital collateral attorneys and referring the

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<sup>376</sup> THE FLORIDA BAR, FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS, at 2, available at [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/18F71B077A612FB785256DFE00664509/\\$FILE/lawyersanctions03.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/18F71B077A612FB785256DFE00664509/$FILE/lawyersanctions03.pdf?OpenElement) (last visited on Aug. 4, 2006).

<sup>377</sup> *Id.* at 2-3.

<sup>378</sup> See, e.g., Ruiz v. State, 743 So. 2d 1, 10 (Fla. 1999) (referring prosecutor to the Bar based on misconduct in a capital case); Johnnides v. Amoco Oil Co., Inc., 778 So. 2d 443, 445 n.2 (Fla. 3d DCA 2001) (containing a list of cases, seven of them criminal but none capital, involving Bar complaints initiated by the courts).

<sup>379</sup> In *Johnnides*, the court stated:

[W]e have no illusions that [referring lawyers to The Florida Bar] will have any practical effect. Our skepticism is caused by the fact that, of the many occasions in which members of this court—reluctantly and usually only after agonizing over what we thought was the seriousness of doing so—have found it appropriate to make such a referral about a lawyer’s conduct in litigation, none has resulted in the public imposition of any discipline—not even a reprimand—whatsoever. In fact, the reported decisions do not reflect that the Bar has responded concretely at all to the tide of uncivil and unprofessional conduct which has been the subject of so much article-writing, sermon-giving, seminar-holding and general hand-wringing for at least the past twenty years. Perhaps the ultimate example of the Bar’s attitude toward the problem is the case of Harvey Hyman, who was the subject of three separate complaints by this court to the Bar, but who avoided any sanction by entering a diversion program which consisted entirely of the arduous requirement of attending a day-long seminar on trial ethics.

Johnnides, 778 So. 2d at 445 n.2.

<sup>380</sup> In *State v. Davis*, No. 91-2291-CF, 1991 WL 206568 (Fla. Cir. June 25, 1991), a capital case, Judge Stan Morris signed an order finding that the state attorney had violated the ethics rule on pre-trial publicity. Defense Attorney David Tarbert forwarded the order to The Florida Bar, which responded with a citation to *The Florida Bar v. McCain*, 330 So. 2d 712 (Fla. 1976), where the Florida Supreme Court held that “where the constitution creates an office, fixes its term and provides upon what conditions the incumbent may be removed before the expiration of his[her] term, it is beyond the power of the legislature or any other authority to remove or suspend such officer in any manner than that provided by the constitution.” *The Florida Bar v. McCain*, 330 So. 2d 712 (Fla. 1976) (citing *In re Investigation of a Circuit Judge of the Eleventh Judicial Circuit of Florida*, 93 So. 2d 601, 604 (1957)).

complaints to The Florida Bar, the Florida Supreme Court, or the Commission on Ethics.<sup>381</sup>

In conclusion, the State of Florida has not vested with one or more independent entities all of the responsibilities contained in Recommendation #3. Specifically, the State of Florida has failed to remove the judiciary from the attorney selection and monitoring process, thereby also failing to protect against the appointment or retention of an attorney for reasons other than his/her qualification. Not only do the entities charged with compiling and maintaining the attorney registries include at least some judges, but judges are also required to appoint attorneys and to monitor their performance. Based on this information, the State of Florida is not in compliance with Recommendation #3. We note that regardless of whether the current reliance on the judicial appointment and monitoring of counsel is responsible, the quality of defense representation remains very uneven, as recognized by the Florida Supreme Court, and yet little appears to have been done about it.

#### *D. Recommendation #4*

##### **Compensation for Defense Team (Guideline 9.1 of the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases):**

- a. The jurisdiction should ensure funding for the full cost of high quality legal representation, as defined by ABA Guideline 9.1, by the defense team and outside experts selected by counsel.<sup>382</sup>**

#### Public Defenders' Offices

The State of Florida is responsible for funding Florida's twenty public defenders' offices, except counties are still responsible for the office overhead, which includes but is not limited to the cost of construction or lease, maintenance, and security of facilities, as well as the cost of utilities.<sup>383</sup> During Fiscal Year 2005-2006, the appropriations for public defenders' offices ranged from 33 full time equivalent positions (FTEs) and \$2.5 million to 415.5 FTEs and \$24.5 million, and included funding for the salaries of attorneys, investigators, and support staff as well as funding for the hiring of expert witnesses.<sup>384</sup>

Similar to the organization of public defenders' offices, each of Florida's twenty judicial circuits has a state attorney's office. It appears that within each judicial circuit, the state attorney's office is allocated at least twice the number of FTEs and twice the amount of

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<sup>381</sup> See *supra* note 215 and accompanying text.

<sup>382</sup> In order for a state to ensure funding for the "full cost of high quality legal representation," it must be responsible for "paying not just the direct compensation of members of the defense team, but also the costs involved with the requirements of the[] Guidelines for high quality representation (e.g., Guideline 4.1 [Recommendation #1], Guideline 8.1 [Recommendation #5])." See American Bar Association, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 984-85 (2003).

<sup>383</sup> FLA. STAT. § 29.008(1) (2006).

<sup>384</sup> See *supra* notes 20-24, 42-43 and accompanying text.

funds than the public defender's office.<sup>385</sup> For example, in the Fourth Judicial Circuit during fiscal year 2005-2006, the state attorney's office was appropriated 361 FTEs and \$21,267,701, while the public defender's office was appropriated 152.5 FTEs and \$9,832,694.<sup>386</sup>

This discrepancy in funding may be explained by the Florida Legislature's approach to funding the public defenders' offices. In 1994, Representative Elvin L. Martinez testified that in determining the amount of funding to appropriate to the public defenders' offices, the Florida Legislature considers the total amount of funding requested by state attorneys and then after deciding the amount to appropriate to state attorneys, the Legislature appropriates fifty percent of that amount for the operation of public defenders' offices.<sup>387</sup> There is no evidence that this practice has changed since 1994, and in fact, the 2005-2006 appropriations for the public defenders' offices and the state attorneys' offices confirm that this practice is still in place today.<sup>388</sup>

### Private Court-Appointed Counsel

Since July 1, 2004,<sup>389</sup> the State of Florida has also been responsible for funding private court-appointed counsel.<sup>390</sup> For fiscal year 2005-2006, the Florida Legislature allocated

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<sup>385</sup> Compare Florida Legislature, Office of Program Policy Analysis and Government Accountability, State Attorney Appropriations and FTE, 2005-06, at [www.oppaga.state.fl.us/profiles/1023/02/right.asp?programnum=1023](http://www.oppaga.state.fl.us/profiles/1023/02/right.asp?programnum=1023) (last visited on Aug. 1, 2006), with Florida Legislature, Office of Program Policy Analysis and Government Accountability, Appropriations and FTEs by Circuit, 2005-2006 Appropriations and Full Time Equivalents (FTEs) for Individual Public Defenders Office by Circuit, at [www.oppaga.state.fl.us/profiles/1024/01/right.asp?programnum=1024](http://www.oppaga.state.fl.us/profiles/1024/01/right.asp?programnum=1024) (last visited on Aug. 4, 2006).

<sup>386</sup> Florida Legislature, Office of Program Policy Analysis and Government Accountability, State Attorney Appropriations and FTE, 2005-06, at [www.oppaga.state.fl.us/profiles/1023/02/right.asp?programnum=1023](http://www.oppaga.state.fl.us/profiles/1023/02/right.asp?programnum=1023) (last visited on Aug. 1, 2006); Florida Legislature, Office of Program Policy Analysis and Government Accountability, Appropriations and FTEs by Circuit, 2005-2006 Appropriations and Full Time Equivalents (FTEs) for Individual Public Defenders Office by Circuit, at [www.oppaga.state.fl.us/profiles/1024/01/right.asp?programnum=1024](http://www.oppaga.state.fl.us/profiles/1024/01/right.asp?programnum=1024) (last visited on Aug. 4, 2006).

<sup>387</sup> See *In Re Certification of Conflict in Motions to Withdraw Filed by Public Defender of the Tenth Judicial Circuit*, 636 So.2d 18, 21 (Fla. 1994).

<sup>388</sup> See *supra* notes 384-386 and the accompanying text.

<sup>389</sup> Prior to July 1, 2004, each of Florida's sixty-seven counties was responsible for funding the cost of court-appointed counsel at trial and on appeal. See JUDICIAL SYSTEM ACHIEVES, *supra* note 71, at 2. In 2002, for example, counties spent \$35,875,000 on indigent defense and the state spent \$144,800,000. AMERICAN BAR ASSOCIATION, STATE AND COUNTY EXPENDITURES FOR INDIGENT DEFENSE IN THE U.S. IN FY 2002 (2003), available at <http://www.abanet.org/legalservices/sclaid/defender/research.html> (last visited on Aug. 4, 2006). Similarly, in fiscal year 1999-2000, counties provided a total of \$57,635,718 for defense attorneys. JUSTIFICATION REVIEW, *supra* note 42, at 4, app. C (containing the Florida Public Defender Association's response, which questioned the accuracy of the numbers). The amount provided by each county, however, ranged from \$35,303 (Third Circuit) to \$15,081,586 (Eleventh Circuit). *Id.* Similarly, "in 1998 county governments spent \$34.8 million on conflict attorneys and their related costs, while the state appropriated \$2.5 million for this purpose." *Id.* at 24.

<sup>390</sup> See *supra* note 41 and accompanying text.

\$37.4 million for the fees and expenses of private court-appointed counsel, which include expenses for investigators and expert witnesses.<sup>391</sup>

### Capital Collateral Regional Counsel and Capital Collateral Registry Attorneys

Since 1985, the State of Florida has at least partially funded the representation of death-sentenced inmates during capital collateral proceedings.<sup>392</sup> However, the adequacy of the funding has continually been challenged. In 1988—prior to the establishment of the Capital Collateral Regional Counsel Offices—the Office of the Capital Collateral Representative (CCR) petitioned the Florida Supreme Court for a writ of mandamus to stay the executions of capital defendants represented by CCR until after July 1, 1988, when additional funds were scheduled to be released to CCR.<sup>393</sup> The petition, however, was denied.<sup>394</sup> Similarly, in 1995, a death-sentenced inmate represented by CCR asserted that CCR could not provide effective assistance of counsel in capital collateral proceedings because it was “overworked and forced to labor under severe time constraints.”<sup>395</sup> The Florida Supreme Court again rejected this argument.<sup>396</sup>

Four years later, in 1999, after CCR was divided into three Capital Collateral Regional Counsel Offices (CCRC-North, CCRC-Middle, and CCRC-South), CCRC-North and CCRC-South each filed separate all writs petitions requesting the Florida Supreme Court to impose a moratorium on the imposition of the death penalty until Florida increased funding for the offices, arguing that the current funding was “woefully inadequate.”<sup>397</sup> The Court denied relief, finding that the funding had “significantly changed and increased through [the 1998 and 1999] legislative sessions.”<sup>398</sup>

Since 1999, the funding allocated to the representation of death-sentenced inmates during capital collateral proceedings has steadily increased from \$7,825,551 in Fiscal Year 1999-2000, which funded CCRC-North, CCRC-South, and CCRC-Middle, to \$9,400,000 in Fiscal Year 2005-2006, which currently funds CCRC-South, CCRC-Middle, and registry attorneys.<sup>399</sup> Despite this increase in funding, it is unclear whether the current funding provided to CCRC-Middle, CCRC-South, and registry attorneys is sufficient.

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<sup>391</sup> See *supra* note 43 and accompanying text.

<sup>392</sup> See Marcia Coyle, *Suit: Death Defense Is a Sham, Claim Is Florida Provides Lawyers But Makes It So They Can't Save Inmates*, NAT'L L. J., Dec. 21, 1998 (stating that the Office of Capital Collateral Representative “started its life grossly underfunded and [as of Dec. 21, 1998] never caught up” and noting that two special commissions created by the Florida Supreme Court concluded in 1993 and 1997 that the CCR was underfunded).

<sup>393</sup> Spalding v. Dugger, 526 So. 2d 71, 72-73 (Fla. 1988).

<sup>394</sup> *Id.* at 73.

<sup>395</sup> White v. Singletary, 663 So. 2d 1324, 1325 (Fla. 1995).

<sup>396</sup> *Id.* at 1325.

<sup>397</sup> See Arbelaez v. Butterworth, 738 So. 2d 326, 326-328 (Fla. 1999).

<sup>398</sup> *Id.* at 326.

<sup>399</sup> Florida Legislature, Office of Program Policy Analysis and Government Accountability, Performance of Collateral Counsels Improved; Registry Accountability Needs to Be Revisited, Report No. 01-52 (2001), available at <http://www.oppaga.state.fl.us/reports/crime/r01-52s.html> (last visited on Aug. 4, 2006); Florida Legislature, Office of Program Policy Analysis and Government Accountability, Justice Administrative

- b. **Counsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation.**
  - i. **Flat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases.**
  - ii. **Attorneys employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor's office in the jurisdiction.**
  - iii. **Appointed counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with the prevailing rates for similar services performed by retained counsel in the jurisdiction, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.**

The amount of compensation provided for representing an indigent defendant charged with or convicted of a capital felony depends on whether the attorney is an assistant public defender, an assistant regional counsel, a private attorney appointed by the court from a registry, or a private attorney appointed through a competitive bidding process.

### Public Defenders

All assistant public defenders are salaried employees earning an approximate minimum salary of \$38,700.<sup>400</sup> However, attorneys handling death penalty cases are paid on average between \$70,000 and \$80,000.<sup>401</sup> These salaries, however, do not appear to be commensurate with the salaries of state attorneys.<sup>402</sup>

Due to the additional funds allocated to state attorneys' offices, as discussed above, these offices are able to hire more assistant state attorneys<sup>403</sup> and pay them higher salaries than assistant public defenders with equivalent experience and case loads.<sup>404</sup> Despite the higher salaries paid to state attorneys, however, the turnover rate for these attorneys as well as for public defenders is extremely high.<sup>405</sup> The high turnover rate, which has been

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Commission, Capital Collateral Regional Counsels (Death Penalty Appeals), at <http://www.oppaga.state.fl.us/profiles/1025/> (last visited on Aug. 4, 2006).

<sup>400</sup> See Phone Interview with Nancy Daniels, Public Defender, Florida Second Judicial Circuit (Apr. 5, 2006); see also Jan Pudlow, *State Attorneys, PDs Need Money to Reduce Turnover*, FLA. B. NEWS, Feb 15, 2006 (stating that the minimum starting salary for assistant public defenders is \$38,317).

<sup>401</sup> See Phone Interview with Nancy Daniels, Public Defender, Florida Second Judicial Circuit (Apr. 5, 2006).

<sup>402</sup> See Kristen Zambo, *State Regulations Set Salaries Higher for State Attorneys than for Public Defenders*, NAPLES DAILY NEWS, Oct. 20, 2003; Phone Interview with Nancy Daniels, Public Defender, Florida Second Judicial Circuit (Apr. 5, 2006).

<sup>403</sup> See *supra* notes 384-387 and the accompanying text.

<sup>404</sup> See Phone Interview with Nancy Daniels, Public Defender, Florida Second Judicial Circuit (Apr. 5, 2006).

<sup>405</sup> See Long-Range Program Plan, FY 2006-2007 through 2010-11, Office of the State Attorneys, First through Twentieth Judicial Circuits, Justice Administrative Commission, Sept. 30, 2005

linked to the low salaries paid to state attorneys and assistant public defenders,<sup>406</sup> results in these positions going to attorneys with less experience.<sup>407</sup>

Lastly, it is unclear whether the salaries paid to public defenders who represent indigent death-sentenced inmates on direct appeal are commensurate with the salaries paid to attorneys from the Capital Appeals Bureau<sup>408</sup> of the Office of the Statewide Prosecutor.

### Private Attorneys Appointed from the Registry to Handle Death Penalty Cases at Trial and on Direct Appeal

In contrast to the salaries paid to public defenders, private attorneys appointed from the circuit registry to handle death penalty trials and appeals are paid at an hourly rate with state funds appropriated to the Justice Administrative Commission (JAC). Since July 1, 2004,<sup>409</sup> when the State of Florida began funding private court-appointed counsel, each

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<http://www.justiceadmin.org/sa/SA-LRPP-A.pdf> (last visited Aug. 1, 2006) (stating that the turnover rate for assistant state attorneys for fiscal year 2000-01 varied from circuit to circuit from 10.9% to 77%); Long-Range Program Plan, FY 2006-2007 through 2010-11, Office of the Public Defenders, First through Twentieth Judicial Circuits, Justice Administrative Commission, Sept. 30, 2005, *at* <http://www.justiceadmin.org/pd/PD-LRPP.pdf> (last visited Aug. 1, 2006) (stating that in fiscal year 2000-2001, the turnover rate for public defenders was 23.47%); Justice at Last for the 20<sup>th</sup> Circuit?, *sun-herald.com*, *at* <http://www.sun-herald.com/NewsArchive2/032706/np8.htm?date=032706&story=np8.htm> (last visited Aug. 1, 2006).

<sup>406</sup> See, e.g., *Justice at Last for the 20<sup>th</sup> Circuit?*, *sun-herald.com*, *at* <http://www.sun-herald.com/NewsArchive2/032706/np8.htm?date=032706&story=np8.htm> (last visited Aug. 1, 2006) (quoting the state attorney for the Twentieth Judicial Circuit who stated: “[R]etention is an awful problem . . . I hired an assistant state attorney at \$43,000 and I lost him to the Charlotte County Attorney’s Office because they offered him \$65,000.”); Jan Pudlow, *State Attorneys, PDs Need Money to Reduce Turnover*, *Florida Bar News*, Feb. 15, 2006 (discussing the high turnover rates in the Eighth Circuit’s Public Defenders Office and the Nineteenth Circuit’s State Attorney’s Office).

<sup>407</sup> See, e.g., *Justice At Last For the 20<sup>th</sup> Circuit?*, *sun-herald.com*, *at* <http://www.sun-herald.com/NewsArchive2/032706/np8.htm?date=032706&story=np8.htm> (last visited Aug. 1, 2006) (noting that “a recent study . . . revealed more than half of Florida’s prosecutors have three years experience or less, and more than half of all assistant state attorneys leave their job within five years”); Jan Pudlow, *State Attorneys, PDs Need Money to Reduce Turnover*, *Florida Bar News*, Feb. 15, 2006 (stating that the Nineteenth Circuit’s State Attorney’s Office “can’t keep experienced lawyers”).

<sup>408</sup> For more information on the Capital Appeals Bureau, see *Criminal Appeals*, Attorney General of Florida, *at* <http://myfloridalegal.com/pages.nsf/4492d797dc0bd92f85256cb80055fb97/7295a759cf3fb5c985256cc600587a33!OpenDocument> (last visited on April 24, 2006).

<sup>409</sup> Prior to July 2004, several attorneys attempted to exceed the local rates of compensation by claiming that they were “confiscatory” of their time. See, e.g., *Bobbitt v. State*, 726 So. 2d 848, 851 (Fla. 5th DC.A 1999) (rejecting the attorneys’ argument that the rate was confiscatory, the court found that “[t]he rate of \$50 per hour was used to compensate every attorney who accepted cases in the Ninth Judicial Circuit, and it was not unreasonable or confiscatory as applied to attorneys Fussell and Sims. Both attorneys . . . were aware of the administrative order setting the hourly rate of payment when they accepted the appointment. The trial judge was not authorized to enter an order granting the attorneys an additional fee award based upon a higher hourly rate, and the undersigned Chief Judge specifically declines to do so. The undersigned Chief Judge has now issued an administrative order increasing the hourly rate of payment for court appointed attorneys, but this order has been issued well after the completion of the instant case, and cannot be applied hereto.”); *Leon County v. McClure*, 541 So. 2d 630, 631 (Fla. 1st DCA 1988) (quashing a fee to court-appointed capital counsel that exceeds the statutory limit of \$3,500 as excessive, noting that the hourly rate awarded is far beyond that approved in other cases.); *Hillsborough Cty. v. Unterberg*, 534 So.

Indigent Services Committee has established its own hourly rate. Some circuit rates distinguish between lead counsel and co-counsel or in-court work and out-of-court work, while others do not. The rates range for lead counsel from \$60 per hour for out-of-court work and \$75 per hour for in-court work to \$90 per hour for out-of-court work and \$150 per hour for in-court work.<sup>410</sup> Similarly, the rates for appellate counsel range from \$75 per hour to \$105 per hour.<sup>411</sup>

Apart from the varying hourly rates, the Florida Legislature has imposed a statutory fee cap of \$3,500 at trial and \$2,000 on appeal.<sup>412</sup> The Florida Supreme Court has found that the statutory fee cap may be exceeded only “in extraordinary and unusual cases,”<sup>413</sup> yet it has also indicated that such cases include “virtually every capital case.”<sup>414</sup>

Although the statutory fee caps may be exceeded, the amount requested by each attorney for fees as well as costs or related expenses (which will be discussed below) is subject to review by the JAC and approval by the trial court.<sup>415</sup> In fact, after review of the fees requested, the JAC has the authority to contest the billing before the court,<sup>416</sup> which could result in the court decreasing the amount awarded.

Regardless of when the billing is approved by the court, private court-appointed attorneys representing the inmate at trial are not entitled to compensation until the final disposition of the case.<sup>417</sup> The only exception is if the attorney has been providing legal services in the matter for more than one year; in which case the court may approve payment of not more than 80 percent of the fees earned, or costs and related expenses incurred, to date, or an amount proportionate to the maximum fees permitted based on the legal services provided to date.<sup>418</sup> We note that Florida’s Justice Administrative Commission (JAC) has been statutorily mandated to develop a schedule of partial payment of fees for cases that are not resolved in six months,<sup>419</sup> but it does not appear that the JAC has promulgated such schedule.

However, private counsel appointed to represent a death-sentenced individual on direct appeal to the Florida Supreme Court may request payment from the JAC at the following

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2d 838, 842 (Fla. 2d. DCA 1988) (“In sum, we cannot conclude in the present case that Unterberger has demonstrated that the hourly rate fixed by the chief judge of the circuit deprives indigent criminal defendants of effective counsel and is thus, unconstitutional. We are not insensitive to the burden that the hourly rate places upon appointed counsel, but unless that rate impacts on the rights of indigent criminal defendants we are not free to declare the rate unconstitutional.”).

<sup>410</sup> See, e.g., *supra* notes 136, 140, 141, 147 and accompanying text.

<sup>411</sup> *Id.*

<sup>412</sup> Fla. Stat. § 27.5304(3)(a)(4), (3)(a)(5) (2006).

<sup>413</sup> *Makemsom v. Martin Cty.*, 491 So. 2d 1109, 1113, 1115 (Fla. 1986) (affirming payment to low-bidding attorney of more than double the statutory maximum due to complexity of case).

<sup>414</sup> *White v. Bd. of Cty. Commissioners of Pinellas Cty.*, 537 So. 2d 1376, 1380 (Fla. 1989).

<sup>415</sup> Fla. Stat. § 27.5304(2) (2006).

<sup>416</sup> *Id.*

<sup>417</sup> *Id.*

<sup>418</sup> *Id.*

<sup>419</sup> FLA. STAT. § 27.5304(10) (2006).

intervals: (1) upon the filing of an appellate brief, including but not limited to, a reply brief; and (2) when the opinion of the appellate court is finalized.<sup>420</sup>

In conclusion, the State of Florida has established a statutory fee cap for trial and appellate counsel in capital cases that the Florida Supreme Court has found is too low for “virtually every capital case,” but which nonetheless could potentially be imposed in these cases. Similarly, although each circuit compensates appointed private attorneys by the hour, in some circuits, the rates vary for in-court and out-of-court work. Lastly, apart from court-appointed appellate attorneys, private attorneys are not entitled to periodic billing.

#### Attorneys Appointed Through a Competitive Bidding Process

In circuits that use a competitive bidding process to appoint counsel in cases of a conflict of interest, Indigent Services Committees appear to offer contracts that include a number of different capital cases for a specified amount of money. The contracts that we were able to obtain include a number of capital cases for a specific lump-sum of money, which averaged out to approximately \$20,880 to \$48,500 per case per year.<sup>421</sup> We note that these contracts provide for the lump-sum to be paid out in monthly increments, but the practice of offering lump-sum contracts in capital cases, regardless of how the money is distributed, is not in compliance with the requirements of Recommendation #4.

#### Capital Collateral Regional Counsel

Similar to public defenders and assistant public defenders, regional counsel and assistant regional counsel are salaried employees. Full-time assistant regional counsel earn between \$45,000 and \$85,000 a year.<sup>422</sup> It is unclear, however, whether these salaries are commensurate with the salaries of attorneys handling capital collateral cases at the Capital Appeals Bureau of the Office of the Statewide Prosecutor.

We note also that as with assistant public defenders, there appears to be a high turnover rate with assistant regional counsel, which indicates that the salaries may not be sufficient to employ experienced capital collateral counsel. In Fiscal Year 2004-2005, the turnover rate for assistant regional counsel in CCRC-Middle and CCRC-South was 16 percent.<sup>423</sup>

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<sup>420</sup> Fla. Stat. § 27.5304(8) (2006).

<sup>421</sup> See *supra* note 183 and accompanying text.

<sup>422</sup> E-mail from Neal Dupree, Capital Collateral Regional Counsel for CCRC-South (April 13, 2006) (on file with author); see also Susan Spencer-Wendel, *Cuts to Death Row Appeals Office Ripped*, PALM BEACH POST, June 2, 2003 (noting that CCRC attorneys’ salaries range from \$40,000 to more than \$100,000).

<sup>423</sup> CAPITAL COLLATERAL REGIONAL COUNSEL, MIDDLE AND SOUTHERN REGIONS, LONG-RANGE PROGRAM PLAN FY 2006-07 THROUGH 2010-11 (2005), at <http://www.justiceadmin.org/ccrc/CCRC-M%20CCRC-S/CCRC-LRPP-A.pdf> (last visited on Aug. 4, 2006).

## Capital Collateral Registry Attorneys

Florida law requires that capital collateral registry attorneys be paid hourly at a rate of \$100 and periodically upon the completion of certain duties, but limits the total compensation to \$84,000 (or 840 hours at \$100/hour).<sup>424</sup> The Spangenberg Group<sup>425</sup> estimates that on average 3,300 “attorney hours” are required to take a case from denial of *certiorari* by the United States Supreme Court after direct appeal to the Florida Supreme Court to denial of *certiorari* from state post-conviction proceedings, which is far above the 840 hours at \$100 per hour provided by Florida law.<sup>426</sup>

Due to this discrepancy, the statutory cap has been challenged on a number of occasions. Most notable is *Olive v. Maas*,<sup>427</sup> in which the Florida Supreme Court rejected the claim that the registry system did not adequately compensate attorneys, noting that under “extraordinary or unusual circumstances,” capital collateral registry attorneys can be compensated in excess of the statutory caps.<sup>428</sup> However, following the *Olive* decision, the Florida Legislature adopted section 27.7002 of the Florida Statutes prohibiting the use of state funds for compensation of appointed registry attorneys in excess of the statutorily prescribed amounts<sup>429</sup> and authorizing the Executive Director of the Commission on Capital Cases to permanently remove from the registry any attorney who seeks compensation above the statutorily prescribed amounts.<sup>430</sup> The constitutionality of this prohibition and sanction was challenged, and the Circuit Court of the Second Judicial Circuit found that, in order for the statute to be constitutional, it must be construed to (1) allow the use of state funds to compensate registry attorneys in excess of the statutory maximums, and (2) prohibit the Executive Director from removing attorneys who seek compensation above the statutory maximums from the registry.<sup>431</sup> The Circuit Court’s order, however, has been appealed.

Due to the statutory prohibition against using state funds for compensation in excess of the cap, and the fact that attorneys may be sanctioned for requesting compensation above the statutory cap even in extraordinary or unusual circumstances, it is unclear whether additional compensation will in fact be available to all attorneys in extraordinary or unusual cases.

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<sup>424</sup> See *supra* notes 229-232 and accompanying text.

<sup>425</sup> The Spangenberg Group is a nationally recognized research and consulting firm specializing in improving justice programs. See Spangenberg Group, Introduction, at <http://www.spangenberggroup.com/> (last visited on August 14, 2006). Members of The Spangenberg Group have achieved recognition as the country’s leading experts on the delivery of indigent defense services. See Spangenberg Group, Overview, at <http://www.spangenberggroup.com/over.html> (last visited on August 14, 2006).

<sup>426</sup> SPANGENBERG GROUP, AMENDED TIME & EXPENSE ANALYSIS OF POST-CONVICTION CAPITAL CASES IN FLORIDA 16 (1998); *A Privatization Failure*, ST. PETERSBURG TIMES, Jan. 31, 2005; Leonard Post, *A Fight Over Limits on Pay, Hours, Florida Faces a Suit from a Death Penalty Lawyer*, NAT’L L. J., March 31, 2003.

<sup>427</sup> 811 So. 2d 644 (Fla. 2002).

<sup>428</sup> See *supra* notes 236-237 and accompanying text.

<sup>429</sup> FLA. STAT. § 27.7002(5) (2006).

<sup>430</sup> FLA. STAT. § 27.7002(6) (2006).

<sup>431</sup> *Olive v. Maas*, 911 So. 2d 837, 839 (Fla. 1st DCA 2005); *Olive v. Maas*, 03-CA-291 (Fla. Cir. Ct. 2d Jud. Cir. March 23, 2006).

## Federal Habeas Corpus Counsel and Clemency Counsel

Attorneys appointed for federal habeas corpus proceedings are entitled to compensation at a rate of not more than \$125 per hour for both in-court and out-of-court work.<sup>432</sup>

In cases in which the court appoints a public defender to represent an indigent death-sentenced inmate during clemency proceedings, issues relating to the amount of compensation may not be as compelling when compared to private attorneys, as public defenders are salaried employees.<sup>433</sup> In practice, recent trends suggest that there is less reliance today upon public defenders for these purposes than in the past. Rather, private attorneys are now commonly appointed in these cases.

Florida law provides that private attorneys appointed by the court may be compensated for both “fees and costs” associated with representing a death-sentenced inmate in clemency proceedings, but the attorney’s fees may not exceed \$1,000.<sup>434</sup> The Florida Supreme Court has found that this \$1,000 limit may be exceeded “when necessary to ensure effective representation.”<sup>435</sup> Although the State of Florida permits the fee cap for clemency cases to be exceeded, attorneys appointed to handle these cases typically are not compensated for their services until the final disposition of the case.<sup>436</sup> The only exception appears to be if the attorney has been providing legal services in the matter for more than one year, then the court may approve payment of not more than 80 percent of the fees earned, or costs and related expenses incurred, to date, or an amount proportionate to the maximum fees permitted based on legal services provided to date.<sup>437</sup>

- c. Non-attorney members of the defense team should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the specialized skills needed by those who assist counsel with the litigation of death penalty cases.**
  - i. Investigators employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor’s office in the jurisdiction.**
  - ii. Mitigation specialists and experts employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale for comparable expert services in the private sector.**
  - iii. Members of the defense team assisting private counsel should be fully compensated for actual time and service performed at an**

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<sup>432</sup> 18 U.S.C. § 3599(g)(1) (2006).

<sup>433</sup> See, e.g., FLA. STAT. § 27.5301 (2006) (nothing that the salaries of public defenders shall be as provided in the General Appropriations Act and shall be paid in equal monthly installments).

<sup>434</sup> FLA. STAT. § 27.5304(3)(b) (2006).

<sup>435</sup> Remeta v. State, 559 So. 2d 1132, 1135 (Fla. 1990) (holding that “courts have the authority to exceed statutory fee caps to compensate court-appointed counsel for the representation of indigent, death-sentenced prisoners in executive clemency proceedings when necessary to ensure effective representation”); State v. Peek, 441 So. 2d 158, 159 (Fla. 2d DCA 1983) (noting that the legislature intended that during clemency proceedings the attorney should be paid reasonable costs in addition to a reasonable fee for services).

<sup>436</sup> FLA. STAT. § 27.5304(2) (2006).

<sup>437</sup> *Id.*

**hourly rate commensurate with prevailing rates paid by retained counsel in the jurisdiction for similar services, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.**

### Public Defenders' Offices

All of the public defenders' offices are authorized to hire investigators and appear to have access to funds for expert witnesses. The salaries of these investigators, however, are unknown. Thus, it is impossible to assess whether the salaries are commensurate with the salary scale of the state attorney's office. Similarly, the rates paid to expert witnesses hired by the public defenders' offices are unknown.

### Court-Appointed Registry Attorneys

Attorneys appointed by the court to represent a capital defendant are entitled to funds for the compensation of investigators and other expert witnesses. The compensation for investigators and other expert witnesses differs among the circuits based on the hourly rate and/or case maximum established by each circuit's Indigent Services Committees. In most circuits, investigators are paid an hourly rate, ranging from \$30 to \$100, without any differentiation between in and out-of-court work.<sup>438</sup> In fact, only one circuit appears to have established a different rate for in and out-of-court work of investigators.<sup>439</sup> However, for the in and out-of-court work of other mental health experts, such as medical doctors, psychologists, and forensic experts, the majority of the Indigent Services Committees have established different rates, which vary from circuit to circuit.<sup>440</sup>

Additionally, given that court-appointed attorneys are not generally compensated until the final disposition of the case, it does not appear that periodic billing is available for these experts,<sup>441</sup> unless the attorney personally covers the fees.

### Capital Collateral Regional Counsel Offices

Similar to the public defenders, each regional counsel is authorized to hire investigators, but the salaries of these investigators are unknown.

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<sup>438</sup> See Indigent Services Fees and Expenses, In the Circuit Court of the Seventh Judicial Circuit of the State of Florida, Admin. Order 2006-009, at Addendum D (Jan. 27, 2006); Rates Adopted by Indigent Services Committee for Due Process Services Within the Twentieth Judicial Circuit (Feb. 13, 2006).

<sup>439</sup> Eleventh Judicial Circuit, Attachment "A", at [http://jud11.flcourts.org/what%27s\\_new/AttachmentA.pdf](http://jud11.flcourts.org/what%27s_new/AttachmentA.pdf) (last visited on Aug. 4, 2006).

<sup>440</sup> See, e.g., Amended Resolution of the Article V Indigent Services Committee for the Ninth Judicial Circuit Governing the Appointment & Compensation of Private Court-Appointed Attorneys & Related Costs in Indigent Cases, the Ninth Judicial Circuit of Florida, ISC Resolution No. ISC-04, available at [http://www.justiceadmin.org/court\\_app\\_counsel/ao/09-circuit/9TH%20CIRCUIT%20RESOLUTION%20-%20ISC%20-%2004.pdf](http://www.justiceadmin.org/court_app_counsel/ao/09-circuit/9TH%20CIRCUIT%20RESOLUTION%20-%20ISC%20-%2004.pdf) (last visited on Aug. 4, 2006); Fees and Expenses for Due Process Services, In the Thirteenth Judicial Circuit Court for Hillsborough County, Florida, Admin. Order S-2005-158 (Dec. 19, 2005).

<sup>441</sup> FLA. STAT. § 27.5304(2) (2006).

### Capital Collateral Registry Attorneys

Florida law states that capital collateral registry attorneys are entitled to funds for investigators and miscellaneous expenses, which includes compensation for experts. Upon court approval, these attorneys are entitled to \$40 per hour, up to a maximum of \$15,000, for investigative services.<sup>442</sup> Similarly, although there is not an hourly rate for experts, the total compensation for all “miscellaneous expenses,” which includes expert witnesses, is limited to \$15,000.<sup>443</sup> The statutory cap for “miscellaneous expenses” may be exceeded, however, if the court finds that “extraordinary circumstances” exist.<sup>444</sup>

Lastly, given that capital collateral registry counsel are entitled to periodic billing, it is possible that the investigators and experts retained by these attorneys are entitled to it as well.

### Federal Habeas Corpus Counsel and Clemency Counsel

In federal habeas corpus proceedings, the court may authorize the appointed attorneys to obtain investigative, expert, or other services as are reasonably necessary for representation.<sup>445</sup> The fees and expenses paid for these services may not exceed \$7,500 in any case, unless the court authorizes payment in excess of the limit.<sup>446</sup>

In cases in which the court appoints a public defender to represent an indigent death-sentenced inmate during clemency proceedings, presumably s/he has some degree of access to experts and/or investigators to prepare for the clemency proceedings.<sup>447</sup> Recent trends suggest that there is less reliance today upon public defenders for these purposes than has been the case in the past. Rather, private counsel are commonly appointed in these cases, but Florida law does not appear to specifically provide funds for investigators or experts to these attorneys. However, the Florida Department of Corrections may provide limited funding for investigators or experts, but it is incumbent upon clemency counsel to seek authorization from the Director of Clemency Administration.

#### **d. Additional compensation should be provided in unusually protracted or extraordinary cases.**

In unusually protracted or extraordinary cases in which a public defender or a capital collateral regional counsel is providing representation, the issue of additional compensation is technically not a concern as these attorneys are salaried employees. In cases in which a court-appointed attorney is providing representation, regardless of whether it is at trial, on appeal, or during capital collateral proceedings, the Florida Supreme Court has found that these attorneys may be provided with compensation in

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<sup>442</sup> FLA. STAT. § 27.711(5) (2006).

<sup>443</sup> FLA. STAT. § 27.711(6) (2006).

<sup>444</sup> *Id.*

<sup>445</sup> 18 U.S.C. § 3599(f) (2006).

<sup>446</sup> 18 U.S.C. § 3599(g)(2) (2006).

<sup>447</sup> *See, e.g.*, FLA. STAT. § 27.53(1) (2006).

excess of the statutory cap in “extraordinary or unusual cases.”<sup>448</sup> However, as discussed earlier, the Florida Legislature recently adopted section 27.7002 of the Florida Statutes, restricting capital collateral registry attorneys from seeking and receiving funds in excess of the statutory caps, even in extraordinary or unusual cases.<sup>449</sup> Although the Circuit Court of the Second Judicial Circuit found that in order for the statute to be constitutional, it must be construed to allow the use of state funds to compensate these attorneys in excess of the statutory maximums and to prohibit the Executive Director from removing attorneys who seek compensation above the statutory maximums from the registry,<sup>450</sup> the Circuit Court’s order has since been appealed. Thus, it is unclear whether additional compensation will in fact be available to all attorneys in extraordinary or unusual cases.

**e. Counsel and members of the defense team should be fully reimbursed for reasonable incidental expenses.**

The issue of compensation for reasonable incidental expenses is not technically an issue in cases where a public defender or a capital collateral regional counsel is providing representation, as these attorneys are salaried employees and their offices are provided by the state with resources for funding the costs associated with defending capital cases.

In cases where a private attorney is appointed at trial or on direct appeal to represent a defendant charged with a capital offense, the attorney is entitled to compensation by the state for “reasonable and necessary expenses,” which include but are not limited to: court reporting and transcription fees; reasonable transportation and travel expenses;<sup>451</sup> and “reasonable pretrial consultation fees and costs.”<sup>452</sup> Similarly, in cases where a private attorney is appointed to represent a death-sentenced inmate during capital collateral proceedings, the attorney is entitled to compensation of up to \$15,000 for “miscellaneous expenses,” which include but are not limited to fees for experts and costs of preparing transcripts and copying documents.<sup>453</sup> This statutory cap may be exceeded, however, if the court finds that “extraordinary circumstances” exist.<sup>454</sup>

Conclusion

In conclusion, it appears that the State of Florida provides funding for at least some of the costs associated with providing legal representation for capital defendants at trial, on appeal, and during capital collateral and clemency proceedings. However, in at least some instances, it does not appear that attorneys handling death penalty cases are being

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<sup>448</sup> See *supra* notes 152-153, 236 and accompanying text.

<sup>449</sup> FLA. STAT. § 27.7002 (2006).

<sup>450</sup> *Olive v. Maas*, 911 So. 2d 837, 839 (Fla. 1st DCA 2005); *Olive v. Maas*, 03-CA-291 (Fla. Cir. Ct. 2d Jud. Cir. March 23, 2006).

<sup>451</sup> FLA. STAT. § 27.5304(1) (2006); FLA. STAT. § 29.007 (2006). Mileage, for example, is reimbursed at .29 cents per mile or at the common carrier fare for such travel, as determined by the agency head. See 2006 Fla. Law ch. 1 (amending FLA. STAT. § 112.061).

<sup>452</sup> FLA. STAT. § 29.007 (2006).

<sup>453</sup> FLA. STAT. § 27.711(6) (2006).

<sup>454</sup> *Id.*

fully compensated at a rate that is commensurate with the provision of high quality legal representation. In fact, not only are some of these attorneys being paid through lump-sum contracts, but also other attorneys' compensation is subject to a statutory cap, only to be exceeded in "extraordinary or unusual cases." Given the statutory prohibitions against the use of state funds for payments in excess of the fee caps for capital collateral registry attorneys and the possibility of sanctions against those attorneys who seek compensation in excess of the caps and the status of the order of the Circuit Court for the Second Judicial Circuit finding these restrictions unconstitutional, it is unclear whether these attorneys will receive compensation in excess of the statutory cap, even in "extraordinary or unusual cases." Therefore, the State of Florida is only in partial compliance with Recommendation #4.

Based on this information, the Florida Death Penalty Assessment Team makes the following recommendations: (1) The State of Florida should take steps to ensure that all conflict trial counsel in death penalty cases are properly compensated. Specifically, the State of Florida should (a) eliminate the statutory fee cap, thus giving judges the discretion to determine on a case-by-case basis the appropriate amount of compensation, and (b) allow greater flexibility for obtaining interim payments for services; and (2) The State of Florida should adopt compensation standards for capital collateral registry attorneys that are consistent with the ABA Guidelines.

*E. Recommendation #5*

**Training (Guideline 8.1 of the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases)**

The Florida Bar requires all attorneys to take thirty hours of continuing legal education every three years. In addition to this requirement, the Florida Rules of Criminal Procedure and the Florida Statutes require public defenders and private-court appointed trial attorneys handling death penalty cases, as well as capital collateral registry attorneys—but not capital collateral regional counsel—to take additional training devoted to the death penalty.

- a. The jurisdiction should provide funds for the effective training, professional development, and continuing education of all members of the defense team.**

The State of Florida provides funding for the training, professional development, and continuing education of some, but not all, members of the defense team. The Commission on Capital Cases, created by the Florida Legislature, annually offers both in-person and on-line continuing legal education (CLE) courses for attorneys litigating capital cases.<sup>455</sup> These courses, however, do not appear to offer training for investigators or other members of the defense team.

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<sup>455</sup> Florida Legislature, Commission on Capital Cases, Home Page, available at <http://www.floridacapitalcases.state.fl.us/> (last visited on Aug. 4, 2006) (including an advertisement for a seminar on mental retardation and the death penalty); Florida Legislature, Commission on Capital Cases,

In addition to funding courses on capital defense, the State of Florida provides attorneys who are “actively representing a capital defendant” with funds for these courses.<sup>456</sup> Specifically, these attorneys are entitled to a maximum of \$500 per fiscal year for tuition and expenses for continuing legal education that pertains to the representation of capital defendants.<sup>457</sup>

- b. Attorneys seeking to qualify to receive appointments should be required to satisfactorily complete a comprehensive training program, approved by the independent appointing authority, in the defense of capital cases. Such a program should include, but not be limited to, presentations and training in the following areas:**
- i. relevant state, federal, and international law;**
  - ii. pleading and motion practice;**
  - iii. pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty;**
  - iv. jury selection;**
  - v. trial preparation and presentation, including the use of experts;**
  - vi. ethical considerations particular to capital defense representation;**
  - vii. preservation of the record and of issues for post-conviction review;**
  - viii. counsel’s relationship with the client and his family;**
  - ix. post-conviction litigation in state and federal courts;**
  - x. the presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science;**
  - xi. the unique issues relating to the defense of those charged with committing capital offenses when under the age of 18.**

Apart from the general CLE requirements mandated by The Florida Bar for all attorneys, the additional training required of attorneys seeking appointment to death penalty cases differs depending upon at which point in the proceedings the attorney is providing the representation. Rule 3.112 of the Florida Rules of Criminal Procedure applies only to attorneys handling death penalty cases at trial or on direct appeal and contains a general training requirement of twelve hours of “capital defense training” within two years prior to appointment.<sup>458</sup> Rule 3.112 does not specify what the “capital defense training” should include, such as presentations or training on any of the issues listed above. Therefore, although training on “capital defense” certainly could include presentations and training on all of the issues listed above, attorneys are not necessarily required to take training that covers all of these issues.

Similarly, it does not appear that there are any detailed training requirements for either capital collateral regional counsel or capital collateral registry attorneys. Rather, in order for an attorney to be placed on the capital collateral registry, s/he must have attended a continuing legal education program of at least ten hours duration on the “defense of

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Continuing Legal Education, *available at* <http://www.floridacapitalcases.state.fl.us/c-cle.cfm> (last visited on Aug. 4, 2006) (including online seminars from 2004 and 2005).

<sup>456</sup> FLA. STAT. § 27.711(7) (2006).

<sup>457</sup> *Id.*

<sup>458</sup> FLA. R. CRIM. P. 3.112(f)(7), (g)(2)(E), (h)(6).

capital cases” within the last year.<sup>459</sup> However, training devoted to the “defense of capital cases” does not necessarily have to include training on all of the issues listed above.

- c. Attorneys seeking to remain on the roster or appointment roster should be required to attend and successfully complete, at least once every two years, a specialized training program approved by the independent appointing authority that focuses on the defense of death penalty cases.**

All attorneys seeking appointment to a death penalty case at trial, on direct appeal, or during capital collateral proceedings are required to take a specialized training program on the defense of death penalty cases at least once every two years. Specifically, trial and appellate attorneys are required to take twelve hours of this training within the last two years of his/her appointment and capital collateral registry attorneys are required to take at least ten hours of this training within the last year.<sup>460</sup>

- d. The jurisdiction should insure that all non-attorneys wishing to be eligible to participate on defense teams receive continuing professional education appropriate to their areas of expertise.**

As indicated above, we were unable to find any information indicating that the State of Florida provides continuing professional education to all non-attorneys wishing to be a part of the defense team.

### Conclusion

In conclusion, the State of Florida provides funding for the training, professional development, and continuing legal education for some, but not all, members of the defense team. Additionally, although the State of Florida requires attorneys in most cases to undergo some training, the training may not cover all of the topics included in Recommendation #5. Therefore, the State of Florida is only in partial compliance with Recommendation #5.

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<sup>459</sup> FLA. STAT. § 27.710(1) (2006).

<sup>460</sup> FLA. R. CRIM. P. 3.112(f)(7), (g)(2)(E), (h)(6); FLA. STAT. § 27.710(1) (2006).

## CHAPTER SEVEN

### DIRECT APPEAL PROCESS

#### INTRODUCTION TO THE ISSUE

Every death-row inmate must be afforded at least one level of judicial review. This process of judicial review is called the direct appeal. As the United States Supreme Court stated in *Barefoot v. Estelle*, “[d]irect appeal is the primary avenue for review of a conviction of sentence, and death penalty cases are no exception.” The direct appeal process in capital cases is designed to correct any errors in the trial court’s findings of fact and law and to determine whether the trial court’s actions during the guilt/innocence and penalty phases of the trial were unlawful, excessively severe, or an abuse of discretion.

One of the best ways to ensure that the direct appeal process works as it is intended is through meaningful comparative proportionality review. Comparative proportionality review is the process through which a sentence of death is compared with sentences imposed on similarly situated defendants to ensure that the sentence is not disproportionate. Meaningful comparative proportionality review helps to (1) ensure that the death penalty is being administered in a rational, non-arbitrary manner, (2) provide a check on broad prosecutorial discretion, and (3) prevent discrimination from playing a role in the capital decision-making process.

Comparative proportionality review is the most effective method of protecting against arbitrariness in capital sentencing. In most capital cases, juries determine the sentence, yet they are not equipped and do not have the information necessary to evaluate the propriety of that sentence in light of the sentences in similar cases. In the relatively small number of cases in which the trial judge determines the sentence, proportionality review still is important, as the judge may be unaware of statewide sentencing practices or be affected by public or political pressure. Regardless of who determines the sentence, dissimilar results are virtually ensured without the equalizing force of proportionality review.

Simply stating that a particular death sentence is proportional is not enough, however. Proportionality review should not only cite previous decisions, but should analyze their similarities and differences and the appropriateness of the death sentence. In addition, proportionality review should include cases in which a death sentence was imposed, cases in which the death penalty was sought but not imposed, and cases in which the death penalty could have been sought but was not.

Because of the role that meaningful comparative proportionality review can play in eliminating arbitrary and excessive death sentences, states that do not engage in the review, or that do so only superficially, substantially increase the risk that their capital punishment systems will function in an arbitrary and discriminatory manner.

## I. FACTUAL DISCUSSION

To initiate an appeal in the Florida Supreme Court, the appellant or his/her counsel must file a notice of appeal with the lower court within thirty days of the rendition of the order imposing death.<sup>1</sup> During the appeal process, counsel for both the appellant<sup>2</sup> and the state will have the opportunity to file appellate briefs<sup>3</sup> and make oral arguments before the Florida Supreme Court.<sup>4</sup> The Florida Supreme Court will review the enumerations of error,<sup>5</sup> the sufficiency of the evidence used to convict the defendant,<sup>6</sup> and the proportionality of the appellant's death sentence.<sup>7</sup> In fact, the Court is required to review the sufficiency of the evidence<sup>8</sup> and the proportionality of the appellant's death sentence even if such issues are not presented for review.<sup>9</sup>

### A. Proportionality Review of the Appellant's Death Sentence

The Florida Supreme Court has interpreted the Florida Constitution to impose "an absolute obligation" on the Court to determine whether death is a proportionate penalty.<sup>10</sup> The Florida Supreme Court's proportionality review entails considering "the totality of the circumstances" in a case as compared to other cases in which the death penalty has been imposed.<sup>11</sup> When comparing these cases, the Court must not compare the number

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<sup>1</sup> FLA. R. APP. P. 9.140(b)(3) (stating that "the defendant shall file the notice [of appeal] prescribed by rule 9.110(d) with the clerk of the lower tribunal at any time between the rendition of a final judgment and 30 days following rendition of a written order imposing sentence"); *see also* FLA. R. APP. P. 9.030(a)(1)(A)(i) (referencing FLA. R. APP. P. 9.140).

<sup>2</sup> FLA. STAT. § 27.5303(4)(a) (2006) (stating that "[i]f the defendant is convicted and the death sentence is imposed, the appointed attorney shall continue representation through appeal to the Supreme Court"); *see also* *Davis v. State*, 789 So. 2d 978, 981 (Fla. 2001) (stating that "in Florida there is no state constitutional right to proceed pro se in direct appeals in capital cases").

<sup>3</sup> FLA. R. APP. P. 9.142(a)(2). The appellant must file his/her brief within sixty days of the date the record is filed; the state then has forty-five days from the date the appellant's brief is served to file its answer brief; and then the appellant will have another thirty days from the date the state's brief is served to serve his/her reply brief. *Id.*

<sup>4</sup> FLA. R. APP. P. 9.142(a)(4). Oral arguments must be scheduled after the filing of the appellant's reply brief. *Id.*

<sup>5</sup> FLA. STAT. § 924.051(3) (2006).

<sup>6</sup> FLA. STAT. § 921.141(4) (2006); FLA. R. APP. P. 9.142(a)(6).

<sup>7</sup> FLA. STAT. § 921.141(4) (2006); FLA. R. APP. P. 9.142(a)(6).

<sup>8</sup> FLA. STAT. § 921.141(4) (2006); FLA. R. APP. P. 9.142(a)(6); *Taylor v. State*, 855 So. 2d 1, 14 (Fla. 2003); *Sexton v. State*, 775 So. 2d 923, 933-34 (Fla. 2000).

<sup>9</sup> FLA. STAT. § 921.141(4) (2006); FLA. R. APP. P. 9.142(a)(6).

<sup>10</sup> *Farr v. State*, 656 So. 2d 448, 450 (Fla. 1995). As to the source of the Florida Supreme Court's obligation to ensure that the death penalty is administered proportionally, the Florida Supreme Court has stated that such obligation "has a variety of sources in Florida law, including the Florida Constitution's express prohibition against unusual punishments. Art. I, § 17, Fla. Const. . . . Moreover, proportionality review in death cases rests at least in part on the recognition that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties. Art. I, § 9, Fla. Const." *See Bell v. State*, 841 So. 2d 329, 337 (Fla. 2002).

<sup>11</sup> *Crook v. State*, 908 So. 2d 350, 356 (Fla. 2005) (citing *Slincy v. State*, 699 So. 2d 662, 672 (Fla. 1997), in which the Court limited its proportionality review to cases in which the death penalty was imposed); *Anderson v. State*, 863 So. 2d 169, 187-88 (Fla. 2003) (stating that "this Court considers the totality of the circumstances in a case as compared to other cases in which the death penalty has been imposed"); *Urbin v. State*, 714 So. 2d 411, 417 (Fla. 1998). *See also State v. Dixon*, 283 So. 2d 1, 10 (Fla.

of aggravating and mitigating circumstances; rather, it must perform a “qualitative review . . . of the underlying basis for each aggravator and mitigator.”<sup>12</sup> The Court must also determine “whether the crime falls within the category of *both*: (1) the most aggravated, and (2) the least mitigated murders.”<sup>13</sup>

In cases involving multiple co-participants or co-defendants, however, the Florida Supreme Court “performs an additional analysis guided by the principle that ‘equally culpable co-defendants should be treated alike in capital sentencing and receive equal punishment.’”<sup>14</sup> Specifically, in conducting its proportionality review in these cases, the Court compares the death sentence under review with the sentences of other equally culpable co-participants or co-defendants.<sup>15</sup>

### *B. Types of Reviewable Trial Errors*

In addition to its automatic review of the sufficiency of the evidence and the proportionality of the appellant’s death sentence, the Florida Supreme Court will also consider the following types of trial error on direct appeal from a capital conviction and sentence of death: (1) trial errors properly preserved at trial and properly raised on appeal; and (2) fundamental error.

#### 1. Trial Errors Properly Preserved in the Circuit Court and Timely Raised and/or Argued in the Florida Supreme Court

Trial errors that are properly preserved at trial—i.e., through a contemporaneous objection—and which are presented to the Florida Supreme Court in the appellant’s brief will be reviewed by the Court under the harmless error test. Even when the Florida Supreme Court finds error, it may find the error harmless under the circumstances unless prejudice is found.<sup>16</sup> Once an error has been found, the prosecution can prove that the defendant was not prejudiced by the error and avoid reversal on direct appeal by demonstrating, “beyond a reasonable doubt,” that the error did not contribute to the verdict or sentence.<sup>17</sup>

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1973) (articulating the Florida Supreme Court’s proportionality review standard as: “If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great,” which is clearly not explicitly limited to cases in which death has been imposed).

<sup>12</sup> *Urbin*, 714 So. 2d at 416; *Tillman v. State*, 591 So. 2d 167, 169 (Fla. 1991).

<sup>13</sup> *Crook v. State*, 908 So. 2d 350, 357 (Fla. 2005) (citing *Almeida v. State*, 748 So. 2d 922, 933 (Fla. 1999)); *see also* *Cooper v. State*, 739 So. 2d 82, 85 (Fla. 1999).

<sup>14</sup> *Brooks v. State*, 918 So.2d 181, 208 (Fla. 2005).

<sup>15</sup> *Puccio v. State*, 701 So. 2d 858, 863 (Fla. 1997); *see also* *Shere v. Moore*, 830 So. 2d 56, 64-66 (Fla. 2002); *Hertz v. State*, 803 So. 2d 629, 653-54 (Fla. 2001); *Hazen v. State*, 700 So. 2d 1207 (Fla. 1997).

<sup>16</sup> *Johnson v. State*, 460 So. 2d 954, 958 (Fla. 5th DCA 1984). Fundamental error can never be found harmless. *Id.*

<sup>17</sup> *Willis v. State*, 840 So. 2d 1135, 1137-38 (Fla. 4th DCA 2003) (citing *Goodwin v. State*, 751 So. 2d 537, 546 (Fla.1999)).

## 2. Fundamental Error

When the defendant does not properly preserve trial court error for appeal or fails to timely raise that error on appeal, s/he waives that ground on appeal, unless the trial court error rises to the level of “fundamental error.”<sup>18</sup> Fundamental error is an “error [that] reach[es] down into the validity of the trial itself to the extent that a verdict of guilty [or sentence of death] could not have been obtained without the assistance of the alleged error.”<sup>19</sup>

Fundamental error can be raised at any time.<sup>20</sup> In death penalty cases, fundamental error is primarily asserted as a means to overcome a procedural default of an unpreserved trial error that the defendant raises on direct appeal.<sup>21</sup>

### *C. Disposition of Appeal in the Florida Supreme Court*

Following the review of the death sentence and any enumerations of error, the Florida Supreme Court must render a judgment within two years of the filing of the notice of appeal.<sup>22</sup> The Court’s judgment may affirm the trial court’s decision or remand the case to the trial court for a new guilt/innocence and/or penalty phase, or remand the case to the trial court with directions for a judgment of acquittal or to reduce the sentence to life.

### *D. Discretionary Review by the United States Supreme Court*

If the Florida Supreme Court affirms the appellant’s conviction and sentence, the appellant has ninety days after the decision is entered to file a petition for a writ of *certiorari* with the United States Supreme Court, seeking discretionary review of the Florida Supreme Court’s decision affirming the appellant’s conviction and sentence.<sup>23</sup> The United States Supreme Court may either deny or accept the appellant’s case for review.<sup>24</sup> If the United States Supreme Court accepts the case, the Court may affirm the conviction and the sentence, affirm the conviction and overturn the sentence, or overturn both the conviction and sentence.<sup>25</sup>

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<sup>18</sup> FLA. STAT. § 924.051(3) (Fla. 2006).

<sup>19</sup> *Miller v. State*, 926 So. 2d 1243, 1261 (Fla. 2006) (citing *Brooks v. State*, 762 So. 2d 879, 898 (Fla. 2000)). For instance, improper comments made in the closing arguments of a sentencing phase of a death penalty case only constitute fundamental error when they are so prejudicial as to taint the jury’s sentencing recommendation. *Id.*

<sup>20</sup> *Moore v. State*, 924 So. 2d 840, 841 (Fla. 4th DCA 2006).

<sup>21</sup> *Brooks v. State*, 762 So. 2d 879, 898-99 (Fla. 2000).

<sup>22</sup> FLA. STAT. § 921.141(4) (2006).

<sup>23</sup> 28 U.S.C. § 1257 (2006); SUP. CT. R. 13.

<sup>24</sup> SUP. CT. R. 16.

<sup>25</sup> 28 U.S.C. § 2106 (2006).

## II. ANALYSIS

### A. Recommendation #1

**In order to (1) ensure that the death penalty is being administered in a rational, non-arbitrary manner, (2) provide a check on broad prosecutorial discretion, and (3) prevent discrimination from playing a role in the capital decision making process, direct appeals courts should engage in meaningful proportionality review that includes cases in which a death sentence was imposed, cases in which the death penalty was sought but not imposed, and cases in which the death penalty could have been sought but was not.**

The Florida Supreme Court has interpreted the Florida Constitution to impose on the Court the obligation to perform a proportionality review in all cases in which the death penalty is imposed. In performing this review, the Florida Supreme Court limits its review to cases in which the death penalty was actually imposed, examining only those cases on which it has already performed a proportionality review.<sup>26</sup> In cases involving multiple co-participants or co-defendants, however, the Court conducts an additional analysis whereby it compares the death sentence under review with the sentences imposed on the co-participants or co-defendants, including sentences other than death.<sup>27</sup> If the Court determines that two or more co-defendants have equal criminal culpability, one of those defendants may not receive a death sentence while the others are given a sentence of life in prison.<sup>28</sup>

Until recently, Florida's comparative proportionality review of death sentences appeared to be more meaningful than that of other jurisdictions; the Florida Supreme Court reversed thirty-seven death sentences on proportionality grounds between 1989 and 2003.<sup>29</sup> However, a recent study of 272 death sentences reviewed for proportionality by the Florida Supreme Court between January 1, 1989 and December 31, 2003 demonstrated that since 1999, the Court has been much less likely to declare a death sentence disproportionate.<sup>30</sup> Specifically, the study found that the Florida Supreme Court's average rate of vacating death sentences significantly decreased from 20 percent for the 1989-1999 time period to 4 percent for the 2000-2003 time period.<sup>31</sup>

The study concluded that this drop-off resulted from the Florida Supreme Court's failure to undertake comparative proportionality review in the "meaningful and vigorous

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<sup>26</sup> Crook v. State, 908 So. 2d 350, 356 (Fla. 2005) (citing Sliney v. State, 699 So. 2d 662, 672 (Fla. 1997), in which the Court limited its proportionality review to cases in which the death penalty was imposed); Anderson v. State, 863 So. 2d 169, 187-88 (Fla. 2003) (stating that "this Court considers the totality of the circumstances in a case as compared to other cases in which the death penalty has been imposed"); Urbin v. State, 714 So. 2d 411, 417 (Fla. 1998).

<sup>27</sup> See Brooks v. State, 918 So.2d 181, 208 (Fla. 2005); Puccio v. State, 701 So. 2d 858, 863 (Fla. 1997).

<sup>28</sup> Puccio, 701 So. 2d at 863.

<sup>29</sup> Phillip L. Durham, *Review in Name Alone: The Rise and Fall of Comparative Proportionality Review of Capital Sentences by the Supreme Court of Florida*, 17 ST. THOMAS L. REV. 299, 311 (2004).

<sup>30</sup> *Id.* at 314-18.

<sup>31</sup> *Id.* at 318-20.

manner” it did between 1989 and 1999.<sup>32</sup> Two explanations for this apparent inconsistency are advanced. First, the political pressure from the executive and legislative branches regarding the disposition of death penalty appeals and the changing composition of the Court appear to have caused the court to engage in a less vigorous proportionality review and, in turn, vacate fewer death sentences on proportionality grounds.<sup>33</sup> Second, the Court affirmed death sentences in cases with low levels of aggravation and high levels of mitigation—cases with the lowest level of criminal culpability—at a much higher rate in 2000-2003 than it did in 1989-1999.<sup>34</sup>

It also appears that, since 1999, the Florida Supreme Court is no longer holding true to its own rule that proportionality review should be a “qualitative review . . . of the underlying basis for each aggravator and mitigator” and not simply a comparison between the number of aggravating and mitigating circumstances.<sup>35</sup> Because the Court uses a “precedent-seeking” or “comparative culpability” approach in its proportionality review, which limits its review only to cases in which a death sentence has been imposed, the Court must determine what “level of aggravation is sufficiently low” and what “level of mitigation is sufficiently high to raise concerns of arbitrariness.”<sup>36</sup> This determination suggests some consideration of the number of aggravating and mitigating circumstances contained in the case,<sup>37</sup> undermining the Court’s assertion that their review is qualitative, rather than quantitative.

Given that the Florida Supreme Court, in performing its proportionality review, generally only reviews cases in which a death sentence has been imposed and only expands that review to cases where the death penalty was not imposed when multiple defendants or participants are involved, the State of Florida only partially complies with Recommendation #1.

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<sup>32</sup> *Id.* at 349.

<sup>33</sup> *Id.* at 343-48. See also David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411, 1463 (2004). In their article, Baldus & Woodworth specifically stated:

In the early 1990s, the Florida Supreme Court, a highly visible institution, especially with respect to its death penalty jurisprudence, developed a meaningful system of comparative proportionality review that relied on a rich and transparent database with well reasoned opinions . . . . [D]uring the 1990s, the court vacated 19% (32/170) of the death cases it reviewed on [the proportionality] issue . . . . However, the practice was scaled back dramatically in 2000 after the Florida court came under severe political attack from the Governor and the Republican-controlled legislature for allegedly slowing unreasonably the pace of the executions in state. The 19% vacation rate on the proportionality issue in the 1990s dropped to 3% (3/97) between 2000 and 2003. The message from the experience of the Florida court is clear. Whatever a court’s commitment to selective and consistent death sentencing may be, top-down, highly visible, and aggressive review practices may carry distinct political risks.

*Id.*

<sup>34</sup> Durham, *supra* note 29, at 320-39, 340-43.

<sup>35</sup> *Urbin v. State*, 714 So. 2d 411, 416 (Fla. 1998); *Tillman v. State*, 591 So. 2d 167, 169 (Fla. 1991).

<sup>36</sup> Durham, *supra* note 29, at 313.

<sup>37</sup> *Id.*

## CHAPTER EIGHT

### STATE POST-CONVICTION PROCEEDINGS

#### INTRODUCTION TO THE ISSUE

The availability of state post-conviction and federal habeas corpus relief through collateral review of state court judgments long has been an integral part of the capital punishment process. Very significant percentages of capital convictions and death sentences have been set aside in such proceedings as a result of ineffective assistance of counsel claims; claims made possible by the discovery of crucial new evidence; claims based upon prosecutorial misconduct; claims based on unconstitutional racial discrimination in jury selection; and other meritorious constitutional claims.

The importance of such collateral review to the fair administration of justice in capital cases cannot be overstated. Because many capital defendants receive inadequate counsel at trial and on direct appeal, and it is often not possible until after direct appeal to uncover prosecutorial misconduct or other crucial evidence, state post-conviction proceedings often provide the first real opportunity to establish meritorious constitutional claims. Due to doctrines of exhaustion and procedural default, such claims, no matter how valid, must almost always be presented first to the state courts before they may be considered in federal habeas corpus proceedings.

Securing relief on meritorious federal constitutional claims in state post-conviction proceedings or federal habeas corpus proceedings has become increasingly difficult in recent years because of more restrictive state procedural rules and practices and more stringent federal standards and time limits for review of state court judgments. Among the latter are: a one-year statute of limitations on bringing federal habeas proceedings; tight restrictions on evidentiary hearings with respect to facts not presented in state court (no matter how great the justification for the omission) unless there is a convincing claim of innocence; and a requirement in some circumstances that federal courts defer to state court rulings that the Constitution has not been violated, even if the federal courts conclude that the rulings are erroneous.

In addition, United States Supreme Court decisions and the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) have greatly limited the ability of a death-row inmate to return to federal court a second time. Another factor limiting grants of federal habeas corpus relief is the more frequent invocation of the harmless error doctrine; under recent decisions, prosecutors no longer are required to show in federal habeas that the error was harmless beyond a reasonable doubt in order to defeat meritorious constitutional claims.

Changes permitting or requiring courts to decline consideration of valid constitutional claims, as well as the federal government's de-funding of resource centers for federal habeas proceedings in capital cases, have been justified as necessary to discourage

frivolous claims in federal courts. In fact, however, a principal effect of these changes has been to prevent death-row inmates from having valid claims heard or reviewed at all.

State courts and legislatures could alleviate some of the unfairness these developments have created by making it easier to get state court rulings on the merits of valid claims of harmful constitutional error. The numerous rounds of judicial proceedings do not mean that *any* court, state or federal, ever rules on the merits of the inmate's claims—even when compelling new evidence of innocence comes to light shortly before an execution. Under current collateral review procedures, a “full and fair judicial review” often does not include reviewing the merits of the inmate's constitutional claims.

## I. FACTUAL DISCUSSION

### A. *Overview of State Post-Conviction Proceedings*

Rule 3.851 of the Florida Rules of Criminal Procedure governs all state post-conviction proceedings initiated by death-row inmates challenging a conviction and/or death sentence.<sup>1</sup>

#### 1. Appointment of Post-Conviction Counsel and Preliminary Procedures

Upon the judgment of conviction and sentence of death becoming final on direct appeal, the Florida Supreme Court must appoint the appropriate office of the Capital Collateral Regional Counsel (CCRC) to represent the inmate during post-conviction proceedings.<sup>2</sup> If all regional counsels have a conflict of interest and the post-conviction judge accepts their motion to withdraw or the inmate was convicted and sentenced to death in the Northern Region of Florida (which no longer has a CCRC office), the chief judge of the circuit court or an assigned judge must appoint an attorney from the statewide registry to represent the inmate in post-conviction proceedings.<sup>3</sup>

Within thirty days of the judgment of conviction and sentence of death being affirmed on direct appeal, the chief judge must assign the case to a post-conviction judge.<sup>4</sup> Within ninety days of the assignment, the assigned judge must hold a status hearing and hold status conferences at least every ninety days thereafter until the evidentiary hearing, if held, has been completed or the motion has been ruled on without a hearing.<sup>5</sup> At the status hearing and conferences, the judge will entertain pending motions, disputes involving public records, or any other matters ordered by the court.<sup>6</sup> The inmate's presence is generally not required at any status hearing or conference.<sup>7</sup>

Within forty-five days of appointment of post-conviction counsel, the inmate's trial counsel must provide post-conviction counsel with all information pertaining to the inmate's capital case and post-conviction counsel must maintain the confidentiality of all confidential information received.<sup>8</sup>

#### 2. Time Limits for Filing a Motion for Post-Conviction Relief

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<sup>1</sup> FLA. R. CRIM. P. 3.851(a).

<sup>2</sup> FLA. R. CRIM. P. 3.851(b)(1).

<sup>3</sup> FLA. R. CRIM. P. 3.851(b)(2),(3); FLA. STAT. §§ 27.701(2), 27.703(1), 27.710(5)(a) (2006).

<sup>4</sup> FLA. R. CRIM. P. 3.851(c)(1).

<sup>5</sup> FLA. R. CRIM. P. 3.851(c)(2).

<sup>6</sup> *Id.*

<sup>7</sup> FLA. R. CRIM. P. 3.851(c)(3). However, the inmate must be present at the evidentiary hearing on the merits of any claim and at any hearing involving conflict with or removal of collateral counsel. *Id.*

<sup>8</sup> FLA. R. CRIM. P. 3.851(c)(4).

Any person sentenced to death whose judgment of conviction and sentence have been affirmed on direct appeal may file a rule 3.851 motion seeking post-conviction relief.<sup>9</sup> The motion must be made under oath.<sup>10</sup>

The death-row inmate must file his/her rule 3.851 motion within one year after his/her judgment and sentence become final.<sup>11</sup> A judgment and sentence become final:

- (1) on the expiration of the time permitted to file in the United States Supreme Court a petition for writ of *certiorari* seeking review of the Florida Supreme Court's decision affirming the inmate's judgment and sentence of death (ninety days after the opinion becomes final); or
- (2) on the disposition of the petition for writ of *certiorari* by the United States Supreme Court, if filed.<sup>12</sup>

The Florida Supreme Court may grant an extension of time for the filing of a post-conviction motion pursuant to rule 3.851 if the inmate's counsel can demonstrate good cause as to why counsel could not file the motion within the one-year time limit.<sup>13</sup>

Timely filed motions may be amended or supplemented outside of the one-year time limit.<sup>14</sup> To accomplish this, the movant must file a motion to amend no later than thirty days before the evidentiary hearing, including in the motion the reasons additional claims were not raised upon the initial filing and attaching to the motion the claims sought to be added.<sup>15</sup>

### 3. Types of Claims Properly Raised in a Post-Conviction Motion

A rule 3.851 motion may allege any claim for post-conviction relief from a judgment of conviction or sentence.<sup>16</sup>

#### a. Claims of Ineffective Assistance of Counsel

##### i. Ineffective Assistance of Trial Counsel

Claims of ineffective assistance of trial counsel, which represent the bulk of claims brought during post-conviction proceedings, are cognizable in a rule 3.851 motion to present a valid reason for failing to properly preserve a trial error for appeal through a

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<sup>9</sup> FLA. R. CRIM. P. 3.851(a).

<sup>10</sup> FLA. R. CRIM. P. 3.851(e)(1).

<sup>11</sup> FLA. R. CRIM. P. 3.851(d)(1).

<sup>12</sup> FLA. R. CRIM. P. 3.851(d)(1)(A), (B).

<sup>13</sup> FLA. R. CRIM. P. 3.851(d)(5).

<sup>14</sup> FLA. R. CRIM. P. 3.851(d)(4).

<sup>15</sup> FLA. R. CRIM. P. 3.851(f)(4).

<sup>16</sup> FLA. R. CRIM. P. 3.851(a).

contemporaneous objection.<sup>17</sup> However, claims previously raised on direct appeal will not be heard on a motion for post-conviction relief simply because those claims are raised under the guise of ineffective assistance of counsel.<sup>18</sup> Additionally, claims of ineffective assistance of counsel may not be “used to circumvent the rule that post-conviction proceedings cannot serve as a second appeal” of claims that could have been but were not raised on direct appeal.<sup>19</sup>

In order to make a legally sufficient claim of ineffective assistance of trial counsel, the movant first must show deficient performance by demonstrating that his/her counsel’s performance “fell below an objective standard of reasonableness” to such a degree that, by making such serious errors, counsel was “not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.”<sup>20</sup> The movant next must demonstrate the prejudicial effect of that deficient performance by alleging that a reasonable probability exists that, but for counsel’s deficient performance, the result of the proceeding would have been different.<sup>21</sup>

## ii. Ineffective Assistance of Appellate Counsel

Claims of ineffective assistance of appellate counsel may not be made in a rule 3.851 motion and are properly raised in a petition for writ of habeas corpus filed in “the court that heard the [inmate’s] direct appeal”—the Florida Supreme Court in a death case.<sup>22</sup> Such habeas petition is generally filed when a post-conviction movant is appealing the denial of his/her rule 3.851 motion to the Florida Supreme Court. The standard applied to these claims parallels the standard applied to claims involving the effectiveness of trial counsel as set forth above.<sup>23</sup>

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<sup>17</sup> See *Serici v. State*, 469 So. 2d 119, 120 (Fla. 1985); *Johnson v. State*, 888 So. 2d 122, 125 (Fla. 4th DCA 2004) (citing *Jackson v. State*, 711 So. 2d 1371, 1372 (Fla. 4th DCA 1998)) (holding that such claims were cognizable in rule 3.850, the predecessor to rule 3.851).

<sup>18</sup> *Serici*, 469 So. 2d at 120.

<sup>19</sup> *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990) (citing *Blanco v. Wainwright*, 507 So. 2d 1377 (Fla. 1987)).

<sup>20</sup> *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

<sup>21</sup> *Id.* at 694. A “reasonable probability” is a probability sufficient to undermine the confidence in the outcome of the proceeding. *Id.*

<sup>22</sup> *Nixon v. State*, 2006 WL 1027135, \*10 (Fla. Apr. 20, 2006) (citing *Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000)). Rule 3.851 (and its predecessor rule 3.850) are outgrowths of the writ of habeas corpus. While habeas corpus is no longer the proper method of challenging the validity of one’s conviction and sentence, habeas corpus can be used to challenge, among other things, unlawful detention after arrest and before one’s conviction and sentence become final, and the validity of involuntary civil commitment.

<sup>23</sup> *Nixon*, 2006 WL 1027135, at \*10. If a legal issue “would in all probability have been found to be without merit” had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel’s performance ineffective. *Williamson v. Dugger*, 651 So. 2d 84, 86 (Fla. 1994) (citing *Thomas v. Wainwright*, 474 So. 2d 1162, 1163 (Fla. 1985)). This is generally true as to issues that would have been found to be procedurally barred had they been raised on direct appeal, such as those that were not properly preserved by trial counsel through a contemporaneous objection at trial. *Miller v. State*, 926 So. 2d 1243, 1261 (Fla. 2006). The sole exception to this rule is when the unpreserved trial error not raised by appellate counsel is deemed to be fundamental error. *Id.* (citing *Brooks v. State*, 762 So. 2d 879, 898 (Fla. 2000)). Fundamental error is an error that “reach[es] down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained

### iii. Ineffective Assistance of Post-Conviction Counsel

Although capital post-conviction litigants in Florida have a right to counsel, they do not have a state or federal constitutional right to assert a claim of ineffective assistance of state post-conviction counsel.<sup>24</sup> Thus, a claim that post-conviction counsel was ineffective is not a valid basis for relief in a successive rule 3.851 post-conviction motion.<sup>25</sup>

#### b. Claims of Institutional Discrimination

The Florida Supreme Court has found that claims arguing that the death penalty is imposed in an arbitrary and capricious manner based on racial discrimination should be raised in a motion for post-conviction relief.<sup>26</sup>

### 4. Requirements for and Procedures Specific to an “Initial Motion”

#### a. Pleading Requirements

When the state court has not previously ruled on a post-conviction motion challenging the same judgment and sentence, a post-conviction motion then-filed is deemed an “initial motion.”<sup>27</sup> An initial motion must include:

- (1) a statement specifying the judgment and sentence under attack and the name of the court that rendered the judgment and sentence;
- (2) a statement of each issue raised on appeal and the disposition of each issue;
- (3) the nature of the relief sought;
- (4) a detailed allegation of the factual basis for any claim for which an evidentiary hearing is sought; and
- (5) a detailed allegation as to the basis for any purely legal or constitutional claims for which an evidentiary hearing is not required and the reason that these claims could not have been or were not raised on direct appeal.<sup>28</sup>

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without the assistance of the alleged error.” Kilgore v. State, 688 So. 2d 895, 898 (Fla. 1996) (quoting State v. Delva, 575 So. 2d 643, 644-45 (Fla. 1991)).

<sup>24</sup> Zack v. State, 911 So. 2d 1190, 1203 (Fla. 2005).

<sup>25</sup> *Id.* (citing Lambrix v. State, 698 So. 2d 247, 248 (Fla. 1996)).

<sup>26</sup> Stewart v. Wainwright, 494 So. 2d 489, 490 (Fla. 1986); *see also* Henry v. State, 377 So. 2d 692, 692-93 (Fla. 1979); Smith v. State, 457 So. 2d 1380, 1381 (Fla. 1984) (stating that “[t]he claim that the death sentence was the product of racially discriminatory sentencing practices is in theory one that can be raised [during post-conviction proceedings]”); Griffin v. Wainwright, 760 F.2d 1505 (11th Cir. 1985) (finding that “Griffin’s claim of unconstitutional application of the death penalty [based on the race of the victim] was properly placed before the state courts in Griffin’s petition for post-conviction relief”). *But see* Ruthann Robson & Michael Mello, *Ariadne’s Provisions: A ‘Clue of Thread’ to the Intricacies of Procedural Default, Adequate and Independent State Grounds, And Florida’s Death Penalty*, 76 CAL. L. REV. 87, 139 (1988) (citing Stone v. State, 481 So. 2d 478 (Fla. 1985) and Booker v. State, 441 So. 2d 148 (Fla. 1983), and stating that the Florida Supreme Court has found similar claims to be procedurally barred for not being raised on direct appeal).

<sup>27</sup> FLA. R. CRIM. P. 3.851(e)(1).

The movant must also attach to the motion a memorandum of law setting forth the relevant case law supporting relief on each asserted claim.<sup>29</sup> The memorandum of law must also state why claims that should have or could have been raised on direct appeal are being raised for the first time in the post-conviction motion.<sup>30</sup>

The court may strike an initial motion that fails to comply with the above content requirements of rule 3.851, but it is an abuse of discretion to do so without also allowing the movant leave to amend the motion within a reasonable time, i.e., ten to thirty days.<sup>31</sup>

#### b. Post-Conviction Discovery and the Evidentiary Hearing

Within ninety days after the state files its answer to an initial post-conviction motion, the court must hold a case management conference, at which time both parties must “disclose all documentary exhibits that they intend to offer at the evidentiary hearing, provide an exhibit list of all such exhibits, and exchange a witness list with the names and addresses of any potential witnesses.”<sup>32</sup> At this conference, the court must also:

- (1) schedule an evidentiary hearing, to be held within ninety days, on claims asserted by the movant which require a factual determination;
- (2) hear argument on purely legal claims not based on disputed facts;<sup>33</sup> and
- (3) resolve any discovery disputes.<sup>34</sup>

The court, upon a showing of good cause by either party, may extend the time for holding an evidentiary hearing on the initial motion for up to ninety days.<sup>35</sup>

### 5. Requirements for and Procedures Specific to “Successive Motions”

#### a. Pleading Requirements

When the state court has previously ruled on a post-conviction motion challenging the same judgment and sentence, a post-conviction motion filed thereafter is deemed a

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<sup>28</sup> FLA. R. CRIM. P. 3.851(e)(1)(A)-(E).

<sup>29</sup> FLA. R. CRIM. P. 3.851(e)(1).

<sup>30</sup> *Id.*

<sup>31</sup> *See* Bryant v. State, 901 So. 2d 810, 819 (Fla. 2005).

<sup>32</sup> FLA. R. CRIM. P. 3.851(f)(5)(A). The list of potential witnesses must include expert witnesses and the parties must attach reports of any potential expert witnesses to the list. *Id.*

<sup>33</sup> The Florida Supreme Court has stated that “[b]ecause of the severity of punishment at issue in a death penalty post[-]conviction case, . . . the judge must allow the attorneys the opportunity to appear before the court and be heard on an initial [post-conviction] motion.” Huff v. State, 622 So. 2d 982, 983 (Fla. 1993). The Court cautioned that this “hearing” is not the equivalent of an evidentiary hearing, nor does it require the judge to conduct an evidentiary hearing in all death penalty post-conviction cases. *Id.* Instead, the hearing before the judge is for the purpose of determining whether an evidentiary hearing is required and to hear legal argument relating to the motion. *Id.*

<sup>34</sup> FLA. R. CRIM. P. 3.851(f)(5)(A)(i)-(iii).

<sup>35</sup> FLA. R. CRIM. P. 3.851(f)(5)(C).

“successive motion.”<sup>36</sup> In addition to the contents required for an initial motion,<sup>37</sup> a successive rule 3.851 motion must include:

- (1) the disposition of all previous claims raised in post-conviction proceedings and the reason(s) the claims in the present motion were not raised in the former motion(s); and
- (2) the following, if the claims are based on newly discovered evidence:
  - (a) the names, addresses, and telephone numbers of all witnesses supporting the claim;
  - (b) a statement that the witness will be available to testify under oath to the facts alleged in the motion, should an evidentiary hearing be held on that issue;
  - (c) if evidentiary support is in the form of documents, copies of relevant documents and affidavits must be attached to the motion; and
  - (d) as to any witness or document in the motion or attachment to the motion, an explanation as to why the witness or document was not previously available.<sup>38</sup>

#### b. Evidentiary Hearing

No later than thirty days after the state files its answer to a successive post-conviction motion, the court must hold a case management conference, at which the court must also determine whether an evidentiary hearing should be held and hear arguments on any purely legal claims not based on disputed facts.<sup>39</sup> If the motion, as well as the files and records<sup>40</sup> in the case, conclusively demonstrate that the movant is not entitled to relief, the court may deny the successive motion without an evidentiary hearing.<sup>41</sup> If, however, the court determines that an evidentiary hearing should be held, the hearing should be scheduled and held within sixty days of that decision.<sup>42</sup>

The court, upon a showing of good cause by either party, may extend the time for holding an evidentiary hearing on the successive motion for up to ninety days.<sup>43</sup>

### 6. Decisions on Motions for Post-Conviction Relief

#### a. Disposition of a Motion or Particular Claims Without an Evidentiary Hearing

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<sup>36</sup> FLA. R. CRIM. P. 3.851(e)(2).

<sup>37</sup> FLA. R. CRIM. P. 3.851(e)(2)(A).

<sup>38</sup> FLA. R. CRIM. P. 3.851(e)(2)(B), (C).

<sup>39</sup> FLA. R. CRIM. P. 3.851(f)(5)(B).

<sup>40</sup> This refers to the court files and the record on appeal.

<sup>41</sup> FLA. R. CRIM. P. 3.851(f)(5)(B).

<sup>42</sup> *Id.*

<sup>43</sup> FLA. R. CRIM. P. 3.851(f)(5)(C).

The court may dispose of any post-conviction motion or any particular post-conviction claims within that motion, without holding an evidentiary hearing, where “(1) the motion, files and records in the case conclusively show that [s/he] is not entitled to any relief, or (2) the motion or a particular claim is legally insufficient.”<sup>44</sup> The movant must support his/her motion with specific factual allegations;<sup>45</sup> conclusory allegations will not justify an evidentiary hearing.<sup>46</sup>

Additionally, the court may dismiss successive motions without an evidentiary hearing where (1) the movant does not provide a reason for failing to raise the successive claims in his/her previous rule 3.851 motion;<sup>47</sup> or (2) the motion raises claims that have already been asserted and adjudicated on the merits in a previous rule 3.851 proceeding.<sup>48</sup>

#### b. Decisions on Rule 3.851 Motions after an Evidentiary Hearing

When an evidentiary hearing is held in post-conviction proceedings under rule 3.851, the court must immediately request a transcript of the hearing at its conclusion.<sup>49</sup> Within thirty days after receiving the transcript, the court must render its order, including:

- (1) a ruling on each claim considered at the evidentiary hearing and all other claims asserted in the motion;
- (2) detailed findings of fact and conclusions of law with respect to each claim; and
- (3) attached or referenced portions of the record as are necessary for meaningful appellate review.<sup>50</sup>

#### 7. Motion for Rehearing and Appealing Decisions on Post-Conviction Motions

A motion for rehearing may be filed with the post-conviction court within fifteen days of the rendition of its order on the post-conviction motion and the court must render an order disposing of the motion for rehearing within fifteen days.<sup>51</sup>

The movant may appeal the decision of the post-conviction court to the Florida Supreme Court within thirty days from the date the court rendered its order on the post-conviction motion.<sup>52</sup> If the Florida Supreme Court affirms the lower court’s decision, the movant

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<sup>44</sup> Johnson v. State, 904 So. 2d 400, 403 (Fla. 2005).

<sup>45</sup> *Id.* at 404 (citing Thompson v. State, 759 So. 2d 650, 659 (Fla. 2000)).

<sup>46</sup> *Id.* (citing Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989)).

<sup>47</sup> See, e.g., Hill v. State, 921 So. 2d 579, 584 (Fla. 2006) (holding that the movant’s successive claim alleging that he was mentally retarded and, therefore, could not be executed pursuant to *Atkins v. Virginia*, 536 U.S.304 (2002), was procedurally barred because the movant gave no reason why the claim could not have been raised in his 2003 Rule 3.851 motion, which was filed after the issuance of the *Atkins* decision).

<sup>48</sup> See, e.g., Johnson v. State, 904 So. 2d 400, 412 (Fla. 2005) (rejecting the movant’s successive claim that lethal injection constitutes cruel and unusual punishment because it was raised and rejected in the movant’s previous post-conviction proceeding).

<sup>49</sup> FLA. R. CRIM. P. 3.851(f)(5)(D).

<sup>50</sup> *Id.*

<sup>51</sup> FLA. R. CRIM. P. 3.851(f)(7).

<sup>52</sup> FLA. R. APP. P. 9.110(b), 9.140(b)(1)(D), (b)(3).

may file a petition for a writ of *certiorari* with the United States Supreme Court.<sup>53</sup> If the United States Supreme Court declines review or affirms the lower's court decision, the state post-conviction appeal is complete.

8. Special Procedures for Rule 3.851 Motions Filed When Inmate Is Under a Signed Death Warrant

In cases in which the Governor signs a death warrant prior to the one-year filing deadline, Rule 3.851 explicitly requires the Florida Supreme Court, on the movant's request, to grant a stay of execution to allow post-conviction motions to proceed in a timely and orderly manner.<sup>54</sup> In practice, however, this requirement is unnecessary because the Governor has agreed that, absent the circumstance where a competent death-sentenced individual voluntarily requests that a death warrant be signed, no death warrants will be issued during the initial round of federal and state review, provided that counsel for the death penalty movant is proceeding in a timely and diligent manner.<sup>55</sup>

Once the one-year filing deadline has passed and after the initial round of state and federal collateral review is over, the Governor may then sign a death warrant, at which point any subsequently-filed post-conviction motions, initial or successive, will be subject to the following expedited procedures. The chief judge of the circuit court is required to assign the case to a judge as soon as s/he receives notification of the death warrant.<sup>56</sup> Proceedings after a death warrant has been issued are required to take precedence over all other cases.<sup>57</sup> The normal time limitations in rule 3.851 do not apply after a death warrant has been signed; instead, all motions must be heard expeditiously considering the time limitations set by the execution date and the time required for appellate review.<sup>58</sup>

The assigned judge must schedule a case management conference as soon as reasonably possible after receiving notification that a death warrant has been signed.<sup>59</sup> At the conference, the court will set a deadline for the filing of a rule 3.851 post-conviction motion, schedule a hearing to determine whether an evidentiary hearing should be held, and hear arguments on any purely legal claims not based on disputed facts.<sup>60</sup>

All rule 3.851 motions for post-conviction relief filed after a death warrant is issued are considered successive motions and must comply with the content requirements for successive rule 3.851 motions.<sup>61</sup> If the motion, files, and records in the case conclusively show that the movant is not entitled to relief, the motion may be denied without an

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<sup>53</sup> 28 U.S.C. § 1257 (2004).

<sup>54</sup> FLA. R. CRIM. P. 3.851(d)(4).

<sup>55</sup> FLA. R. CRIM. P. 3.851 cmt.

<sup>56</sup> FLA. R. CRIM. P. 3.851(h)(1).

<sup>57</sup> FLA. R. CRIM. P. 3.851(h)(2).

<sup>58</sup> FLA. R. CRIM. P. 3.851(h)(3).

<sup>59</sup> FLA. R. CRIM. P. 3.851(h)(6).

<sup>60</sup> *Id.*

<sup>61</sup> FLA. R. CRIM. P. 3.851(h)(4); *see also* FLA. R. CRIM. P. 3.851(e)(2)(A)-(C).

evidentiary hearing.<sup>62</sup> If, however, the trial court determines that an evidentiary hearing should be held, it must hold the evidentiary hearing and have transcriptions of that evidentiary hearing completed<sup>63</sup> as soon as reasonably possible considering the time limitations set by the date of execution and the time required for appellate review.<sup>64</sup>

After the evidentiary hearing is completed, the court must immediately obtain a transcript of all proceedings and, as soon as possible after the hearing is concluded, render its order.<sup>65</sup> A copy of the final order<sup>66</sup> must be immediately electronically transmitted to the Florida Supreme Court and to the attorneys of record;<sup>67</sup> the record must also be sent to the Florida Supreme Court—electronically, where possible.<sup>68</sup>

### *B. Procedural Restrictions on Post-Conviction Motions*

A motion filed after the one-year time limit will not be entertained unless the movant alleges that:

- (1) the facts on which the claim is predicated were not known to the movant or his/her attorney and could not have been ascertained within the one-year time limit by the exercise of due diligence;
- (2) the fundamental constitutional right asserted was not established within the one year time limit and has been held to apply retroactively; or
- (3) his/her post-conviction counsel, through neglect, failed to file the motion.<sup>69</sup>

A movant will also be precluded from relief on a post-conviction claim: (1) which was raised on appeal and adjudicated on the merits;<sup>70</sup> or (2) which could have been but was not raised at trial<sup>71</sup> or on appeal.<sup>72</sup>

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<sup>62</sup> FLA. R. CRIM. P. 3.851(h)(6).

<sup>63</sup> FLA. R. CRIM. P. 3.851(h)(7).

<sup>64</sup> FLA. R. CRIM. P. 3.851(h)(6).

<sup>65</sup> FLA. R. CRIM. P. 3.851(h)(8).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> FLA. R. CRIM. P. 3.851(h)(9). The filing of a notice of appeal is not required to transmit the record. *Id.*

<sup>69</sup> FLA. R. CRIM. P. 3.851(d)(2)(A)-(C).

<sup>70</sup> *See, e.g.*, Mungin v. State, 932 So. 2d 986, 997 (Fla. 2006).

<sup>71</sup> *See, e.g.*, Washington v. State, 907 So. 2d 512, 514 (Fla. 2005).

<sup>72</sup> *See, e.g.*, Bryant v. State, 901 So. 2d 810, 821 (Fla. 2005) (holding that the claim that certain statements made to police were coerced was procedurally barred because it could have been, but was not, raised on appeal). The following cases illustrate the types of claims that have been procedurally barred in post-conviction proceedings because the claim could have, but was not raised, on direct appeal: *Rose v. State*, 675 So. 2d 567 (Fla. 1996) (alleged *Miranda* violation; use of false and misleading testimony); *Brady* violation; proceedings conducted outside defendant's presence); *Marquard v. State*, 850 So. 2d 417 (Fla. 2002) (comments by prosecutor and trial judge which diminished jury's role in sentencing; vague and overbroad jury instructions); *Cole v. State*, 841 So. 2d 409 (Fla. 2003) (reliance on non-statutory aggravating factor; instruction improperly shifted burden to defendant to prove mitigating circumstances); *Thomas v. State*, 838 So. 2d 535 (Fla. 2003) (invalid waiver of right to appeal guilt phase issues); *Sochor v. State*, 883 So. 2d 766 (Fla. 2004) (claim that juror-attorney contact rules are unconstitutional); *Schwab v. State*, 814 So. 2d 402 (Fla. 2002) (invalid jury waiver; judicial bias); *Arbelaez v. State*, 775 So. 2d 909

The court will treat a subsequent rule 3.851 motion as successive if a movant has previously filed a post-conviction motion that challenged the same judgment and sentence as in the instant post-conviction motion.<sup>73</sup> A movant may not relitigate the same or similar claims in a successive rule 3.851 motion if the claims have already been litigated and decided against him/her in a previous post-conviction motion.<sup>74</sup> A movant also generally is not entitled to relief on claims that could have been raised in his/her first or earlier motion. Specifically, the court will deny a successive rule 3.851 motion raising successive claims not raised in the initial or earlier motion, unless the movant provides reason(s) why the claims were not raised in the former motion.<sup>75</sup>

### 1. Newly Discovered Evidence Exception to a Procedural Bar

Rule 3.851 allows for newly discovered evidence claims to be alleged in a post-conviction motion as a means to overcome the one-year time limitation and the bar to successive motions.<sup>76</sup> However, in order for evidence to be “newly discovered,” the movant must demonstrate that:

- (1) the asserted facts “must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that movant or his[her] counsel could not have known them by the use of diligence;”<sup>77</sup> and
- (2) “the newly discovered evidence must be of such nature that it would *probably* produce an acquittal on retrial.”<sup>78</sup>

### 2. Fundamental Error Exception to Procedural Bars

In addition to the aforementioned exceptions, Florida law allows a litigant to overcome a valid procedural bar by claiming that the alleged error constitutes “fundamental error.” In order for an error to be fundamental and justify consideration—despite being otherwise barred—“the error must reach down into the validity of the trial itself to the extent that a verdict of guilty [or sentence of death] could not have been obtained without the assistance of the alleged error.”<sup>79</sup> For instance, improper comments made in the

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(Fla. 2000) (inability to interview jurors); *Valdes v. State*, 728 So. 2d 736 (Fla. 1999) (variance from indictment).

<sup>73</sup> FLA. R. CRIM. P. 3.851(e)(2).

<sup>74</sup> *See, e.g., Johnson v. State*, 904 So. 2d 400, 412 (Fla. 2005) (rejecting movant’s successive claim that lethal injection constitutes cruel and unusual punishment because it was raised and rejected in the movant’s previous post-conviction proceeding).

<sup>75</sup> FLA. R. CRIM. P. 3.851(e)(2)(B). *See, e.g., Hill v. State*, 921 So. 2d 579, 584 (Fla. 2006) (holding that the movant’s successive claim alleging that he was mentally retarded and, therefore, could not be executed pursuant to *Atkins v. Virginia*, 536 U.S.304 (2002), was procedurally barred because the movant gave no reason why the claim could not have been raised in his 2003 Rule 3.851 motion, which was filed after the issuance of the *Atkins* decision).

<sup>76</sup> FLA. R. CRIM. P. 3.851(e)(2)(C).

<sup>77</sup> *Scott v. Dugger*, 604 So. 2d 465, 468 (Fla. 1992); *see also Miller v. State*, 926 So. 2d 1243, 1258 (Fla. 2006).

<sup>78</sup> *Scott*, 604 So. 2d at 468.

<sup>79</sup> *Miller*, 926 So. 2d at 1261.

closing arguments of the penalty phase only constitute fundamental error when they are so prejudicial as to taint the jury's sentencing recommendation.<sup>80</sup>

Fundamental error can be raised at any time,<sup>81</sup> including to collaterally attack a conviction or sentence in post-conviction proceedings.<sup>82</sup> In death penalty cases, fundamental error is primarily asserted as a means to overcome a procedural default of an unpreserved trial error that the defendant asserts on direct appeal.<sup>83</sup> It is also used to make a valid claim of ineffective assistance of appellate counsel for failure to raise a trial error on appeal that was not properly preserved during trial.<sup>84</sup>

### C. Review of Error

The standard of review for a constitutional error during state post-conviction proceedings depends on the actual constitutional error asserted. If the defendant asserts a *Giglio*<sup>85</sup> claim, based on the prosecutor's presentation of false evidence at trial, the state must prove that its presentation of the evidence was "harmless beyond a reasonable doubt."<sup>86</sup> In other words, the state must establish beyond a reasonable doubt that its use of false evidence "did not affect the verdict."<sup>87</sup>

However, if the defendant raises a claim of ineffective assistance of counsel, the burden rests with the defendant to "show a reasonable probability" that counsel's deficient performance affected the outcome of the proceeding.<sup>88</sup> Similarly, in asserting a *Brady*<sup>89</sup> violation—wherein the state fails to disclose favorable evidence—the burden again rests with the defendant to show "a reasonable probability" that disclosure of the evidence would have affected the outcome of the proceeding.<sup>90</sup>

### D. Retroactivity of Rules

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<sup>80</sup> *Id.* Fundamental error can never be found harmless. *Johnson v. State*, 460 So. 2d 954, 958 (Fla. 5th DCA 1984).

<sup>81</sup> *Moore v. State*, 924 So. 2d 840, 841 (Fla. 4th DCA 2006).

<sup>82</sup> *Johnson*, 460 So. 2d at 958.

<sup>83</sup> *Brooks v. State*, 762 So. 2d 879, 899 (Fla. 2000).

<sup>84</sup> *See Peterka v. State*, 890 So. 2d 219, 243-44 (Fla. 2004).

<sup>85</sup> *Giglio v. United States*, 405 US 150 (1972).

<sup>86</sup> *Guzman v. Florida*, 868 So. 2d 498, 506 (Fla. 2003); *Guzman v. Florida*, No. SC04-2016, 2006 WL 1766765, at \*4-5 (Fla. Sup. Ct. June 29, 2006). In *Guzman*, the Florida Supreme Court reiterated that the State must prove that a *Giglio* violation was harmless beyond a reasonable doubt. In order for this harmless error standard to be met, the State must establish that "there is no reasonable possibility that the error contributed to the conviction." Still, the Court asserted that this standard is the same as the one utilized in *Chapman* and that the "dispositive question is whether the State has established beyond a reasonable doubt that [the *Giglio* violation] did not affect the verdict." Additionally, to avoid confusion among the varying standards for constitutional claims, the *Guzman* Court adopted the use of the term "reasonable possibility" in place of the term "reasonable likelihood," which had been previously employed in deciding whether a *Giglio* violation was harmless. *Id.* at \*4-5.

<sup>87</sup> *Guzman v. Florida*, No. SC04-2016, 2006 WL 1766765, at \*5 (Fla. Sup. Ct. June 29, 2006).

<sup>88</sup> *Hendrix v. State*, 908 So. 2d 412, 419 (Fla. 2005); *Guzman*, 868 So. 2d at 506 n. 9.

<sup>89</sup> *Brady vs. Maryland*, 373 U.S. 83 (1963).

<sup>90</sup> *Guzman*, 2006 WL 1766765, at \*4.

Generally, a new constitutional rule may only apply to those cases on direct appeal, and would not apply to those cases in which the conviction and sentence have become final before the new rule is announced, i.e. post-conviction cases.<sup>91</sup>

In deciding whether a new rule should apply retroactively in a rule 3.851 post-conviction proceeding, the court balances two important considerations: (1) the finality of decisions; and (2) the fairness and uniformity of the court system.<sup>92</sup> Despite the fact that the United States Supreme Court adopted a new retroactivity test in *Teague v. Lane*,<sup>93</sup> Florida still abides by the old *Linkletter/Stovall*<sup>94</sup> retroactivity test.<sup>95</sup> Under this test, a new rule of law will not apply retroactively in a post-conviction proceeding unless the new rule: (1) emanates from the Florida Supreme Court or the United States Supreme Court; (2) is constitutional in nature; and (3) constitutes a development of fundamental significance.<sup>96</sup>

A new rule is a development of “fundamental significance” when it either places “beyond the authority of the state the power to regulate certain conduct or impose certain penalties,” or when the rule is “of sufficient magnitude to necessitate retroactive application”<sup>97</sup> by considering: (1) the purpose to be served by the new rule;(2) the extent of reliance on the old rule; and (3) the effect on the administration of justice of a retroactive application of the new rule.<sup>98</sup>

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<sup>91</sup> *Teague v. Lane*, 489 U.S. 288, 310 (1989).

<sup>92</sup> *Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980).

<sup>93</sup> *Teague*, 489 U.S. at 313 (holding that new constitutional rules are not retroactively applied in collateral post-conviction proceedings unless (1) the new rule places certain kinds of conduct beyond the power of the criminal law-making authority to proscribe; or (2) the new rule is a “‘watershed’ rule of criminal procedure that requires the observation of procedures that are implicit in the concept of ordered liberty and whose non-application would seriously diminish the likelihood of an accurate conviction”).

<sup>94</sup> *Linkletter v. Walker*, 381 U.S. 618 (1965); *Stovall v. Denno*, 388 U.S. 293 (1967).

<sup>95</sup> *Witt*, 387 So. 2d at 931. Interestingly, Justice Cantero, with the support of Justices Bell and Wells, has recently stated in a concurring opinion that the Florida Supreme Court should discontinue its use of the *Linkletter/Stovall* test announced in *Witt*, in favor of the *Teague* test for retroactivity. See *Windom v. State*, 886 So. 2d 915, 941-45 (Fla. 2004) (Cantero, J., concurring).

<sup>96</sup> *Witt*, 387 So. 2d at 931.

<sup>97</sup> *Id.* at 929.

<sup>98</sup> *Id.* at 926 (citing to *Stovall*, 388 U.S. at 293; *Linkletter*, 381 U.S. at 618).

## II. ANALYSIS

### A. Recommendation #1

**All post-conviction proceedings at the trial court level should be conducted in a manner designed to permit adequate development and judicial consideration of all claims. Trial courts should not expedite post-conviction proceedings unfairly; if necessary, courts should stay executions to permit full and deliberate consideration of claims. Courts should exercise independent judgment in deciding cases, making findings of fact and conclusions of law only after fully and carefully considering the evidence and the applicable law.**

Numerous aspects of Florida law governing post-conviction proceedings may preclude the adequate development and judicial consideration of all post-conviction claims. For example, Florida law (1) does not require an automatic stay of execution when an inmate files a post-conviction motion, initial or successive, after the one-year time limitation; (2) allows the post-conviction court to make a wholesale adoption of the state's proposed order; and (3) provides only a short period of time to file a post-conviction motion after one's conviction and sentence become final.

#### Stays of Execution

The Florida Supreme Court has stated that when hearing post-conviction motions, the circuit court has jurisdiction to enter a stay of execution where the application for a stay is filed with a rule 3.851 motion for post-conviction relief, or where the application itself shows grounds upon which the inmate might be entitled to post-conviction relief.<sup>99</sup> Additionally, the Florida Statutes and Rules of Criminal Procedure give the Florida Supreme Court the authority to stay an execution.<sup>100</sup> In fact, rule 3.851 explicitly requires the Florida Supreme Court to grant an inmate's motion to stay execution when the Governor has signed a death warrant before the inmate filed his/her timely initial rule 3.851 motion.<sup>101</sup>

In practice, however, the Governor has rendered this requirement unnecessary by agreeing, absent the circumstance where a competent death-sentenced individual voluntarily requests that a death warrant be signed, to not issue death warrants during the initial round of federal and state collateral review, provided that counsel for the death penalty movant is proceeding in a timely and diligent manner.<sup>102</sup> This agreement alleviates the necessity of a stay until the disposition of the inmate's timely filed initial post-conviction motion and allows for full consideration of post-conviction claims in that motion.

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<sup>99</sup> Amendment to Florida Rule of Criminal Procedure 3.851(h), 828 So. 2d 999, 1001 (Fla. 2002) (citing State *ex rel.* Russell v. Schaeffer, 467 So. 2d 698 (Fla. 1985); FLA. CONST. art. V, § 5(b)).

<sup>100</sup> FLA. STAT. § 922.06(1) (2006); FLA. R. CRIM. P. 3.851(d)(4).

<sup>101</sup> FLA. R. CRIM. P. 3.851(d)(4).

<sup>102</sup> FLA. R. CRIM. P. 3.851 cmt.

In successive motions, however, despite the discretion to stay an execution, Florida post-conviction courts are clearly not required to do so to permit the full consideration of post-conviction claims and, where an initial or successive post-conviction motion is filed after a death warrant has been signed (after the first round of state and federal collateral review), rule 3.851 expedites the proceedings to accommodate the date of execution.

### Wholesale Adoption of Proposed Orders

Within thirty days of receiving the transcript of the evidentiary hearing, if held, the post-conviction court must render its order, ruling on all of the asserted claims and making detailed findings of fact and conclusions of law.<sup>103</sup> In preparation for rendering the order, the court may receive proposed findings of fact and conclusions of law from the parties.<sup>104</sup> Although it has repeatedly warned against the practice,<sup>105</sup> the Florida Supreme Court has rejected the claim that the court's wholesale adoption of the state's proposed order denying a motion for post-conviction relief violated due process—at least where the order was supported by testimony from the evidentiary hearing.<sup>106</sup> The court's wholesale adoption or copying of either party's proposed findings of fact and conclusions of law undermines the judge's necessary duty to exercise independent judgment in deciding cases, by carefully considering the evidence and applicable law, before rendering findings of fact and conclusions of law in the written order.

### Filing Deadlines and Evidentiary Hearings

A death-row movant has only one year after his/her conviction and sentence becomes final on direct appeal to file a rule 3.851 post-conviction motion.<sup>107</sup> The only exceptions to this time limitation are when:

- (1) the facts on which the claim is predicated were not known to the movant or his/her attorney and could not have been ascertained within the time limit by the exercise of due diligence;
- (2) the fundamental constitutional right asserted was not established within the one-year time limit and has been held to apply retroactively; or
- (3) the movant's post-conviction counsel, through neglect, failed to file the motion.<sup>108</sup>

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<sup>103</sup> FLA. R. CRIM. P. 3.851(f)(5)(D).

<sup>104</sup> See, e.g., *Valle v. State*, 778 So. 2d 960, 964-65 (Fla. 2001).

<sup>105</sup> *Blackwelder v. State*, 851 So. 2d 650, 653 (Fla. 2003) (noting that a “sentencing order should reflect the trial judge’s independent judgment” and when a judge simply copies verbatim the state’s submission, the judge abdicates that responsibility). The *Blackwelder* court warned trial judges that they should avoid copying verbatim a state’s sentencing memorandum. *Id.*; see also *Spencer v. State*, 615 So. 2d 688, 690-91 (Fla. 1993); *Huff v. State*, 622 So. 2d 982, 983 (Fla. 1993); *Rose v. State*, 601 So. 2d 1181, 1182 (Fla. 1992); *Patterson v. State*, 513 So. 2d 1257, 1262 (Fla. 1987).

<sup>106</sup> *Valle*, 778 So. 2d at 964-65.

<sup>107</sup> FLA. R. CRIM. P. 3.851(d)(1).

<sup>108</sup> FLA. R. CRIM. P. 3.851(d)(2)(A)-(C).

A post-conviction court in Florida must hold an evidentiary hearing when the claims filed in an initial rule 3.851 motion require a factual determination.<sup>109</sup> However, the court can dispose of claims in a post-conviction motion without holding an evidentiary hearing if: (1) the claims were raised and reviewed at trial or on appeal or could have been raised at trial or appeal, but were not, provided the claims are not based on fundamental trial error;<sup>110</sup> (2) “the motion, files and records in the case conclusively show that [s/he] is not entitled to any relief;” or (3) the motion or a particular claim is legally insufficient,<sup>111</sup> stating only conclusory allegations.<sup>112</sup> In addition to the above reasons for disposing of claims without an evidentiary hearing, the court may also dispose of a successive motion without an evidentiary hearing if it raises claims that were previously litigated and decided on the merits, or raises new and different claims without giving a reason for not raising such claims in the initial or earlier motion.<sup>113</sup>

Given that the court may dispose of a motion without first holding an evidentiary hearing, it is imperative that post-conviction movants be given adequate time to fully develop their claims to avoid such disposal on procedural grounds. It is unclear whether the one-year time period for filing a post-conviction motion provides adequate time for inmates to fully develop viable claims and file legally and procedurally sufficient motions. We note, however, that inmates seeking post-conviction relief in non-death penalty cases are given two years from the date their conviction and sentence become final to file a rule 3.850 motion for post-conviction relief.<sup>114</sup> To expedite the claims of death-row movants by giving them less time to file post-conviction motions than non-death-row movants seems to discount the complexity of a death case and the gravity of a death sentence.<sup>115</sup>

## Conclusion

In conclusion, the State of Florida provides a post-conviction framework that potentially inhibits the full development and full judicial consideration of claims by allowing for the disposal of some claims without an evidentiary hearing and the wholesale adoption of a party’s proposed findings and conclusions. Thus, Florida’s post-conviction framework does not appear to be in compliance with the requirements of Recommendation #1.

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<sup>109</sup> FLA. R. CRIM. P. 3.851(f)(5)(A)(i). Additionally, both rule 3.851 and Florida Supreme Court case law require the post-conviction court to hold a conference after the filing of the post-conviction motion to hear argument on purely legal claims not based on disputed facts and determine whether a full evidentiary hearing is necessary. FLA. R. CRIM. P. 3.851(f)(5)(A)(ii); *Huff v. State*, 622 So. 2d 982, 983 (Fla. 1993).

<sup>110</sup> *See supra* notes 71-72, 79-80 and accompanying text.

<sup>111</sup> *Johnson v. State*, 904 So. 2d 400, 403-04 (Fla. 2005).

<sup>112</sup> *Id.* at 404 (citing *Kennedy v. State*, 547 So. 2d 912, 913 (Fla. 1989)).

<sup>113</sup> FLA. R. CRIM. P. 3.851(f)(5)(B).

<sup>114</sup> FLA. R. CRIM. P. 3.850.

<sup>115</sup> We note that even if the State of Florida changed the filing deadline from one year to two years, the movant would still have to file his/her federal habeas corpus petition with the applicable federal district court within one year from the date on which: (1) the judgment became final; (2) the State impediment that prevented the petitioner from filing was removed; (3) the United States Supreme Court recognized a new right and made it retroactively applicable to cases on collateral review; or (4) the underlying facts of the claim(s) could have been discovered through due diligence. *See* 28 U.S.C. § 2244(d)(1) (2006). The one-year filing deadline may be tolled if the movant is pursuing a properly filed application for state post-conviction relief or other collateral review. *See* 28 U.S.C. § 2244(d)(2) (2006).

*B. Recommendation #2*

**The State should provide meaningful discovery in post-conviction proceedings. Where courts have discretion to permit such discovery, the discretion should be exercised to ensure full discovery.**

Rule 3.851 provides that within ninety days after the state files its answer to an initial post-conviction motion, the court must hold a case management conference, at which both parties must “disclose all documentary exhibits that they intend to offer at the evidentiary hearing, provide an exhibit list of all such exhibits, and exchange a witness list with the names and addresses of any potential witnesses.”<sup>116</sup> The witness list should include expert witnesses and copies of any reports generated by those experts.<sup>117</sup> Additionally, in limited circumstances, the court has the discretion to allow the parties to obtain discovery depositions.<sup>118</sup> Thus, the State of Florida makes post-conviction discovery a mandatory part of the capital post-conviction proceeding.

Although the scope of the discovery provided by rule 3.851 is likely sufficient to allow the movant to effectively present his/her claim, it is not “full discovery.” Based on this information, the State of Florida is only in partial compliance with the requirements of Recommendation #2.

*C. Recommendation #3*

**Trial judges should provide sufficient time for discovery and should not curtail discovery as a means of expediting the proceedings.**

As discussed above, rule 3.851 provides that within ninety days after the state files its answer to the movant’s initial post-conviction motion—which must be filed 60 days after the filing of the movant’s initial post-conviction motion—the court must hold a case management conference, at which time both parties must make their discovery disclosures.<sup>119</sup> The state, therefore, may have as much as 150 days between the day it is served with a copy of the movant’s initial post-conviction motion alerting the state of the asserted claims and the day when it must make its discovery disclosure.<sup>120</sup> This appears to be sufficient time for the state to evaluate how to best address the movant’s post-conviction claims and prepare its discovery disclosure accordingly. Moreover, rule 3.851 requires the evidentiary hearing to be held, if necessary, within 90 days of the discovery disclosure,<sup>121</sup> which appears to give the movant a reasonable amount of time to prepare to present his/her claims at the hearing.

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<sup>116</sup> FLA. R. CRIM. P. 3.851(f)(5)(A).

<sup>117</sup> *Id.*

<sup>118</sup> *State v. Lewis*, 656 So. 2d 1248, 1249 (Fla. 1994) (holding that movants seeking post-conviction relief under rule 3.850 were permitted to obtain pre-trial discovery, including discovery depositions); *see also Rodriguez v. State*, 919 So.2d 1252, 1279 (Fla. 2005) (discussing the application of *Lewis* in the context of a rule 3.850 motion).

<sup>119</sup> FLA. R. CRIM. P. 3.851(f)(5)(A).

<sup>120</sup> FLA. R. CRIM. P. 3.851(f)(3); FLA. R. CRIM. P. 3.851(f)(5)(A).

<sup>121</sup> FLA. R. CRIM. P. 3.851(f)(5)(A)(i).

We note, however, that when a rule 3.851 motion is filed after the movant is already under a death warrant, the normal time limitations in rule 3.851, including those for discovery, do not apply and may be expedited to take into account the scheduled date of execution and the time required for appellate review.<sup>122</sup>

While there appears to be sufficient time for post-conviction discovery in most capital post-conviction proceedings, when the movant is already under warrant upon the filing of his/her rule 3.851 motion, those time limits may be expedited, which may prohibit meaningful discovery. The State of Florida, therefore, is only in partial compliance with Recommendation #3.

*D. Recommendation #4*

**When deciding post-conviction claims on appeal, state appellate courts should address explicitly the issues of fact and law raised by the claims and should issue opinions that fully explain the bases for dispositions of claims.**

In non-death penalty post-conviction appeals, the district courts of appeal may issue per curiam affirmances without an opinion to dispose of appeals from the denial of post-conviction motions;<sup>123</sup> affirmances without an opinion have no precedential value.<sup>124</sup> Unlike non-death penalty post-conviction appeals, a review of Florida Supreme Court opinions reviewing the denial of a rule 3.851 motion indicates that the Court generally renders opinions addressing the issues of fact and law and explaining the basis for the disposition of the asserted claims. Additionally, we were unable to locate any instances of the Florida Supreme Court issuing an affirmance without an opinion, and there does not appear to be any rule, statute or case law permitting such practice in the Florida Supreme Court.

Thus, it appears that the State of Florida meets the requirements of Recommendation #4.

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<sup>122</sup> FLA. R. CRIM. P. 3.851(h)(3).

<sup>123</sup> The Second District Court of Appeal has stated that:

If it were not permissible to issue per curiam affirmances without opinion, the processing of appeals would be materially delayed. Further, we do not wish to write additional opinions to merely repeat well established principles and further burden attorneys with their research. As it is, the volumes of the Southern Reporter are already growing at an extremely rapid rate, a rate which would be far greater if an opinion were written in every case.

Whipple v. State, 431 So. 2d 1011, 1016 (Fla. 2d DCA 1983) (citing City of Miami Beach v. Poindexter, 119 So. 136 (Fla. 1928)).

<sup>124</sup> Department of Legal Affairs v. District Court of Appeal, 5th Dist., 434 So. 2d 310, 311 (Fla. 1983).

*E. Recommendation #5*

**On the initial state post-conviction application, state post-conviction courts should apply a “knowing, understanding and voluntary” standard for waivers of claims of constitutional error not preserved properly at trial or on appeal.**

Florida post-conviction courts, including the circuit court hearing the rule 3.851 motion and the Florida Supreme Court hearing an appeal from the denial of the motion, do not use the “knowing, understanding, and voluntary” standard for overcoming procedural default of constitutional errors not properly preserved at trial or raised on appeal. The State of Florida, therefore, fails to meet the requirements of Recommendation #5.

*F. Recommendation #6*

**When deciding post-conviction claims on appeal, state appellate courts should apply a “knowing, understanding and voluntary” standard for waivers of claims of constitutional error not raised properly at trial or on appeal and should liberally apply a plain error rule with respect to errors of state law in capital cases.**

The Florida Supreme Court hearing an appeal from the denial of the motion, does not use the “knowing, understanding, and voluntary” standard for overcoming procedural default of state law errors not properly preserved at trial or raised on appeal. If the constitutional error claimed for the first time in a post-conviction motion could have been, but was not objected to at trial,<sup>125</sup> or could have been, but was not raised on appeal,<sup>126</sup> the claim of error is procedurally barred during post-conviction proceedings. In order to obtain post-conviction consideration of such claim, rule 3.851 requires the movant to give reasons why the claim was not raised on direct appeal.<sup>127</sup> Other than ineffective assistance of counsel, it is unclear what other reasons for not raising the claim on direct appeal would justify consideration of a procedurally barred claim.

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<sup>125</sup> See, e.g., *Washington v. State*, 907 So. 2d 512, 514 (Fla. 2005).

<sup>126</sup> See, e.g., *Bryant v. State*, 901 So. 2d 810, 821 (Fla. 2005) (holding that the claim that certain statements made to police were coerced was procedurally barred because it could have been, but was not, raised on appeal). The following cases illustrate the types of claims that have been procedurally barred in post-conviction proceedings because the claim could have, but was not raised, on direct appeal: *Rose v. State*, 675 So. 2d 567 (Fla. 1996) (alleged *Miranda* violation; use of false and misleading testimony; *Brady* violation; proceedings conducted outside defendant’s presence); *Marquard v. State*, 850 So. 2d 417 (Fla. 2002) (comments by prosecutor and trial judge which diminished jury’s role in sentencing; vague and overbroad jury instructions); *Cole v. State*, 841 So. 2d 409 (Fla. 2003) (reliance on non-statutory mitigating factor; instruction improperly shifted burden to defendant to prove mitigating circumstances); *Thomas v. State*, 838 So. 2d 535 (Fla. 2003) (invalid waiver of right to appeal guilt phase issues); *Sochor v. State*, 883 So. 2d 766 (Fla. 2004) (prosecution contact with jurors); *Howell v. State*, 877 So. 2d 697 (Fla. 2004) (insufficient evidence of premeditation; defense attorney conflict of interest due to death threat); *Schwab v. State*, 814 So. 2d 402 (Fla. 2002) (judicial bias); *Arbelaez v. State*, 775 So. 2d 909 (Fla. 2000) (inability to interview jurors); *Valdes v. State*, 728 So. 2d 736 (Fla. 1999) (variance from indictment).

<sup>127</sup> FLA. R. CRIM. P. 3.851(e)(1).

Florida does allow a litigant to raise a procedurally defaulted claim if it is based on “fundamental error.” In order for error to be fundamental, “the error must reach down into the validity of the trial itself to the extent that a verdict of guilty [or sentence of death] could not have been obtained without the assistance of the alleged error.”<sup>128</sup> Fundamental error can be raised at any time,<sup>129</sup> including to collaterally attack a conviction or sentence in post-conviction proceedings.<sup>130</sup> Thus, Florida’s fundamental error doctrine functions like the plain error rule to overcome a valid procedural bar. Unfortunately, according to a review of Florida cases by Robson and Mello, “the only principle that can be fairly derived from the application of the [fundamental error rule] is that the court applies it on an ad hoc basis.”<sup>131</sup> The Court has recognized in several cases, however, that the fundamental error rule does apply.<sup>132</sup>

Because the State of Florida does not apply the “knowing, understanding, and voluntary” standard for state law error not properly preserved at trial or raised on appeal and we are unable to determine whether Florida courts apply the fundamental error rule to non-constitutional state law errors, we are unable to ascertain whether the State of Florida complies with the requirements of Recommendation #6.

#### *G. Recommendation #7*

**The states should establish post-conviction defense organizations, similar in nature to the capital resources centers de-funded by Congress in 1996, to represent capital defendants in state post-conviction, federal habeas corpus, and clemency proceedings.**

In 1985, the Florida Legislature created the Office of Capital Collateral Representative, and twelve years later, in 1997, divided the Office of Capital Collateral Representative into three Capital Collateral Regional Counsel Offices (CCRC)—the North, Middle,<sup>133</sup> and South.<sup>134</sup> Each CCRC is charged with representing persons convicted and sentenced to death within its region in capital collateral proceedings.<sup>135</sup>

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<sup>128</sup> Miller v. State, 926 So. 2d 1243, 1261 (Fla. 2006).

<sup>129</sup> Moore v. State, 924 So. 2d 840, 841 (Fla. 4th DCA 2006).

<sup>130</sup> Johnson, 460 So. 2d at 958.

<sup>131</sup> Robson & Mello, *supra* note 26, at 140.

<sup>132</sup> See, e.g., Robinson v. State, 707 So. 2d 688, 693 (Fla. 1998); Scott v. State, 657 So. 2d 1129, 1134 (Fla. 1995) (considering *Brady* claim over the dissent, which noted that the claim should have been procedurally barred).

<sup>133</sup> The Middle Regional Office is located in Tampa and covers the following Judicial Circuits: Fifth, Sixth, Seventh, Ninth, Tenth, Twelfth, Thirteenth, and Eighteenth. See FLA. STAT. § 27.701(1) (2006); Florida Legislature, Office of Program Policy Analysis and Government Accountability, Capital Collateral Regional Counsels (Death Penalty Appeals), Justice Administrative Commission, at <http://www.oppaga.state.fl.us/profiles/1025/> (last visited on Aug. 7, 2006).

<sup>134</sup> The Southern Regional Office is located in Fort Lauderdale and covers the following Judicial Circuits: Eleventh, Fifteenth, Sixteenth, Seventeenth, Nineteenth, and Twentieth. See FLA. STAT. § 27.701(1) (2006); Florida Legislature, Office of Program Policy Analysis and Government Accountability, Capital Collateral Regional Counsels (Death Penalty Appeals), Justice Administrative Commission, at <http://www.oppaga.state.fl.us/profiles/1025/> (last visited on Aug. 7, 2006).

<sup>135</sup> FLA. STAT. § 27.702(2) (2006).

On July 1, 2003, the Florida Legislature implemented a “pilot program” whereby CCRC-North was closed,<sup>136</sup> and the responsibilities of CCRC-North were transferred to a registry of attorneys compiled and maintained by the Commission on Capital Cases.<sup>137</sup> Attorneys from CCRC and the registry represent death-sentenced inmates in state and federal post-conviction proceedings.<sup>138</sup>

The Executive Director of the Commission on Capital Cases is charged with compiling and maintaining a statewide registry of private attorneys who are qualified to handle capital collateral cases.<sup>139</sup> Attorneys from the registry are appointed either when there is

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<sup>136</sup> The Northern Regional Office was previously located in Tallahassee and covered the following Judicial Circuits: First, Second, Third, Fourth, Eighth, and Fourteenth. *See* FLA. STAT. § 27.701(1) (2006); Florida Legislature, Office of Program Policy Analysis and Government Accountability, Capital Collateral Regional Counsels (Death Penalty Appeals), Justice Administrative Commission, at <http://www.oppaga.state.fl.us/profiles/1025/> (last visited on Aug. 7, 2006). The closure of the CCRC-North was due at least in part to the findings of the Potts and Hirt report. ISABELLE POTTS & GRETCHEN HIRT, REPORT TO THE COMMISSION ON THE ADMINISTRATION OF JUSTICE IN CAPITAL CASES, EXECUTIVE SUMMARY, at <http://www.fcc.state.fl.us/fcc/reports/fsu/fsuexsum.html> (last visited on Aug. 7, 2006) (stating that in 1998, the Florida Senate commissioned a study to look at whether the “elimination of state post-conviction proceedings in death penalty cases will reduce delays in carrying out a sentence of death in capital cases.”). Potts and Hirt were commissioned to look at whether “elimination of state post-conviction proceedings in death penalty cases will reduce delays in carrying out a sentence of death in capital cases.” *Id.* The legislation specifically required a review of “the average number of post-conviction motions and writs filed in capital cases, prior legislative and judicial attempts to reduce delays in capital cases, and the length of time required for capital post-conviction claims in state and federal court,” as well as a determination of the “average delays in capital cases, whether those delays have increased in the last 10 years, and the reasons for any increase in delays.” *Id.* The report was also to address “the legal, fiscal, and practical considerations concerning the elimination of state post-conviction proceedings.” *Id.* The report was completed in 1999 and made the following findings: (1) the Florida Supreme Court cannot eliminate all post-conviction proceedings because habeas corpus writs are guaranteed by the Florida Constitution; (2) despite the fact that the U.S. Supreme Court and the Florida Supreme Courts have held the Sixth Amendment does not guarantee an absolute right to state-paid representation in post-conviction proceedings, both courts recognize a due process right to such representation under the Fifth Amendment, on a case-by-case basis; (3) the Florida Supreme Court would probably not uphold legislation eliminating all state funding for post-conviction proceedings or imposing an absolute limit of one state post-conviction proceeding per death-row inmate; and (4) privatization of post-conviction representation would save money for the State of Florida. *Id.*

<sup>137</sup> FLA. STAT. § 27.701(2) (2006). At the time in which the CCRC-North was closed, it was responsible for sixty-three cases. *See* WILLIAM O. MONROE, AUDITOR GENERAL, CAPITAL COLLATERAL REGIONAL COUNSEL – NORTHERN REGION, TRANSFER OF RESPONSIBILITIES TO THE REGISTRY OF ATTORNEYS – PILOT PROGRAM, REPORT NO. 2004-124, at 6 (2004), available at [http://www.myflorida.com/audgen/pages/pdf\\_files/2004-124.pdf](http://www.myflorida.com/audgen/pages/pdf_files/2004-124.pdf) (last visited Aug. 4, 2006); *see also* COMMISSION ON CAPITAL CASES, FISCAL YEAR 2003-2004 REPORT PILOT PROJECT, TRANSFER OF RESPONSIBILITIES FROM CAPITAL COLLATERAL REGIONAL COUNSEL – NORTH TO THE STATEWIDE ATTORNEY REGISTRY (2004), available at <http://www.floridacapitalcases.state.fl.us/Publications/fiscal%20report%202004.pdf> (last visited on Aug. 4, 2006). All of these cases were reassigned within an average of twenty-six days, and the majority of these cases (forty-five) were reassigned to former CCRC-North attorneys who joined the registry. *Id.*

<sup>138</sup> FLA. STAT. § 27.702(2) (2006).

<sup>139</sup> FLA. STAT. § 27.710(1) (2006).

a conflict of interest or when the inmate was convicted and sentenced to death in the Northern Region of Florida, which no longer has a CCRC regional office.<sup>140</sup>

Additionally, indigent death-sentenced inmates have a right to counsel in clemency proceedings,<sup>141</sup> and will be appointed a public defender or, in the case of conflict of interest, a private attorney.<sup>142</sup>

Although death-sentenced inmates are appointed attorneys during state and federal post-conviction proceedings and clemency proceedings, only some of these attorneys—specifically those from CCRC—are similar to that provided by the now-defunded capital resource centers. The State of Florida, therefore, is only in partial compliance with Recommendation #7.

#### *H. Recommendation #8*

**For state post-conviction proceedings, the state should appoint counsel whose qualifications are consistent with the recommendations in the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*. The state should compensate appointed counsel adequately and, as necessary, provide sufficient funds for investigators and experts.**

#### Qualifications of Post-Conviction Counsel

Although the State of Florida provides counsel to death-sentenced inmates seeking post-conviction relief, these counsel are not required to fully meet the requirements of the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Guidelines). Specifically, full-time assistant regional counsel and capital collateral registry attorneys are not required to have demonstrated skills in all of the areas outlined in Guideline 5.1.<sup>143</sup> In fact, these attorneys are only required to be members in good standing of The Florida Bar with at least three years of experience in the practice of criminal law; prior to employment, they also must have participated in at least five felony jury trials, five felony appeals, or five capital post-conviction evidentiary hearings or any

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<sup>140</sup> FLA. STAT. §§ 27.701(2), 27.703(1), 27.710(5)(a) (2006); *see also* *Olive v. Maas*, 811 So. 2d 644, 650 (Fla. 2002) (noting that the original goal behind establishing the registry was to “alleviate CCRC’s backlog of capital cases which have not been assigned to an attorney”).

<sup>141</sup> *See* FLA. STAT. §§ 27.51(5)(a), 27.5303(4)(b) (2006); *see also* *Remeta v. State*, 559 So. 2d 1132, 1135 (Fla. 1990) (stating “[w]e emphasize that this type of clemency proceeding is just part of the overall death penalty procedural scheme in this state. The circuit court in this instance had the responsibility to appoint counsel under this statutory right.”); *Olive*, 811 So. 2d at 652-53 (quoting *Remeta*, 559 So. 2d at 1132, 1135, and noting that “it is clear that this state has established a right to counsel in clemency proceedings for death penalty cases and this statutory right necessarily carries with it the right to have effective assistance of counsel”). The right to counsel in clemency proceedings was originally based on section 925.035 of the Florida Statutes, which was repealed effective July 1, 2005. *See* 2003 Fla. Laws ch. 402, § 153 (H.B. 113-A); 2005 Fla. Laws ch. 3, § 3.

<sup>142</sup> FLA. STAT. § 27.5303(4)(b) (2006); *see also* FLA. STAT. § 27.51(5)(a) (2006);

<sup>143</sup> For the text of Guideline 5.1 concerning qualifications for death-penalty counsel, see Chapter Six: Defense Services, *supra*, at 179-180 (Recommendation #2).

combination of at least five such proceedings.<sup>144</sup> Capital collateral registry attorneys must certify on an application provided to the Executive Director of the Commission on Capital Cases that they meet these minimum requirements,<sup>145</sup> as well as any continuing legal education requirements.

As noted in Chapter Six of this Assessment Report,<sup>146</sup> the qualifications of some capital collateral registry attorneys are questionable and the performance of these attorneys has been criticized on a number of occasions. The Executive Director of the Commission on Capital Cases has noted that while on average, registry attorneys have more experience than capital collateral regional counsel, most of their work has been in trials, not appeals.<sup>147</sup> A newspaper article in 2000 reported that one lawyer, who prior to signing up for the registry had been involved in capital trials, admitted that he was not qualified to handle post-conviction appeals.<sup>148</sup> He stated, “It was a terrible mistake for me to get involved, and a lot of other lawyers I know who are messing with this are having a rough time of it.”<sup>149</sup>

This lack of appellate experience may account for the questionable performance by some registry attorneys. A number of registry attorneys have missed state post-conviction and federal habeas corpus filing deadlines possibly precluding their clients from having their claims heard.<sup>150</sup> Specifically, registry attorneys in at least twelve separate cases filed their clients’ state post-conviction motions or federal habeas corpus petitions between two months to three years after the applicable filing deadline.<sup>151</sup> Performances like this have led two Florida Supreme Court Justices to publicly comment on the quality, or lack thereof, of registry attorneys. Justice Cantero has stated that the representation provided by some registry attorneys is “[s]ome of the worst lawyering” he has ever seen.<sup>152</sup> Specifically, Justice Cantero stated “some of the registry counsel have little or no experience in death penalty cases. They have not raised the right issues . . . [and] [s]ometimes they raise too many issues and still haven’t raised the right ones.”<sup>153</sup> Chief Justice Barbara Pariente reiterated the concerns of Justice Cantero by stating that “[a]s for

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<sup>144</sup> FLA. STAT. §§ 27.704(1), (2), 27.710 (2006); *see also* Jim Ash, *Privatizing Death Cases Saving State Money, So Far*, PALM BEACH POST, Jan. 20, 2004 (noting that “[t]o qualify for the state registry, attorneys need only minimal experience . . . . In comparison, most Capital Collateral Regional Counsel attorneys have been trying these complicated cases for years”).

<sup>145</sup> FLA. STAT. § 27.710(2) (2006).

<sup>146</sup> *See* Chapter Six: Defense Services, *supra*, at 135.

<sup>147</sup> Gary Blankenship, *Registry Lawyers Defended at Committee Meeting*, FLA. B. NEWS, Apr. 1, 2005.

<sup>148</sup> Jo Becker, *System May Be Slowing*, ST. PETERSBURG TIMES, July 17, 2000, *available at* [www.sptimes.com/News/071700/news\\_pf/State/System\\_may\\_be\\_slowing.shtml](http://www.sptimes.com/News/071700/news_pf/State/System_may_be_slowing.shtml) (last visited on Aug. 4, 2006).

<sup>149</sup> *Id.*

<sup>150</sup> *See, e.g., Death Appeals Not Quite Dead*, DAILY BUS. REV., April 30, 2003, *available at* [http://www.fadp.org/news/bizrev\\_5\\_20.html](http://www.fadp.org/news/bizrev_5_20.html) (last visited on Aug. 4, 2006) (discussing several problems with registry counsel).

<sup>151</sup> Amicus Curiae Brief of the American Civil Liberties Union and the ACLU of Florida in Support of Petitioner, *Lawrence v. Florida*, at 15-19 (U.S. Sup. Ct. 2006) (No. 05-8820).

<sup>152</sup> Marc Caputo, *Justice Blasts Lawyers Over Death Row Appeals*, MIAMI HERALD, Jan. 28, 2005; Jackie Hallifax, *Lawmaker Asks Court for Names of Bad Lawyers*, MIAMI HERALD, Mar. 23, 2005.

<sup>153</sup> Caputo, *supra* note 152.

registry counsel, we have observed deficiencies and we would definitely endorse the need for increased standards for registry counsel, as well as a continuing system of screening and monitoring to ensure minimum levels of competence.”<sup>154</sup> The questionable performance of these attorneys, as well as the lack of requisite qualifications, are particularly troublesome in light of the fact that death-sentenced inmates do not have a state or federal constitutional right to assert a claim of ineffective assistance of state post-conviction counsel.<sup>155</sup>

### Funding for CCRC and Compensation of Collateral Regional and Registry Counsel

Since 1985, the State of Florida has at least partially funded the representation of death-sentenced inmates during capital post-conviction proceedings.<sup>156</sup> However, the adequacy of the funding has continually been challenged. In 1988, the Office of the Capital Collateral Representative (CCR) petitioned the Florida Supreme Court for a writ of mandamus to stay the executions of capital movants represented by CCR until after July 1, 1988, when additional funds were scheduled to be released to CCR.<sup>157</sup> The petition, however, was denied.<sup>158</sup> Similarly, in 1995, a death-sentenced inmate represented by CCR asserted that CCR could not provide effective assistance of counsel in capital collateral proceedings because it was “overworked and forced to labor under severe time constraints.”<sup>159</sup> The Florida Supreme Court again rejected this argument.<sup>160</sup>

Four years later, in 1999, after CCR was divided into three Capital Collateral Regional Counsel Offices (CCRC-North, CCRC-Middle, and CCRC-South), CCRC-North and CCRC-South, each filed separate all writs petitions requesting the Florida Supreme Court to impose a moratorium on the imposition of the death penalty until the State of Florida increased funding, arguing that the funding was “woefully inadequate.”<sup>161</sup> The Court denied relief, finding that the funding had “significantly changed and increased through two legislative sessions [the 1998 and 1999 sessions].”<sup>162</sup>

Since 1999, the funding allocated to the representation of death-sentenced inmates during capital collateral proceedings has steadily increased from \$7,825,551 in Fiscal Year 1999-2000, which funded CCRC-North, CCRC-South, and CCRC-Middle, to \$9,400,000 in Fiscal Year 2005-2006, which currently funds CCRC-South, CCRC-Middle, and

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<sup>154</sup> Blankenship, *supra* note 147.

<sup>155</sup> Zack v. State, 911 So. 2d 1190, 1203 (Fla. 2005) (stating “[t]his Court has stated that ‘claims of ineffective assistance of post[-]conviction counsel do not present a valid basis for relief’”).

<sup>156</sup> See Marcia Coyle, *Suit: Death Defense Is a Sham, Claim Is Florida. Provides Lawyers But Makes It So They Can't Save Inmates*, NAT'L L.J., Dec. 21, 1998 (stating that the Office of Capital Collateral Representative “started its life grossly underfunded and [as of Dec. 21, 1998] never caught up” and noting that two special commissions created by the Florida Supreme Court concluded in 1993 and 1997 that CCR was underfunded).

<sup>157</sup> Spalding v. Dugger, 526 So. 2d 71, 72-73 (Fla. 1988).

<sup>158</sup> *Id.* at 73.

<sup>159</sup> White v. Singletary, 663 So. 2d 1324, 1325 (Fla. 1995).

<sup>160</sup> *Id.* at 1325.

<sup>161</sup> See Arbelaez v. Butterworth, 738 So. 2d 326, 326-328 (Fla. 1999).

<sup>162</sup> *Id.* at 326.

registry attorneys.<sup>163</sup> Despite the increase in funding, it is unclear whether the funding provided to CCRC-Middle, CCRC-South, and registry attorneys is sufficient.

Furthermore, capital regional counsel and assistant regional counsel are salaried employees. Full-time assistant regional counsel earn between \$45,000 and \$85,000 per year.<sup>164</sup> It is unclear, however, whether these salaries are commensurate with the salaries of state attorneys handling capital collateral cases. Additionally, there appears to be a high turnover rate with assistant regional counsel, which indicates that the salaries may not be sufficient to employ experienced capital collateral regional counsel. In Fiscal Year 2004-2005, the turnover rate for assistant regional counsel in CCRC-Middle and CCRC-South was 16 percent.<sup>165</sup>

Florida law provides that capital collateral registry attorneys be paid (1) hourly at a rate of \$100, and (2) periodically upon the completion of certain duties. Florida law, however, limits the total compensation to \$84,000 (or 840 hours at \$100 per hour), which must cover fees associated with the hiring of additional counsel.<sup>166</sup> The Spangenberg Group<sup>167</sup> estimates that on average 3,300 “attorney hours” are required to take a case from denial of *certiorari* by the United States Supreme Court after direct appeal to the Florida Supreme Court to denial of *certiorari* from state post-conviction proceedings, which is far above the 840 hours at \$100 per hour provided by Florida law.<sup>168</sup>

Due to this discrepancy, the statutory cap has been challenged on a number of occasions. Most notable is *Olive v. Maas*,<sup>169</sup> in which the Florida Supreme Court rejected the claim that the registry system did not adequately compensate attorneys, noting that under “extraordinary or unusual circumstances” capital collateral registry attorneys can be

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<sup>163</sup> FLORIDA LEGISLATURE, OFFICE OF PROGRAM POLICY ANALYSIS AND GOVERNMENT ACCOUNTABILITY, PERFORMANCE OF COLLATERAL COUNSELS IMPROVED; REGISTRY ACCOUNTABILITY NEEDS TO BE REVISITED, REPORT NO. 01-52 (Nov. 2001), available at <http://www.oppaga.state.fl.us/reports/crime/r01-52s.html> (last visited on Aug. 4, 2006); Florida Legislature, Office of Program Policy Analysis and Government Accountability, Capital Collateral Regional Counsels (Death Penalty Appeals), Justice Administrative Commission, at <http://www.oppaga.state.fl.us/profiles/1025/> (last visited on Aug. 4, 2006).

<sup>164</sup> E-mail from Neal Dupree, Capital Collateral Regional Counsel for CCRC-South (Apr. 13, 2005) (on file with the author); see also Susan Spencer-Wendel, *Cuts to Death Row Appeals Office Ripped*, PALM BEACH POST, June 2, 2003 (noting that CCRC attorneys’ salaries range from \$40,000 to more than \$100,000).

<sup>165</sup> CAPITAL COLLATERAL REGIONAL COUNSEL, MIDDLE AND SOUTHERN REGIONS, LONG-RANGE PROGRAM PLAN FY 2006-07 THROUGH 2010-11 (Sept. 2005), at <http://www.justiceadmin.org/ccrc/CCRC-M%20CCRC-S/CCRC-LRPP-A.pdf> (last visited on Aug. 4, 2006).

<sup>166</sup> See FLA. STAT. §§ 27.703(2), 27.711(4)(a)-(h) (2006).

<sup>167</sup> The Spangenberg Group is a nationally recognized research and consulting firm specializing in improving justice programs. See Spangenberg Group, Introduction, at <http://www.spangenberggroup.com/> (last visited on August 14, 2006). Members of The Spangenberg Group have achieved recognition as the country’s leading experts on the delivery of indigent defense services. See Spangenberg Group, Overview, at <http://www.spangenberggroup.com/over.html> (last visited on August 14, 2006).

<sup>168</sup> SPANGENBERG GROUP, AMENDED TIME & EXPENSE ANALYSIS OF POST-CONVICTION CAPITAL CASES IN FLORIDA 16 (1998); *A Privatization Failure*, ST. PETERSBURG TIMES, Jan. 31, 2005; Leonard Post, *A Fight Over Limits On Pay, Hours, Florida Faces a Suit from a Death Penalty Lawyer*, NAT’L L. J., Mar. 31, 2003.

<sup>169</sup> 811 So. 2d 644 (Fla. 2002)

compensated in excess of the statutory caps.<sup>170</sup> However, following the *Olive* decision, the Florida Legislature adopted section 27.7002 of the Florida Statutes prohibiting the use of state funds for compensation of appointed registry attorneys in excess of the statutorily prescribed amounts<sup>171</sup> and authorizing the Executive Director of the Commission on Capital Cases to permanently remove from the capital collateral registry any attorney who seeks compensation above the statutorily prescribed amounts.<sup>172</sup> The constitutionality of this prohibition and sanction was challenged, and the Circuit Court of the Second Judicial Circuit found that, in order for the statute to be constitutional, it must be construed to allow the use of state funds to compensate these attorneys in excess of the statutory maximums and to prohibit the Executive Director from removing from the registry attorneys who seek compensation above the statutory maximums.<sup>173</sup> The Circuit Court's order, however, has been appealed.

### Funding for Investigators and Experts

Each regional counsel is authorized to hire investigators, but the salaries of these investigators are unknown. Florida law also states that capital collateral registry attorneys are entitled to funds for investigators and miscellaneous expenses, which includes compensation for experts. Upon approval by the court, these attorneys are entitled to \$40 per hour, up to a maximum of \$15,000, for investigative services. Similarly, although there is not an hourly rate for experts, the total compensation for all "miscellaneous expenses," which includes expert witnesses, is limited to \$15,000.<sup>174</sup> This statutory cap may be exceeded, however, if the court finds that "extraordinary circumstances" exist.<sup>175</sup> Lastly, given that capital collateral registry counsel are entitled to periodic billing, it is conceivable that the investigators and experts retained by these attorneys are subject to it as well.

### Conclusion

In conclusion, while capital post-conviction counsel are required to meet minimum qualifications, these qualifications are not as stringent as those required by the ABA Guidelines. Additionally, numerous anecdotal accounts also bring into question the adequacy of capital post-conviction counsel. Unfortunately, we were unable to determine whether the funding allocated to CCRC or capital collateral registry attorneys is adequate. But, it is clear that the statutory cap on registry counsel compensation, the statutory prohibition against using state funds for compensation in excess of the cap, and the fact that registry attorneys may be sanctioned for requesting compensation above the statutory cap—even in extraordinary or unusual circumstances—are contrary to the ABA

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<sup>170</sup> See *id.* at 653 (citing *Remeta v. State*, 559 So. 2d 1132, 1135 (Fla. 1990) (quoting *Makemson v. Martin County*, 491 So. 2d 1109 (Fla. 1986)).

<sup>171</sup> FLA. STAT. § 27.7002(5) (2006).

<sup>172</sup> FLA. STAT. § 27.7002(6) (2006).

<sup>173</sup> *Olive v. Maas*, 911 So. 2d 837, 839 (Fla. 2005); *Olive v. Maas*, 03-CA-291 (Fla. Cir. Ct. 2d Jud. Cir. Mar. 23, 2006).

<sup>174</sup> FLA. STAT. § 27.711(6) (2006).

<sup>175</sup> *Id.*

Guidelines. Based on this information, the State of Florida is only in partial compliance with Recommendation #8.

*I. Recommendation #9*

**State courts should give full retroactive effect to United States Supreme Court decisions in all proceedings, including second and successive post-conviction proceedings, and should consider in such proceedings the decisions of federal appeals and district courts.**

Post-conviction courts in Florida give full retroactive effect to changes in the law announced by the United States Supreme Court only in limited circumstances. Specifically, post-conviction courts will give retroactive effect to new rules of criminal procedure in collateral post-conviction proceedings only when the new rule (1) emanates from the Florida Supreme Court or the United States Supreme Court; (2) is constitutional in nature, and (3) constitutes a development of fundamental significance.<sup>176</sup>

The Florida Supreme Court has stated that a new rule is one of “fundamental significance” when it either places “beyond the authority of the state the power to regulate certain conduct or impose certain penalties,” or when the rule is “of sufficient magnitude to necessitate retroactive application”<sup>177</sup> by considering the purpose to be served by the new rule, the extent of reliance on the old rule, and the effect on the administration of justice of a retroactive application of the new rule.<sup>178</sup>

Because Florida law only gives retroactive effect to changes in the law announced by the United States Supreme Court in limited circumstances, the State of Florida only partially meets the requirements of Recommendation #9.

*J. Recommendation #10*

**State courts should permit second and successive post-conviction proceedings in capital cases where counsels’ omissions or intervening court decisions resulted in possibly meritorious claims not previously being raised, factually or legally developed, or accepted as legally valid.**

Florida law generally prohibits the filing of successive rule 3.851 post-conviction motions which (1) attempt to relitigate claims decided on the merits in a previous motion,<sup>179</sup> or (2) raise new claims that could have been raised in the initial or earlier

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<sup>176</sup> Witt v. State, 387 So. 2d 922, 931 (Fla. 1980). We note that three sitting Florida Supreme Court Justices have agreed that the Court should discontinue its use of the *Linkletter/Stovall* test announced in *Witt*, in favor of the *Teague* test for retroactivity. See *Windom v. State*, 886 So. 2d 915, 941-45 (Fla. 2004) (Cantero, J., concurring).

<sup>177</sup> *Id.* at 929.

<sup>178</sup> *Id.* at 926 (citing to *Stovall v. Denno*, 388 U.S. 293 (1967); *Linkletter v. Walker*, 381 U.S. 618 (1965)).

<sup>179</sup> See, e.g., *Johnson v. State*, 904 So. 2d 400, 412 (Fla. 2005) (rejecting movant’s successive claim that lethal injection constitutes cruel and unusual punishment because it was raised and rejected in the movant’s previous post-conviction proceeding).

motion.<sup>180</sup> A post-conviction court, however, may allow a successive motion raising new and different grounds than those raised in the initial motion when (1) the movant gives a valid reason for not raising the claim in a previous motion,<sup>181</sup> or (2) the new claim is based on newly discovered evidence.<sup>182</sup>

Contrary to the first part of this Recommendation, a movant may never claim that his/her earlier post-conviction counsel failed to raise a claim in an earlier post-conviction motion as a means of overcoming the bar against successive rule 3.851 motions, because the movant is not entitled to assert a claim of ineffective assistance of post-conviction counsel.<sup>183</sup> In regard to the second part of this Recommendation, however, Florida post-conviction courts will allow intervening changes in the law to overcome the bar against successive motions in limited circumstances.<sup>184</sup> The State of Florida, therefore, only partially meets the requirements of Recommendation #10.

#### *K. Recommendation #11*

**In post-conviction proceedings, state courts should apply the harmless error standard of *Chapman v. California*, 386 U.S. 18 (1967), which requires the prosecution to show that a constitutional error is harmless beyond a reasonable doubt.**

In *Chapman v. California*, the United States Supreme Court stated that “before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.”<sup>185</sup> The burden to show that the error was harmless falls on the “beneficiary of the error either to prove that there was no injury or to suffer a reversal of his[/her] erroneously obtained judgment.”<sup>186</sup>

During post-conviction proceedings in Florida, the standard of review for a constitutional error depends on the actual constitutional error asserted. For example, in accordance with *Chapman*, if the defendant asserts a *Giglio*<sup>187</sup> violation, based on the prosecutor’s presentation of false evidence at trial, the state must prove that its presentation of the

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<sup>180</sup> See, e.g., *Hill v. State*, 921 So. 2d 579, 584 (Fla. 2006) (holding that the movant’s successive claim alleging that he was mentally retarded and, therefore, could not be executed pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002), was procedurally barred because the movant gave no reason why the claim could not have been raised in his 2003 Rule 3.851 motion, which was filed after the issuance of the *Atkins* decision).

<sup>181</sup> FLA. R. CRIM. P. 3.851(e)(2)(B). The *Hill* court suggests that if the new claim was not available to the movant at the time of the earlier motion, this would provide a valid reason for not having raised the new claim in the previous motion. *Hill*, 921 So. 2d at 584. The Florida Supreme Court has also rejected as a reason for not previously raising a claim the allegation that the information underlying the new claim was only discovered by a newspaper reporter after the movant’s earlier petition, where the movant did not allege that the information could not have been found by the movant or his/her counsel. See *King v. State*, 808 So. 2d 1237, 1244 (Fla. 2002).

<sup>182</sup> FLA. R. CRIM. P. 3.851(e)(2)(C).

<sup>183</sup> See *supra* notes 24-25 and accompanying text.

<sup>184</sup> See *supra* notes 91-98 and accompanying text.

<sup>185</sup> 386 U.S. 18, 24 (1967).

<sup>186</sup> *Id.*

<sup>187</sup> *Giglio v. United States*, 405 US 150 (1972).

evidence was “harmless beyond a reasonable doubt.”<sup>188</sup> In other words, the state must establish beyond a reasonable doubt that its use of false evidence “did not affect the verdict.”<sup>189</sup>

However, if the defendant raises a claim of ineffective assistance of counsel, the burden rests with the defendant to “show a reasonable probability” that counsel’s deficient performance affected the outcome of the proceeding.<sup>190</sup> Similarly, in asserting a *Brady*<sup>191</sup> violation—wherein the state fails to disclose favorable evidence—the burden again rests with the defendant to show “a reasonable probability” that disclosure of the evidence would have affected the outcome of the proceeding.<sup>192</sup>

Because Florida courts only require the state to prove during post-conviction proceedings that certain constitutional errors—and not all—are harmless beyond a reasonable doubt, the State of Florida is only in partial compliance with Recommendation #11.

#### *L. Recommendation #12*

**During the course of a moratorium, a “blue ribbon” commission should undertake a review of all cases in which individuals have been either wrongfully convicted or wrongfully sentenced to death and should recommend ways to prevent such wrongful results in the future.**

Because Recommendation #12 is predicated on the implementation of a moratorium, it is not applicable to the State of Florida at this time.

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<sup>188</sup> *Guzman v. Florida*, 868 So. 2d 498, 506 (Fla. 2003); *Guzman v. Florida*, No. SC04-2016, 2006 WL 1766765, at \*4-5 (Fla. Sup. Ct. June 29, 2006). In *Guzman*, the Florida Supreme Court reiterated that the State must prove that a *Giglio* violation was harmless beyond a reasonable doubt. In order for this harmless error standard to be met, the State must establish that “there is no reasonable possibility that the error contributed to the conviction.” Still, the Court asserted that this standard is the same as the one utilized in *Chapman* and that the “dispositive question is whether the State has established beyond a reasonable doubt that [the *Giglio* violation] did not affect the verdict.” Additionally, to avoid confusion among the varying standards for constitutional claims, the *Guzman* Court adopted the use of the term “reasonable possibility” in place of the term “reasonable likelihood,” which had previously been employed in deciding whether a *Giglio* violation was harmless. *Id.* at \*4-5.

<sup>189</sup> *Guzman*, 2006 WL 1766765, at \*5.

<sup>190</sup> *Hendrix v. State*, 908 So. 2d 412, 419 (Fla. 2005); *Guzman*, 868 So. 2d at 506 n. 9.

<sup>191</sup> *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

<sup>192</sup> *Guzman*, 2006 WL 1766765, at \*4.

## CHAPTER NINE

### CLEMENCY

#### INTRODUCTION TO THE ISSUE

Under a state's constitution or clemency statute, the Governor or entity established to handle clemency matters is empowered to pardon an individual's criminal offense or commute an individual's death sentence. In death penalty cases, the clemency process traditionally was intended to function as a final safeguard to evaluate (1) the fairness and judiciousness of the penalty in the context of the circumstances of the crime and the individual; and (2) whether a person should be put to death. The clemency process can only fulfill this critical function when the exercise of the clemency power is governed by fundamental principles of justice, fairness, and mercy, and not by political considerations.

The clemency process should provide a safeguard for claims that have not been considered on the merits, including claims of innocence and claims of constitutional deficiencies. Clemency also can be a way to review important sentencing issues that were barred in state and federal courts. Because clemency is the final avenue of review available to a death-row inmate, the state's use of its clemency power is an important measure of the fairness of the state's justice system as a whole.

While elements of the clemency process, including criteria for filing and considering petitions and inmates' access to counsel, vary significantly among states, some minimal procedural safeguards are constitutionally required. "Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process."<sup>1</sup>

Since 1972, when the United States Supreme Court temporarily barred the death penalty as unconstitutional, clemency has been granted in substantially fewer death penalty cases. From 1976, when the Court authorized states to reinstate capital punishment, through November 2005, clemency has been granted on humanitarian grounds 229 times in nineteen of the thirty-eight death penalty states and the federal government.<sup>2</sup> One hundred sixty seven of these were granted by former Illinois Governor George Ryan in 2003 out of concern that the justice system in Illinois could not ensure that an innocent person would not be executed.

Due to restrictions on the judicial review of meritorious claims, the need for a meaningful clemency power is more important than ever. As a result of these restrictions, clemency can be the State's final opportunity to address miscarriages of justice, even in cases involving actual innocence. A clemency decision-maker may be the only person or body that has the opportunity to evaluate all of the factors bearing on the appropriateness of the

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<sup>1</sup> Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring).

<sup>2</sup> See Death Penalty Information Center, Clemency, at <http://www.deathpenaltyinfo.org/article.php?did=126&scid=13> (last visited on Aug. 7, 2006).

death sentence without regard to constraints that may limit a court's or jury's decision making. Yet as the capital punishment process currently functions, meaningful review frequently is not obtained and clemency too often has not proven to be the critical final check against injustice in the criminal justice system.

## I. FACTUAL DISCUSSION

### A. Clemency Decision-Makers

#### 1. Authority, Composition, and Election of the Board of Executive Clemency

The Florida State Constitution provides the Governor with the power to grant, by executive order, clemency,<sup>3</sup> including full or conditional pardons and commutations of death sentences, with the approval of two members of the Board of Executive Clemency (Board).<sup>4</sup> Acting alone, however, the Governor may grant reprieves of not more than sixty days<sup>5</sup> and deny clemency at any time, for any reason.<sup>6</sup>

The Board is comprised of the Governor and members of the Cabinet.<sup>7</sup> The Cabinet consists of three elected officials—the Attorney General, the Commissioner of Agriculture, and the Chief Financial Officer.<sup>8</sup> All Board members, including the Governor, are elected in a statewide general election, held every four years.<sup>9</sup>

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<sup>3</sup> Clemency is defined as “an act of mercy.” See FLA. R. EXEC. CLEMENCY 1, available at <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006). The Florida Rules of Executive Clemency include eight distinct types of clemency, all of which may be granted on a conditional basis: (1) full pardon; (2) pardon without firearm authority; (3) pardon for misdemeanor; (4) commutation of sentence; (5) remission of fines and forfeitures; (6) specific authority to own, possess, or use firearms; (7) restoration of civil rights in Florida; and (8) restoration of alien status under Florida Law. See FLA. R. EXEC. CLEMENCY 4, available at <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006).

<sup>4</sup> FLA. CONST. art. IV, § 8(a) (noting that clemency may not be granted in cases of treason and in cases where impeachment results in conviction); FLA. STAT. § 940.01(1) (2006); see also FLA. R. EXEC. CLEMENCY 1, 4, available at <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006).

<sup>5</sup> FLA. CONST. art. IV, § 8(a); FLA. STAT. § 940.01(1) (2004); FLA. R. EXEC. CLEMENCY 1, available at <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006). The Governor may grant two or more successive reprieves in the same case, which combined exceed sixty days, but one reprieve may not exceed sixty days. See *In re Advisory Opinion to Governor*, 62 Fla. 7 (Fla. 1911).

<sup>6</sup> See FLA. R. EXEC. CLEMENCY 4, available at <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006).

<sup>7</sup> See FLA. R. EXEC. CLEMENCY 1, available at <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006).

<sup>8</sup> FLA. CONST. art. IV, § 4; see also My Florida, Cabinet Affairs, Cabinet Process Summary, at <http://www.myflorida.com/myflorida/cabinet/cabprocess.html> (last visited on Aug. 7, 2006). The Governor and all three cabinet members must be at least thirty years of age and have resided in the state for the preceding seven years. See FLA. CONST. art. IV, § 5(b). Additionally, the Attorney General must have been a member of The Florida Bar for the preceding five years. See *Id.* The current Board members are Governor Jeb Bush, Attorney General Charlie Crist, Commissioner of Agriculture Charles Bronson, and Chief Financial Officer Tom Gallagher. Florida Parole Commission, Florida Board of Executive Clemency, at <https://fpc.state.fl.us/Clemency.htm> (last visited on Aug. 7, 2006).

<sup>9</sup> FLA. CONST. art. IV, § 5(a); see also FLA. CONST. art. IV, § 5(b) (stating that “[n]o person who has, or but for resignation would have, served as governor or acting governor for more than six years in two consecutive terms shall be elected governor for the succeeding term”). In 2006, the offices of Governor, Attorney General, Commissioner of Agriculture, and Chief Financial Officer are up for election. Due to the constitutionally imposed term limits, current Governor Jeb Bush is ineligible to run for re-election in 2006.

## B. Clemency Applications and Investigations

### 1. The Florida Rules of Executive Clemency

All clemency proceedings are governed by the Florida Rules of Executive Clemency (Rules), which were created by the Board “to assist persons in applying for clemency.”<sup>10</sup> No rule “can or is intended to limit the authority or discretion given to the Board in the exercise of its constitutional prerogative.”<sup>11</sup> In fact, the Rules are not binding on either the Governor or any of the other Board members.<sup>12</sup>

### 2. Commencing Clemency Proceedings and the Role of the Florida Parole Commission

Section 940.03 of the Florida Statutes requires death-sentenced inmates to file “an application for executive clemency . . . within 1 year after the date the Florida Supreme Court issues a mandate on a direct appeal or the United States Supreme Court denies a petition for *certiorari*, whichever is later.”<sup>13</sup> However, the Rules do not include a filing deadline for clemency applications. Based on Rule 15(C) of the Florida Rules of Executive Clemency, it appears that death-sentenced inmates are not required to submit clemency applications, as the Florida Parole Commission (Parole Commission) is required, in all cases in which the inmate has been sentenced to death, to initiate a clemency investigation after denial of an initial writ of habeas corpus by the Eleventh Circuit Court of Appeals, or failure to file any post-conviction appeal within the respective time-limit.<sup>14</sup>

#### a. Authority and Composition of the Florida Parole Commission

The Parole Commission, a constitutionally authorized decision-making body, serves as the investigative arm of the Board, which includes performing investigations related to

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<sup>10</sup> See FLA. R. EXEC. CLEMENCY 2(A), available at <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006).

<sup>11</sup> *Id.*

<sup>12</sup> See FLA. ADMIN. CODE R. 27 app. (2006) (stating that the Rules are not regulated by the Florida Administrative Procedure Act and are not binding on the Clemency Board or the Governor).

<sup>13</sup> FLA. STAT. § 940.03 (2006); Florida Parole Commission, Application for Clemency (Form 1501), available at <https://fpc.state.fl.us/PDFs/clemency/ClemencyApplicationOtherthanRCRForm1501Final31902.PDF> (last visited on Aug. 7, 2006).

<sup>14</sup> See FLA. R. EXEC. CLEMENCY 15(C), available at <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006); E-mail from Mark Schlakman (Aug. 10, 2005) (noting that section 940.03 of the Florida Statutes “appears to have no current force or effect”).

clemency applications.<sup>15</sup> The Parole Commission is comprised of three Commissioners<sup>16</sup> who are appointed by the Governor and the Cabinet.<sup>17</sup> Upon any vacancies in the Parole Commission, the Parole Qualifications Committee (Committee), which is also appointed by the Governor and the Cabinet, is required to submit to the Governor and the Cabinet a list of three eligible applicants per open seat, including any incumbents.<sup>18</sup> The Governor and the Cabinet may accept or reject the list of applicants;<sup>19</sup> any accepted applicant(s) must be confirmed by the full Senate.<sup>20</sup> Once confirmed, the Commissioners will serve six-year terms, and no commissioner may serve more than two consecutive six-year terms.<sup>21</sup>

#### b. The Florida Parole Commission's Investigation

In all cases in which an inmate has been sentenced to death, “the [Parole] Commission may conduct a thorough and detailed investigation into all factors relevant to the issue of clemency” and submit a report of its findings to the Board.<sup>22</sup> To fulfill its duties, the Parole Commission's Capital Punishment Research Specialist, under the supervision of the Parole Commission's Director of Clemency Administration,<sup>23</sup> routinely monitors and tracks death penalty cases beyond direct appeal.<sup>24</sup>

#### i. Timing of the Florida Parole Commission's Investigation

The Parole Commission's investigation must “begin at such time as designated by the Governor.”<sup>25</sup> However, if the Governor does not designate a time to commence the

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<sup>15</sup> See FLA. CONST. art. IV, § 8(c) (stating that “there may be created by law a parole and probation commission with the power to supervise persons on probation and grants paroles of conditional release to persons under sentences for crime”); FLA. STAT. § 20.32(1) (2006).

<sup>16</sup> FLA. STAT. § 947.01 (2006). The current Parole Commissioners are Monica David, Chair; Frederick T. Dunphy, Vice Chair; and Tena Pate, Secretary. See Florida Parole Commission, Commissioners, available at <http://www.state.fl.us/fpc/Commissioners.htm> (last visited on Aug. 7, 2006).

<sup>17</sup> FLA. STAT. § 947.03(1) (2006).

<sup>18</sup> FLA. STAT. § 947.02(2), (3) (2006).

<sup>19</sup> FLA. STAT. § 947.02(4) (2006) (noting that if the list of applicants is rejected, the Committee must reinitiate the application and examination procedure).

<sup>20</sup> FLA. STAT. § 947.02(1) (2006); see also Florida Parole Commission, FAQ, Parole and Clemency, available at <https://fpc.state.fl.us/FAQ.htm> (last visited on Aug. 7, 2006).

<sup>21</sup> FLA. STAT. § 947.03(1) (2006).

<sup>22</sup> See FLA. R. EXEC. CLEMENCY 15(B), (D) available at <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006). The Parole Commission's Clemency Administration Office (Clemency Administration) is specifically charged with conducting the required investigation. See Florida Parole Commission, Florida Board of Executive Clemency, available at <https://fpc.state.fl.us/Clemency.htm> (last visited Aug. 7, 2006); FLORIDA PAROLE COMMISSION, ANNUAL REPORT 2003-2004, at 22 (2004) [2003-2004 ANNUAL REPORT], available at <https://fpc.state.fl.us/PDFs/FPCannualreport200304.pdf> (last visited on Aug. 7, 2006); FLORIDA CORRECTIONS COMMISSION, 2000 ANNUAL REPORT (2000) [hereinafter 2000 ANNUAL REPORT], available at <http://www.fcc.state.fl.us/fcc/reports/final00/1fpc.htm> (last visited on Aug. 7, 2006).

<sup>23</sup> For a discussion on the role of the Clemency Administration, see *supra* note 22.

<sup>24</sup> Florida Parole Commission, Florida Board of Executive Clemency, available at <https://fpc.state.fl.us/Clemency.htm> (last visited Aug. 7, 2006); 2000 ANNUAL REPORT, *supra* note 22.

<sup>25</sup> See FLA. R. EXEC. CLEMENCY 15(C) available at <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006).

investigation, “the investigation shall begin immediately after” (1) the Eleventh Circuit Court of Appeals has denied the inmate’s initial petition for a writ of habeas corpus, as long as all state and federal post-conviction petitions were timely filed; or (2) the inmate has failed to timely file the initial motion for state post-conviction relief, or any appeal thereof, or the initial petition of a writ of habeas corpus in federal court, or any appeal thereof.<sup>26</sup> Failure to conduct or complete the investigation pursuant to these timelines, however, will not constitute a ground for relief for the death-sentenced inmate.<sup>27</sup>

Upon initiating the investigation, the Parole Commission must notify the Office of the Attorney General’s Bureau of Advocacy and Grants (Office of the Attorney General) of the investigation.<sup>28</sup> The Office of the Attorney General should then provide notification of the investigation to the victims of record and request written comments from them.<sup>29</sup>

#### ii. Scope of the Florida Parole Commission’s Investigation

The Parole Commission’s investigation should include, but is not limited to, the following:

- (1) an interview of the inmate conducted in the presence of clemency counsel, if applicable, by the Parole Commission,<sup>30</sup> which generally means that at least two of the three Parole Commissioners will conduct the interview;<sup>31</sup>
- (2) an interview of the trial attorneys who prosecuted and defended the case, if possible;
- (3) an interview with the presiding judge, if possible; and
- (4) an interview with the defendant’s family, if possible.<sup>32</sup>

Any statements and testimony given by the death-sentenced inmate relating to the Parole Commission’s investigation must be recorded and transcribed and provided upon request to the attorney for the state, the inmate’s attorney, and the victim’s family.<sup>33</sup>

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> FLA. R. EXEC. CLEMENCY 15(B), *available at* <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006).

<sup>29</sup> *Id.*

<sup>30</sup> *See* 2003-2004 ANNUAL REPORT, *supra* note 22, at 22 (noting that the Clemency Administration actually coordinates the interview of the inmate by the Parole Commission); 2000 ANNUAL REPORT, *supra* note 22.

<sup>31</sup> *See, e.g.,* 2000 ANNUAL REPORT, *supra* note 22 (noting that the Parole Commission’s “Office of Clemency Administration is responsible for coordinating the interview of the death-row inmate by two Parole Commissioners”); E-mail from Mark Schlakman (Aug. 10, 2005) (on file with author) (noting that generally at least two members of the Parole Commission interview the death-sentenced inmate). In addition to the Parole Commissioners, the clemency aides of the Governor and/or other members of the Board may attend the interview at the discretion of the Governor and the other members of the Board. *See* E-mail from Mark Schlakman (April 7, 2006) (on file with author).

<sup>32</sup> FLA. R. EXEC. CLEMENCY 15(B), *available at* <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006); *see also* 2000 ANNUAL REPORT, *supra* note 22.

<sup>33</sup> FLA. R. EXEC. CLEMENCY 15(G), *available at* <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006).

The Parole Commission must also compile the “circumstances, the criminal records, and the social, physical, mental, and psychiatric conditions and histories” of death-sentenced inmates and provide this information to the Board.<sup>34</sup> The Parole Commission’s 2003-2004 Annual Report appears to expand this requirement by stating that the Parole Commission “is responsible for . . . researching the entire case to include offense of conviction, prior and subsequent record, institutional record, co-defendant information, and court information relating to trial and appeals.”<sup>35</sup>

In addition to investigating new cases, the Parole Commission, at the Governor’s discretion, may reinvestigate cases examined under previous administrations.<sup>36</sup>

c. Florida Parole Commission’s Report to the Board of Executive Clemency

After the investigation is completed, the Parole Commissioners who personally interviewed the inmate must draft a “final report on their findings and conclusions,” including: (1) any statements made by the inmate and/or his/her counsel during the investigation; (2) a detailed summary of the interview; and (3) any other information gathered during the investigation.<sup>37</sup>

The Parole Commissioners must also include in the report any written comments obtained from the victim’s representatives by the Office of the Attorney General.<sup>38</sup> The report also typically includes a non-binding clemency recommendation.<sup>39</sup>

The Parole Commissioners must complete the final report and forward it to the Board within 120 days after the commencement of the investigation, unless the Governor extends the deadline.<sup>40</sup>

3. Additional Information Submitted to the Board of Executive Clemency

The inmate and his/her counsel, the attorney for the state, the victim’s family, and any other interested person also may file with the Office of Executive Clemency<sup>41</sup> a written

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<sup>34</sup> See FLA. STAT. § 947.13(1)(e) (2006).

<sup>35</sup> 2003-2004 ANNUAL REPORT, *supra* note 22, at 22.

<sup>36</sup> FLA. R. EXEC. CLEMENCY 15(C), *available at* <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006).

<sup>37</sup> FLA. R. EXEC. CLEMENCY 15(D), *available at* <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006).

<sup>38</sup> *Id.* The Office of the Attorney General’s Bureau of Advocacy and Grants is responsible for notifying the victim’s family of the Commission’s investigation and requesting comments. *Id.*

<sup>39</sup> E-mail from Mark Schlakman (Aug. 10, 2005) (on file with author); Florida Legislature, Office of Program Policy Analysis and Government Accountability, Parole Commission, Clemency, *at* <http://www.oppaga.state.fl.us/profiles/1036> (last visited on Aug. 7, 2006).

<sup>40</sup> See FLA. R. EXEC. CLEMENCY 15(D), *available at* <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006).

<sup>41</sup> The Office of Executive Clemency is charged with “processing applications for executive clemency.” See Florida Parole Commission, Florida Board of Executive Clemency, *at* <https://fpc.state.fl.us/Clemency.htm> (last visited on Aug. 7, 2006).

statement, brief, or memorandum of the case.<sup>42</sup> All written statements, briefs, and memoranda must be filed within ninety days of the initiation of the investigation.<sup>43</sup> The person filing such written information must provide five copies, which may be distributed by the Office of Executive Clemency to the Board members.<sup>44</sup>

### C. Clemency Hearings

Based on the Commission's investigation or report, any Board member may request that a clemency hearing be set for one of the Board's regularly scheduled meetings, which routinely are held on a quarterly basis in the Cabinet Room of the Florida State Capitol,<sup>45</sup> or at a special meeting.<sup>46</sup> All Board members, except for the Governor, must request a hearing within twenty days of receipt of the final report.<sup>47</sup> The Governor may submit his/her request at any time.<sup>48</sup>

If a hearing is requested by any Board member, notice must be provided to the attorney for the state, the inmate's counsel, and the Victim's Rights Coordinator in the Executive Office of the Governor and the Office of Attorney General.<sup>49</sup> The Governor is to conduct the clemency hearing,<sup>50</sup> and the inmate or his/her counsel, the state, and the victim's family may all make oral statements during the hearing.<sup>51</sup> The oral statements of both the inmate or his/her counsel and the state may not exceed fifteen minutes, unless extended by the Governor at his/her discretion.<sup>52</sup> Oral statements from representatives of the victim's family may not exceed five minutes.<sup>53</sup>

The fact that a case is not scheduled for a public hearing is not indicative of whether the Board will consider the merits or lack thereof.<sup>54</sup> In fact, the Board members may make decisions about the case even if it is not scheduled for a hearing.<sup>55</sup>

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<sup>42</sup> FLA. R. EXEC. CLEMENCY 15(G), *available at* <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*; *see also* FLA. R. EXEC. CLEMENCY 2(B), *available at* <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited Aug. 7, 2006) (stating that "The office of Executive Clemency was created to assist in the orderly and expeditious exercise of [clemency].").

<sup>45</sup> Email from Mark Schlakman (Aug. 10, 2005) (on file with author).

<sup>46</sup> FLA. R. EXEC. CLEMENCY 15(E), *available at* <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006).

<sup>47</sup> *Id.*

<sup>48</sup> FLA. R. EXEC. CLEMENCY 15(F), *available at* <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006).

<sup>49</sup> FLA. R. EXEC. CLEMENCY 15(E), *available at* <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006).

<sup>50</sup> E-mail from Mark Schlakman (Aug. 10, 2005) (on file with author).

<sup>51</sup> FLA. R. EXEC. CLEMENCY 15(H), *available at* <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006).

<sup>52</sup> *Id.*

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

<sup>54</sup> E-mail from Mark Schlakman (Aug. 10, 2005) (on file with author).

<sup>55</sup> *Id.*

#### D. Clemency Decision-Making Process

In order for the Governor to grant clemency, s/he must obtain the approval of at least two Board members.<sup>56</sup> But the Governor has the discretion to deny clemency at any time, for any reason, without the approval of any other Board members.<sup>57</sup> In practice, the Board members traditionally defer to the Governor on clemency decisions, and the Governor traditionally looks to the Attorney General for his/her perspective regarding the extent to which issues had been raised and disposed of on appeal.<sup>58</sup>

If the Governor, with the approval of two other Board members, decides to commute an inmate's death sentence, then the commutation order should be filed with the custodian of state records and copies of the order should be distributed to the inmate, inmate's counsel, the attorneys for the state, a representative of the victim's family, the Secretary of the Department of Corrections, and the chief judge of the circuit where the inmate was sentenced.<sup>59</sup> Additionally, the Office of the Attorney General must notify the victim's family within twenty-four hours of the clemency decision.<sup>60</sup>

Apart from the commutation order and the transcripts of any statements or testimony given by the death-sentenced inmate during the Parole Commission's investigation that are provided upon request to the attorney for the state, the inmate's attorney and the victim's family, all records and documents generated and gathered in the clemency process are confidential and unavailable for inspection by any person except members of the Board and their staff.<sup>61</sup> The Governor alone has the discretion to allow such documents to be inspected or copied.<sup>62</sup> Access to such documents, as approved by the Governor, does not constitute a waiver of confidentiality.<sup>63</sup>

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<sup>56</sup> FLA. R. EXEC. CLEMENCY 4, available at <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006).

<sup>57</sup> *Id.*

<sup>58</sup> E-mail from Mark Schlakman (Aug. 10, 2005) (on file with author).

<sup>59</sup> FLA. R. EXEC. CLEMENCY 15(I), available at <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006).

<sup>60</sup> *Id.*

<sup>61</sup> FLA. R. EXEC. CLEMENCY 15(A), available at <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006); *Parole Comm'n v. Lockett*, 620 So. 2d 153 (Fla. 1993) (finding that the clemency investigative files and reports produced by the Parole Commission on behalf of the Governor and Cabinet relating to the granting of clemency are subject solely to the Rules of Executive Clemency, meaning that they are confidential and the Governor has the sole authority to make such records public); *Assay v. Fla. Parole Comm'n*, 649 So. 2d 859, 860 (Fla. 1994) (finding that *Brady v. Maryland* and its progeny do not apply to clemency proceedings and therefore the Florida Parole Commission was not required to disclose the information it gathers during clemency investigations for the Board of Executive Clemency).

<sup>62</sup> FLA. R. EXEC. CLEMENCY 15(A), available at <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006); *Lockett*, 620 So. 2d at 153 (Fla. 1993); *Assay*, 649 So. 2d at 860.

<sup>63</sup> FLA. R. EXEC. CLEMENCY 15(A), available at <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006).

## II. ANALYSIS

Like many of the other sections of this report, this section analyzes Florida's clemency process by using as a benchmark the recommendations set out in the ABA Section of Individual Rights and Responsibilities' publication, *Death without Justice: A Guide for Examining the Administration of the Death Penalty in the United States* (the Protocols). These recommendations have been and will be used to analyze the clemency systems of all assessment states.<sup>64</sup>

### A. Recommendation #1

**The clemency decision-making process should not assume that the courts have reached the merits on all issues bearing on the death sentence in a given case; decisions should be based upon an independent consideration of facts and circumstances.**

The Florida Rules of Executive Clemency (Rules) states that the Florida Parole Commission (Parole Commission), which serves as the investigative arm of the Board of Executive Clemency (Board), is responsible for conducting a "thorough and detailed investigation into all factors relevant to the issue of clemency" and for submitting a report of its findings to the Board.<sup>65</sup> The Parole Commission's investigation should include, but is not limited to, an interview with the inmate and interviews with the trial attorneys, the presiding judge, and the inmate's family, if possible.<sup>66</sup> Apart from these interviews, however, we were unable to determine the full extent of what constitutes a "through and detailed investigation" given the confidentiality surrounding the clemency process. Similarly, while it may be inferred that the Governor and the other Board members consider the findings of the investigation as part of their clemency decision-making process, neither the Florida Statutes nor the Rules require them to consider this information.<sup>67</sup>

Even though the "thorough and detailed investigation into all factors relevant to the issue of clemency" may appear to be in compliance with Recommendation #1, we were unable to determine the extent to which the investigation meets this threshold given the lack of

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<sup>64</sup> The Florida Death Penalty Assessment Team invited the Governor's Legal Office to review this analysis section as well as the factual discussion on clemency. The Governor's Legal Office provided comments in a letter from the Governor's General Counsel, Raquel A. Rodriguez, which can be found *infra* in Appendix 1 of this report. The Comment of the Florida Death Penalty Assessment Team on this letter can be found *infra* in Appendix 2 of this report.

<sup>65</sup> See FLA. R. EXEC. CLEMENCY 15(B), (D), available at <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006).

<sup>66</sup> See FLA. R. EXEC. CLEMENCY 15(B), available at <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006).

<sup>67</sup> See FLA. R. EXEC. CLEMENCY 4, available at <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006).

available information concerning the full extent of the investigation. We are, therefore, unable to assess whether the State of Florida is in compliance with Recommendation #1.

Accordingly, the Florida Death Penalty Assessment Team recommends that Florida's Board of Executive Clemency adopt a rule that calls for the Board to issue a brief written statement in every instance wherein a death-sentenced inmate is denied clemency, making specific reference to the various factors/claims that the Board may have considered.

*B. Recommendation #2*

**The clemency decision-making process should take into account all factors that might lead the decision-maker to conclude that death is not the appropriate punishment.**

Recommendation #2 requires clemency decision-makers to consider "all factors" that might lead the decision-maker to conclude that death is not the appropriate punishment. According to the ABA, "all factors" include, but are not limited to, the following, which are not listed in any particular order of priority:

- (1) constitutional claims that were barred in court proceedings due to procedural default, non-retroactively, abuse of writ, statutes of limitations, or similar doctrines, or whose merits the federal courts did not reach because they gave deference to possibly erroneous, but not "unreasonable," state court rulings;
- (2) constitutional claims that were found to have merit but did not involve errors that were deemed sufficiently prejudicial to warrant judicial relief;
- (3) lingering doubts of guilt (as discussed in Recommendation #4);
- (4) facts that no fact-finder ever considered during judicial proceedings, where such facts could have affected determinations of guilt or sentence or the validity of constitutional claims;
- (5) patterns of racial or geographic disparity in carrying out the death penalty in the jurisdiction (as discussed in Recommendation #3);
- (6) inmates' mental retardation, mental illness, and/or mental competency (as discussed in Recommendation #4); and
- (7) inmates' age at the time of the offense (as discussed in Recommendation #4).<sup>68</sup>

As discussed under Recommendation #1, the Rules direct the Parole Commission, acting in its capacity as the investigative arm of the Board, to conduct a "thorough and detailed investigation into all factors relevant to the issue of clemency"<sup>69</sup> and to submit its

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<sup>68</sup> AMERICAN BAR ASSOCIATION, DEATH WITHOUT JUSTICE: A GUIDE FOR EXAMINING THE ADMINISTRATION OF THE DEATH PENALTY IN THE UNITED STATES (2002).

<sup>69</sup> FLA. R. EXEC. CLEMENCY 15(B), available at <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006).

findings to the Board.<sup>70</sup> We were unable to verify what “factors relevant to the issue of clemency” are considered as part of the “thorough and detailed investigation.”

We do know that, in addition to the findings of its investigation, the Parole Commission may provide the Board with relevant case information, including the offense of conviction; the criminal records (prior, subsequent, and institutional); co-defendant information; court information relating to trial and appeals; and the social, physical, mental, and psychiatric conditions of the death-sentenced inmate.<sup>71</sup> This information, however, appears to be limited, and only pertains to some of the factors delineated by Recommendation #2. But, on a case-by-case basis, the Parole Commission may provide the Board with additional information relating to the other factors delineated in Recommendation #2, and the Board also may retain experts and make inquires on its own initiative.<sup>72</sup> Additionally, the inmate and his/her attorney, as well as any other interested party, may raise in written comments or orally at the clemency hearing, if held, any of the factors delineated in Recommendation #2.<sup>73</sup>

Despite the fact that the Parole Commission is directed to provide the Board with this information, neither Florida law nor the Rules explicitly require the Board to consider any of it or any specific factors when assessing a death-sentenced inmate’s eligibility for clemency. We recognize, however, that even if the Rules did explicitly require the Board to consider these factors, the Rules are not binding on either the Governor or the other Board members.<sup>74</sup>

The Board’s website, however, does indicate that when determining whether to grant clemency in any case, not just in capital cases, it “will consider, but not be limited to, the following factors:”

- (1) the nature of the offense;
- (2) whether the inmate has any history of mental instability, drug or alcohol abuse;
- (3) whether the inmate has any subsequent arrests, including traffic violations;
- (4) the inmate’s employment history;
- (5) whether the inmate is delinquent on any outstanding debts or child support payments; and
- (6) letters submitted in support of, or in opposition to, the grant of executive clemency.<sup>75</sup>

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<sup>70</sup> FLA. R. EXEC. CLEMENCY 15(D), *available at* <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006).

<sup>71</sup> See FLA. STAT. § 947.13(1)(e) (2006); 2003-2004 ANNUAL REPORT, *supra* note 22, at 22.

<sup>72</sup> E-mail from Mark Schlakman (April 7, 2006) (on file with author).

<sup>73</sup> FLA. R. EXEC. CLEMENCY 15(G), (H), *available at* <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006).

<sup>74</sup> See *supra* notes 10-12 and accompanying text.

<sup>75</sup> Florida Office of Executive Clemency, Information and Instructions on Applying for Clemency, *available at* <https://fpc.state.fl.us/PDFs/clemency/instructionsforclemencyorcr.pdf> (last visited on Aug. 7, 2006).

A number of these factors are consistent with the factors delineated by Recommendation #2, and a review of Florida's past clemency decisions indicates that the Board has previously considered at least some of these factors. Between 1972, when Florida reinstated the death penalty, and 1983, which is the last time a death-row inmate received clemency in Florida, the Governor, with the approval of other Board members, commuted the death sentences of six inmates.<sup>76</sup> Although neither the Governor nor any of the other Board members are required to explain his/her clemency decision,<sup>77</sup> it appears that the decision to grant these six commutations may be attributed to one of three factors: (1) lingering doubts about the inmate's guilt;<sup>78</sup> (2) the inmate's mental capacity at the time of the crime;<sup>79</sup> and (3) the disproportionality of the inmate's sentence.<sup>80</sup>

While previous decisions granting clemency do not serve as precedent per se and are not necessarily indicative of current or future decision-making, it is clear that in the past the Board has considered in at least six cases some of the factors delineated by Recommendation #2. Still, it does not appear that the Board is required to consider any specific factors when assessing an inmate's case for clemency, and we were unable to obtain sufficient information to assess whether the Board routinely considers "all factors" delineated in Recommendation #2. We are, therefore, unable to assess whether the State of Florida is in compliance with Recommendation #2.

To help ensure that the factors suggested by the ABA are considered when reviewing petitions for clemency, the Florida Death Penalty Assessment Team calls on Florida's Board of Executive Clemency to adopt a rule delineating the factors that the Board

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<sup>76</sup> See Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. RICH. L. REV. 289, 299-301 (1993). The six inmates who were granted clemency include: (1) Learie Leo Alford, (2) Clifford Hallman, (3) Darrell Edwin Hoy, (4) Richard Henry Gibson, (5) Michael Salvatore, and (6) Jesse Rutledge. *Id.* at 300-02. See also Death Penalty Information Center, *Clemency*, at <http://www.deathpenaltyinfo.org/article.php?did=126&scid=13> (last visited on Aug. 7, 2006). Compare with Michael A.G. Korengold et al., *And Justice for Few: The Collapse of the Capital Clemency System in the United States*, 20 HAMLIN L. REV. 349, 359-60 (stating that "[t]he non-existence of clemency stands in stark contrast to the period from 1949 to 1963 when, in Florida, over twenty-five percent of all death-row inmates received clemency").

<sup>77</sup> E-mail from Mark Schlakman (Aug. 10, 2005) (on file with author). In cases in which clemency is denied, traditionally, the Governor makes only cursory reference to the denial in the context of a whereas clause on the resulting death warrant.

<sup>78</sup> This factor was present in the cases of Alford, Rutledge, and Salvatore. See Radelet & Zsembik, *supra* note 76, at 301.

<sup>79</sup> This factor was present in Hoy's case; his attorney argued at the clemency hearing that his "youth, low intelligence, and susceptibility to domination by his codefendant tended to reduce Hoy's blameworthiness for the crime." See *id.* at 301. But see Death Penalty Information Center, *Clemency*, at <http://www.deathpenaltyinfo.org/article.php?did=126&scid=13> (last visited on Aug. 7, 2006) (noting that the reason for commutation was that the death sentence was disproportional to the sentence given to his equally or more culpable co-defendant, the triggerman).

<sup>80</sup> This factor was present in the cases of Gibson and Hallman. See Radelet & Zsembik, *supra* note 76, at 301-02. In the Gibson case, his death sentence was disproportionate to the sentences imposed on his accomplices. *Id.* In the Hallman case, his death sentence was inappropriate and disproportionate based on his crime. *Id.*

should consider, but not be limited to, when reviewing death-sentenced inmates' grounds for clemency.

*C. Recommendation #3*

**Clemency decision-makers should consider as factors in their deliberations any patterns of racial or geographic disparity in carrying out the death penalty in the jurisdiction, including the exclusion of racial minorities from the jury panels that convicted and sentenced the death-row inmate.**

*Recommendation #4*

**Clemency decision-makers should consider as factors in their deliberations the inmate's mental retardation, mental illness, or mental competency, if applicable, the inmate's age at the time of the offense, and any evidence relating to a lingering doubt about the inmate's guilt.**

*Recommendation #5*

**Clemency decision-makers should consider as factors in their deliberations an inmate's possible rehabilitation or performance of significant positive acts while on death row.**

As discussed under Recommendation #2, it does not appear that the Board is required to consider any specific factors when assessing a death-sentenced inmate's eligibility for clemency. However, the Parole Commission is directed to provide the Board with the findings of its investigation into "all factors relevant to the issue of clemency," as well as relevant case information, including the offense of conviction; the circumstances; the criminal records (prior and subsequent and institutional); co-defendant information; and court information relating to trial and appeals; and the social, physical, mental, and psychiatric conditions and histories of the death-sentenced inmate.<sup>81</sup>

The information that the Parole Commission is directed to provide to the Board does not appear to be relevant to Recommendation #3, but is relevant to Recommendations #4 and #5. This information includes the social, physical, mental, and psychiatric conditions and histories of the death-sentenced inmate and the institutional records of the death-sentenced inmate.<sup>82</sup> Similarly, although past Board decisions are not necessarily an indicator of current or future Board decision-making, in the six cases in which the Board has commuted an inmate's death sentence, the Board did consider an inmate's mental

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<sup>81</sup> See FLA. STAT. § 947.13(1)(e) (2006); 2003-2004 ANNUAL REPORT, *supra* note 22, at 22.

<sup>82</sup> See FLA. STAT. § 947.13(1)(e) (2006); 2003-2004 ANNUAL REPORT, *supra* note 22, at 22.

health in at least one case,<sup>83</sup> as well as evidence related to lingering doubts about the inmate's guilt in at least three of the cases.<sup>84</sup>

Although the Board is provided with information relevant to Recommendations #4 and #5 and has previously considered issues relevant to Recommendation #4, we were unable to obtain sufficient information to assess whether the Board routinely considers the factors addressed in Recommendations #3 through #5.

As recommended above, to help ensure that the factors included in Recommendations #3 through #5 are considered when reviewing petitions for clemency, the Florida Death Penalty Assessment Team again recommends that the Board adopt a rule delineating the factors that the Board should consider, but not be limited to, when reviewing death-sentenced inmates' grounds for clemency.

#### *D. Recommendation #6*

**In clemency proceedings, the death-row inmates should be represented by counsel and such counsel should have qualifications consistent with the American Bar Association Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases.**

In the State of Florida, indigent death-sentenced inmates have a right to counsel in clemency proceedings,<sup>85</sup> which carries with it the right to "effective assistance of counsel."<sup>86</sup> Florida law provides that if the indigent death-sentenced inmate "has applied for executive clemency," s/he will be appointed a public defender or, in the case of a conflict of interest, a private attorney.<sup>87</sup> The Rules, however, do not require the inmate to file a clemency application to initiate clemency proceedings, as the Parole Commission is directed to conduct an investigation in all cases in which the inmate is sentenced to death.<sup>88</sup> In these cases, the Office of Executive Clemency is charged with initiating the attorney appointment process by contacting the respective court.<sup>89</sup>

Similarly, although indigent death-sentenced inmates are entitled to effective assistance of counsel in clemency proceedings, the qualification requirements for these attorneys are

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<sup>83</sup> See Radelet & Zsembik, *supra* note 76, at 301.

<sup>84</sup> See *id.*

<sup>85</sup> See FLA. STAT. § 27.51(5)(a) (2006); FLA. STAT. § 27.5303(4)(b) (2006); see also *Remeta v. State*, 559 So. 2d 1132, 1135 (Fla. 1990) (stating "[w]e emphasize that this type of clemency proceeding is just part of the overall death penalty procedural scheme in this state. The circuit court in this instance had the responsibility to appoint counsel under this statutory right."); *Olive v. Maas*, 811 So. 2d 644, 652 (Fla. 2002) (quoting *Remeta*, 559 So. 2d at 1135, which states that "it is clear that this state has established a right to counsel in clemency proceedings for death penalty cases and this statutory right necessarily carries with it the right to have effective assistance of counsel"). The right to counsel in clemency proceedings was originally based on section 925.035 of the Florida Statutes, which was repealed effective July 1, 2005. See 2003 Fla. Laws ch. 402 (H.B. 113-A) (Fla. 2003).

<sup>86</sup> See *Remeta*, 559 So. 2d at 1135; *Olive*, 811 So. 2d at 652.

<sup>87</sup> FLA. STAT. § 27.5303(4)(b) (2006); see also FLA. STAT. § 27.51(5)(a) (2006).

<sup>88</sup> FLA. R. EXEC. CLEMENCY 15(B), available at <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006); see also *supra* notes 22-36.

<sup>89</sup> See E-mail from Mark Schlakman (April 7, 2006) (on file with author).

unclear. We do know, however, that the State of Florida does not require any attorney handling death penalty cases to have qualifications consistent with the *American Bar Association Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases* (ABA Guidelines).<sup>90</sup>

Based on this information, the State of Florida is only in partial compliance with Recommendation #6. Although the State of Florida provides counsel to death-sentenced inmates during clemency proceedings, it does not require counsel to have qualifications consistent with the ABA Guidelines.

*E. Recommendation #7*

**Prior to clemency hearings, death-row inmates' counsel should be entitled to compensation and access to investigative and expert resources. Counsel also should be provided sufficient time both to develop the basis for any factors upon which clemency might be granted that previously were not developed and to rebut any evidence that the State may present in opposing clemency.**

As discussed under Recommendation #6, death-sentenced inmates are not required to apply for clemency in order to be appointed counsel. Rather, the Office of Executive Clemency initiates the appointment process by contacting the respective court.

In cases in which the court appoints a public defender to represent an indigent death-sentenced inmate during clemency proceedings, issues relating to the amount and timing of compensation may not be as compelling when compared to private attorneys, as public defenders are salaried employees,<sup>91</sup> and presumably have some degree of access to experts and/or investigators to prepare for the clemency proceedings.<sup>92</sup> In practice, however, recent trends suggest that there is less reliance today upon public defenders for these purposes than has been the case in the past.

Similarly, Florida provides that private attorneys appointed by the court may be compensated for both “fees and costs” associated with representing a death-sentenced inmate in clemency proceedings, but the attorney’s fees may not exceed \$1,000.<sup>93</sup> The Florida Supreme Court has found that the \$1,000 limit for fees may be exceeded “when necessary to ensure effective representation.”<sup>94</sup> However, Florida law does not appear to specifically provide funds for investigators or experts to private court-appointed attorneys. In practice, the Florida Department of Corrections may provide limited

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<sup>90</sup> See Chapter Six: Defense Services, *supra*, at 135.

<sup>91</sup> See, e.g., FLA. STAT. § 27.5301 (2006) (noting that “[t]he salaries of public defenders shall be as provided in the General Appropriations Act and shall be paid in equal monthly installments”).

<sup>92</sup> See, e.g., FLA. STAT. § 27.53(1) (2006).

<sup>93</sup> FLA. STAT. § 27.5304(3)(b) (2006).

<sup>94</sup> *Remeta v. State*, 559 So. 2d 1132, 1135 (Fla. 1990) (holding that “courts have the authority to exceed statutory fee caps to compensate court-appointed counsel for the representation of indigent, death-sentenced prisoners in executive clemency proceedings when necessary to ensure effective representation”); *State v. Peek*, 441 So. 2d 158, 159 (Fla. 2d DCA 1983) (noting that the legislature intended that during clemency proceedings the attorney should be paid reasonable costs in addition to a reasonable fee for services).

funding for investigators or experts, but it is incumbent upon clemency counsel to seek authorization through the Director of Clemency Administration.

Although the State of Florida permits the fee cap for clemency cases to be exceeded, attorneys appointed to handle these cases typically are not compensated for their services until the final disposition of the case.<sup>95</sup> The only exception appears to be if the attorney has been providing legal services in the matter for more than one year; then, the court may approve payment of not more than 80 percent of the fees earned, or costs and related expenses incurred, to date, or an amount proportionate to the maximum fees permitted based on legal services provided to date.<sup>96</sup>

Lastly, even though the Office of Executive Clemency is charged with initiating the attorney appointment process, the Rules do not specify when attorneys are actually appointed to represent death-sentenced inmates in clemency proceedings. Therefore, it is unclear whether such attorneys receive sufficient time to develop the bases for certain factors upon which clemency might be granted. To help address such concerns, we recommend that a rule be adopted clarifying that such attorneys should be appointed no later than upon commencement of the corresponding clemency investigation.

Although public defenders appointed to represent indigent death-sentenced inmates presumably are entitled to compensation and expert assistance prior to the clemency hearing, if held, court-appointed attorneys appear to have only limited access to funding for investigators or experts and, generally are not compensated until the final disposition of the case. Therefore, it appears as though the State of Florida is only in partial compliance with Recommendation #7.

*F. Recommendation #8*

**Clemency proceedings should be formally conducted in public and presided over by the Governor or other officials involved in making the clemency determination.**

*Recommendation #9*

**If two or more individuals are responsible for clemency decisions or for making recommendations to clemency decision-makers, their decisions or recommendations should be made only after in-person meetings with clemency petitioners.**

The State of Florida does not have any laws, rules, procedures, standards, or guidelines requiring the Governor or any of the other Board members to hold and preside over public clemency hearings or conduct in-person meetings with all death-sentenced inmates.<sup>97</sup> Instead, the Parole Commission, serving as the investigative arm of the

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<sup>95</sup> FLA. STAT. § 27.5304(2) (2006).

<sup>96</sup> *Id.*

<sup>97</sup> FLA. R. EXEC. CLEMENCY 15(E), (F), *available at* <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006).

Board, is directed to investigate “all factors relevant to the issue of clemency” and interview all death-sentenced inmates.<sup>98</sup> The interview is not open to the public and not all Parole Commissioners are required to attend. Rather, the interview generally is conducted by two of the three Parole Commissioners,<sup>99</sup> and is attended, at the discretion of the Governor and the other Board members, by aides of both the Governor and the other Board members.<sup>100</sup> However, historically, attendance by these aides appears to have been the exception rather than the norm.<sup>101</sup>

Following the interview, the Parole Commissioners who interviewed the inmate are required to provide the Board with a written summary of the interview and a non-binding clemency recommendation.<sup>102</sup> However, neither the Florida Statutes nor the Rules require the Governor or any of the other Board members to consider the Parole Commissioners findings and/or non-binding recommendation. Even if the Rules did explicitly require the Board to consider these findings, however, the Rules are not binding on either the Governor or any of the other Board members.<sup>103</sup> This means that it is conceivable that the Governor could deny clemency even before the Parole Commission interviews the inmate. Therefore, not only are the interviews being conducted by individuals other than the clemency decision-makers, but also nothing prevents the Governor and the other Board members, as the clemency decision-makers, from disregarding the Parole Commissioners’ findings and/or non-binding recommendation(s).

As previously indicated, in addition to the interview conducted by the Parole Commission, all members of the Board are authorized, but not required, to request that a clemency hearing be scheduled.<sup>104</sup> If a hearing is requested, it may be set for one of the Board’s regularly scheduled meetings or for a special meeting.<sup>105</sup> If a hearing is set for one of the Board’s regularly scheduled meetings, it is routinely held in the Cabinet Room of the Florida State Capitol, and all Board members would typically be present.<sup>106</sup>

Although hearings set for a regularly scheduled meeting are open to the public and are usually attended by all Board members, relatively few death-sentenced inmates have received a hearing before the Board. This trend has been even more pronounced over the

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<sup>98</sup> FLA. R. EXEC. CLEMENCY 15(B), *available at* <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006).

<sup>99</sup> *See, e.g.*, 2000 ANNUAL REPORT, *supra* note 22; E-mail from Mark Schlakman (Aug. 10, 2005) (on file with author).

<sup>100</sup> E-mail from Mark Schlakman (April 6, 2006) (on file with author).

<sup>101</sup> E-mail from Mark Schlakman (Aug. 10, 2005) (on file with author).

<sup>102</sup> *Id.*; Florida Legislature, Office of Program Policy Analysis and Government Accountability, Parole Commission, Clemency, *at* <http://www.oppaga.state.fl.us/profiles/1036> (last visited on Aug. 7, 2006); *see also* FLA. R. EXEC. CLEMENCY 15(D), *available at* <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006).

<sup>103</sup> *See supra* notes 10-12 and accompanying text.

<sup>104</sup> FLA. R. EXEC. CLEMENCY 15(E)-(F), *available at* <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006).

<sup>105</sup> *Id.*

<sup>106</sup> E-mail from Mark Schlakman (Aug. 10, 2005) (on file with author).

course of the past several years.<sup>107</sup> Additionally, all records and documents generated and gathered in the clemency process are confidential and unavailable for inspection by any person except members of the Board and their staff.<sup>108</sup> However, the Governor does have the discretion to allow such documents to be inspected or copied by others.<sup>109</sup>

Based on this information, the State of Florida fails to meet the requirements of Recommendation # 8, but can be said to be in partial compliance with Recommendation # 9. While neither the Governor nor any of the other Board members is required to conduct in-person meetings with death-sentenced inmates or hold hearings in all cases, the Parole Commission, acting as the investigative arm of the Board, is directed to interview all death-sentenced inmates. Even though the clemency aides of the Governor or Board members may attend the interview, the actual clemency decision-makers are typically not present during the interview. Moreover, it is unclear what weight, if any, the Board gives to the Parole Commission's investigative findings, including the summary of the inmate's interview and its non-binding recommendation relating to clemency.

To help ensure that clemency decision-makers are fully informed of death-sentenced inmates' grounds for clemency, the Florida Death Penalty Assessment Team calls for the Board of Executive Clemency to adopt a rule establishing that death-sentenced inmates will receive a public hearing before the Board prior to the clemency determination. Moreover, we recommend that the Board adopt a rule that calls for the Governor to, at a minimum, assign a clemency aide to routinely attend, in person or via video-conference, the Parole Commission interviews with the death-sentenced inmate since the Governor is, in effect, the principal clemency decision-maker and counsel therefore be well-served by an aide's first-hand observations. We also recommend that such a rule should attempt to facilitate participation by the clemency aides of the other members of the Board, at the discretion of their respective principals.

#### *G. Recommendation #10*

**Clemency decision-makers should be fully educated, and should encourage education of the public, concerning the broad-based nature of clemency powers and the limitations on the judicial system's ability to grant relief under circumstances that might warrant grants of clemency.**

The State of Florida does not require the Board members to undergo any formal training before they are authorized to carry out their duties.<sup>110</sup> However, clemency aides and

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<sup>107</sup> *Id.*; see also Interview with Stephen Hebert, Director of the Clemency Administrative Office (Jan. 2005) (on file with author).

<sup>108</sup> FLA. R. EXEC. CLEMENCY 15(A), available at <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006). Records are not even available to defendants through discovery rules for later appeals. *Assay v. Fla. Parole Comm'n*, 649 So. 2d 859, 860 (Fla. 1994).

<sup>109</sup> FLA. R. EXEC. CLEMENCY 15(A), available at <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006); *Parole Comm'n v. Lockett*, 620 So. 2d 153 (Fla. 1993); *Assay*, 649 So. 2d at 860.

<sup>110</sup> E-mail from Mark Schlakman (Aug. 10, 2005) (on file with author).

other staff members, who are experienced in the clemency process, generally provide support to the Board members.<sup>111</sup> But it is not uncommon for the Governor or the other Board members to hire new staff members upon taking office, potentially resulting in steep learning curves for staff regarding the clemency process.<sup>112</sup>

Given that clemency decision-makers are not required to undergo formal training and do not appear to be engaged in a public education effort about the nature of clemency powers, the State of Florida does not appear to be in compliance with Recommendation #10.

#### *H. Recommendation #11*

**To the maximum extent possible, clemency determinations should be insulated from political considerations or impacts.**

In the State of Florida, the Governor, with the approval of two other Board members, possesses the authority to grant clemency, and the Governor retains sole authority to deny clemency at any time, for any reason.<sup>113</sup> Neither the Governor nor any of the other Board members is required to explain any of its clemency decisions<sup>114</sup> and all records and documents generated and gathered in the clemency process are confidential.<sup>115</sup> However, the Governor does have the discretion to allow such documents to be inspected or copied by others.<sup>116</sup>

The confidentiality surrounding the clemency decision-making process tends to insulate Board members, except perhaps the Governor, from direct criticism associated with a particular clemency decision, especially if clemency is denied. It also tends to insulate them from being held individually accountable for their decisions. In fact, because Board members, including the Governor, need not explain their decisions, they could conceivably base their clemency decisions on grounds unrelated to the interests of justice.

The fact that the Board is composed entirely of elected officials—the Governor, the Attorney General, the Chief Financial Officer, and the Commissioner of Agriculture<sup>117</sup>-- may increase this likelihood. Additionally, the Attorney General—a constitutionally

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> FLA. R. EXEC. CLEMENCY 4, available at <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006).

<sup>114</sup> Joseph B. Schimmel, *Commutation of the Death Sentence: Florida Steps Back from Justice and Mercy*, 20 FLA. ST. U. L. REV. 253, 270, 279 (1992).

<sup>115</sup> FLA. R. EXEC. CLEMENCY 15(A), 16 available at <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006); *Assay v. Fla. Parole Comm'n*, 649 So. 2d 859, 860 (Fla. 1994).

<sup>116</sup> FLA. R. EXEC. CLEMENCY 15(A), 16 available at <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006); *Parole Comm'n v. Lockett*, 620 So. 2d 153 (Fla. 1993); *Assay*, 649 So. 2d at 860.

<sup>117</sup> FLA. CONST. art. IV, § 5; FLA. R. EXEC. CLEMENCY 1, available at <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf> (last visited on Aug. 7, 2006).

mandated member of the Board—is the chief state legal officer<sup>118</sup> and is required by statute to “act as co-counsel of record [for the State] in capital collateral proceedings.”<sup>119</sup>

Due to the confidentiality surrounding the clemency process, it is impossible to determine the extent to which inappropriate political considerations impact the Florida clemency process. Therefore, we are unable to assess whether the State of Florida is in compliance with Recommendation #11.

To help ensure that clemency determinations are insulated to the maximum extent possible from politically expedient considerations, the Florida Death Penalty Assessment Team renews an earlier recommendation in that the Board should adopt a rule that calls for the Board to issue a brief written statement in every instance wherein a death-sentenced inmate is denied clemency, making specific reference to the various factors/claims that the Board may have considered.

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<sup>118</sup> FLA. CONST. art. IV, § 4(b).

<sup>119</sup> FLA. STAT. § 16.01(6) (2006).



## CHAPTER TEN

### CAPITAL JURY INSTRUCTIONS

#### INTRODUCTION TO THE ISSUE

In virtually all jurisdictions that authorize capital punishment, jurors in capital cases have the “awesome responsibility” of deciding whether another person will live or die.<sup>1</sup> Jurors, prosecutors, defendants, and the general public rely upon state trial judges to present fully and accurately, through jury instructions, the applicable law to be followed in jurors’ decision-making. Jury instructions that are poorly written and conveyed serve only to confuse jurors instead of communicating in an understandable way.

It is important that trial judges impress upon jurors the full extent of their responsibility to decide whether the defendant will live or die or to make their advisory recommendation on sentencing. It also is important that courts ensure that jurors do not act on the basis of serious misimpressions, such as a belief that a sentence of “life without parole” does not ensure that the offender will remain in prison for the rest of his/her life. There is a danger that jurors may vote to impose a death sentence because they erroneously believe that the defendant may be released within a few years.

It is similarly vital that jurors understand the true meaning of mitigation and their ability to bring mitigating factors to bear in their consideration of capital punishment.

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<sup>1</sup> Caldwell v. Mississippi, 472 U.S. 320, 341 (1985).

## I. FACTUAL DISCUSSION

### A. *Promulgation of Standard Jury Instructions and Revisions to the Instructions as Requested by the Parties*

The Florida Supreme Court Committee on Standard Jury Instructions in Criminal Cases created the “Florida Standard Jury Instructions in Criminal Cases” (standard jury instructions), and submits proposed amendments and revisions of the instructions to the Florida Supreme Court.<sup>2</sup> After a period for public comment and argument,<sup>3</sup> the Florida Supreme Court decides whether to adopt the new instruction or amendment.<sup>4</sup>

In individual cases, the state and defense are permitted to help the judge tailor the standard jury instructions or design new instructions by requesting in writing that the judge instruct the jury on certain aspects of the law.<sup>5</sup> The written requests must be submitted to the judge “at the close of the evidence, or at such earlier time during the trial as the court reasonably directs.”<sup>6</sup> The judge will then inform the parties of its proposed action on the request and of the instructions that will be given prior to their argument to the jury.<sup>7</sup>

### B. *Capital Felonies in Florida and the Applicable Standard Jury Instructions*

In the State of Florida, the following offenses constitute the capital felony of first-degree murder:

- (1) premeditated murder;
- (2) felony murder—the unlawful killing of a human being during the commission of or attempt to commit certain trafficking offenses; arson; sexual battery; robbery; burglary; kidnapping; escape; aggravated child abuse; aggravated abuse of an elderly person or disabled adult; aircraft piracy; unlawful throwing; placing or discharging of a destructive device or bomb; carjacking; home-invasion robbery; aggravated stalking; murder of another human being; resisting an officer with violence to his/her person; or felony that is an act of terrorism or is in furtherance of an act of terrorism; and
- (3) an unlawful killing which resulted from the unlawful distribution of certain controlled substances, cocaine, or opium or any synthetic or natural salt, compound, derivative or preparation of opium by a person 18 years of

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<sup>2</sup> See, e.g., *In re: Standard Jury Instructions in Criminal Cases* (No. 2005-6), Case No. SC05-1651 (publication notice), available at [http://www.floridasupremecourt.org/clerk/comments/2005/05-1651\\_PublicationNotice.pdf](http://www.floridasupremecourt.org/clerk/comments/2005/05-1651_PublicationNotice.pdf) (last visited on Aug. 14, 2006).

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

<sup>4</sup> *Id.*

<sup>5</sup> FLA. R. CRIM. P. 3.390(c).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

age or older, when such drug is proved to be the proximate cause of the death of the user.<sup>8</sup>

A person convicted of first-degree murder is sentenced pursuant to section 921.141 of the Florida Statutes. Section 921.141 contains the exclusive list of aggravating circumstances and the non-exclusive list of mitigating circumstances that may be considered in first-degree murder cases, as well as the procedures for determining the defendant's sentence.<sup>9</sup> Standard Jury Instruction 7.11, which is derived from section 921.141, provides the jury charges for capital sentencing in a first-degree murder case.<sup>10</sup>

In addition to first-degree murder, Florida designates two other offenses as capital felonies, punishable by death:

- (1) Trafficking in 150 kilograms or more of certain drugs,<sup>11</sup> combined with either: (a) the intentional killing of or forcing of another to kill an individual, or (b) a resultant "natural, though not inevitable," death of another (capital drug trafficking);<sup>12</sup> and
- (2) Willfully and unlawfully making, possessing, throwing, projecting, placing, discharging, or attempting to make, possess, throw, project, place, or discharge any destructive device, which results in the death of another person (capital bomb throwing).<sup>13</sup>

A person convicted of capital drug trafficking is sentenced pursuant to section 921.142 of the Florida Statutes, which contains procedures for capital sentencing identical to those in section 921.141 but slightly different aggravating and mitigating circumstances.<sup>14</sup>

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<sup>8</sup> FLA. STAT. § 782.04(1)(a) (2006).

<sup>9</sup> FLA. STAT. § 921.141 (2006).

<sup>10</sup> FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 7.11 (5th ed. 2005).

<sup>11</sup> For an exhaustive list of drugs, the trafficking of which may come within this statute, see FLA. STAT. § 893.03(2)(a) (2006).

<sup>12</sup> FLA. STAT. §§ 893.135(1)(b)(2), 921.142 (2006).

<sup>13</sup> FLA. STAT. § 790.161(4) (2006).

<sup>14</sup> The differences between the aggravating circumstances in sections 921.142 and 921.141 are:

- (1) The "sentence of imprisonment" aggravating circumstance in section 921.142(6)(a) does not expressly include those serving on community control or felony probation;
- (2) Instead of allowing a previous violent felony to aggravate a sentence, section 921.142(6)(b) provides for an aggravating circumstance where the defendant has previously been convicted of a "state or federal offense involving the distribution of a controlled substance that is punishable by a sentence of at least 1 year of imprisonment;"
- (3) Instead of referring to the defendant knowingly creating a grave risk to "many persons," section 921.142(6)(c) provides for an aggravating circumstance where the defendant "knowingly created a grave risk to one or more persons such that participation in the offense constituted reckless indifference or disregard for human life;"
- (4) Section 921.142 contains additional aggravating circumstances not included in section 921.141(5) for instances where the offense involves:
  - (a) the use of a firearm during the commission or in furtherance of the offense;
  - (b) the distribution of controlled substances to minors or in a school zone, or employing minors to distribute a controlled substance;

However, the most recent standard jury instructions only contain instructions for death penalty cases involving the offense of first-degree murder.<sup>15</sup> There are no standard jury instructions that contain aggravating and mitigating circumstances for capital drug trafficking. Likewise, the offense of capital bomb throwing does not have its own aggravating and mitigating circumstances or its own standard jury instructions.<sup>16</sup>

The offense of capital sexual battery also constitutes a capital felony,<sup>17</sup> and is statutorily punishable by death.<sup>18</sup> Both state and federal case law, however, have prohibited the imposition of the death penalty for the offense of sexual battery where the victim is not killed.<sup>19</sup> Because a person convicted of capital sexual battery cannot receive the death penalty, this offense does not have aggravating and mitigating circumstances, nor does it have its own standard jury instructions regarding sentencing.

Given that the State of Florida has established capital sentencing standard jury instructions only for first-degree murder cases, the following discussion will focus on the aggravating and mitigating circumstances that apply to a first-degree murder sentencing

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- (c) the distribution of controlled substances known to contain potentially lethal ingredients; and
  - (d) the defendant intentionally killing the victim, intentionally causing serious bodily injury which resulted in the victim's death.

FLA. STAT. § 921.142(6) (2006). The differences between the mitigating circumstances in sections 921.142 and 921.141 are:

- (1) Section 921.141(6) includes a mitigating circumstance for instances where the victim was a participant in the defendant's conduct or consented to the act, unlike section 921.142(7); and
- (2) Section 921.142(7) includes a mitigating circumstance for instances where the defendant could not have reasonably foreseen that his/her conduct in the course of the commission of the offense would cause a grave risk of death to one or more persons, which is not included in section 921.141(6).

*Compare* FLA. STAT. § 921.142(7) (2006) *with* FLA. STAT. § 921.141(6) (2006). For a full list of the aggravating and mitigating circumstances in capital drug trafficking cases, see FLA. STAT. § 921.142(6), (7) (2006).

<sup>15</sup> FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 7.11 (5th ed. 2005).

<sup>16</sup> FLA. STAT. § 790.161(4) (2006).

<sup>17</sup> FLA. STAT. § 794.011(2)(a) (2006). Section 794.011(2)(a) of the Florida Statutes states: A person 18 years of age or older who commits sexual battery upon, or in an attempt to commit sexual battery injures the sexual organs of, a person less than 12 years of age commits a capital felony. *Id.*

<sup>18</sup> FLA. STAT. § 775.082(1) (2006). Section 775.082(1) of the Florida Statutes states: A person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence . . . results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole. *Id.*

<sup>19</sup> *See Coker v. Georgia*, 433 U.S. 584, 591 (1977); *Buford v. State*, 403 So. 2d 943, 951 (Fla. 1981) (citing *Coker* and holding that a sentence of death is grossly disproportionate and excessive punishment for the crime of sexual battery on a child less than 12 years of age and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment); *State v. Hogan*, 451 So. 2d 844, 845 (Fla. 1984) (holding that although a person convicted of capital sexual battery may not receive a death sentence, the offense is still a capital felony for the purposes of determining the proper sentence for an attempt and for determining the proper number of jurors).

proceeding, the general procedures involved in such proceeding, and the standard jury instructions for charging the jury in the capital penalty phase of a first-degree murder trial.

*C. The Application of Standard Jury Instructions and Case Law Interpretations of the Instructions in First-Degree Murder Cases*

1. Preliminary Instructions

After the jury finds the defendant guilty of first-degree murder during the guilt/innocence phase, the court must conduct a separate sentencing proceeding to determine the defendant's sentence.<sup>20</sup>

The standard jury instructions require the judge to tell the jury that the punishment for first-degree murder is a sentence of death or life imprisonment without the possibility of parole.<sup>21</sup> The instructions notify the jury that their sentencing decision is merely advisory and that the "decision as to what punishment shall be imposed rests solely with the judge."<sup>22</sup> The judge must then explain to the jury that the parties will present "evidence relative to the nature of the crime and the character of the defendant."<sup>23</sup>

At the conclusion of the presentation of evidence, the jury should be instructed that they may consider evidence presented<sup>24</sup> in both the guilt/innocence and the penalty phases of the trial, to determine:

- (1) whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty, and
- (2) whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any.<sup>25</sup>

The jury must then be instructed on the aggravating and mitigating circumstances it may consider.<sup>26</sup> The instructions list all statutory aggravating and mitigating circumstances for the offense of first-degree murder and instruct the jury on a two-step analysis for determining its sentence recommendation.<sup>27</sup>

First, the jury should determine whether the state has proven the existence of one or more of the statutory aggravating circumstances beyond a reasonable doubt.<sup>28</sup> The judge should instruct the jury that if it finds that the aggravating circumstances do not justify

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<sup>20</sup> FLA. STAT. § 921.141(1) (2006).

<sup>21</sup> FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 7.11 (5th ed. 2005).

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

<sup>23</sup> *Id.*

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

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

the death penalty or if it does not find any aggravating circumstances at all, the jury’s advisory sentence should be life imprisonment without the possibility of parole.<sup>29</sup>

Second, the jury should be instructed that if it finds that sufficient aggravating circumstances exist beyond a reasonable doubt, then it must determine whether mitigating circumstances exist that outweigh the aggravating circumstances.<sup>30</sup> The judge should instruct the jury on any of the eight statutory mitigating circumstances for which evidence has been presented.<sup>31</sup> The list of statutory mitigators is not exclusive and the jury may consider “[a]ny [other] aspect of the defendant’s character, record, or background,” and “[a]ny other circumstance of the offense.”<sup>32</sup> The instructions also notify the jury that unlike aggravating circumstances, mitigating circumstances need not be proven beyond a reasonable doubt, and if the jury is reasonably convinced of the existence of a mitigating circumstance, then it may consider it established.<sup>33</sup>

The instructions inform the jury that “[i]f a majority determines that [the defendant] should be sentenced to death,” it may advise and recommend to the court such a sentence.<sup>34</sup> Likewise, “[i]f by six or more votes [it] determine[s] that [the defendant] should not be sentenced to death,” the jury must advise and recommend to the court that the defendant be sentenced to life without the possibility of parole.<sup>35</sup>

## 2. Aggravating Circumstances in a First-Degree Murder Case

### a. Standard Jury Instructions

The instructions direct the jury to consider only the listed statutory aggravating circumstances that “are established by the evidence.”<sup>36</sup> The fourteen aggravating circumstances in the standard jury instructions are derived from those listed in section 921.141(5) of the Florida Statutes.<sup>37</sup> However, section 921.141(5) includes an additional aggravating factor that is not included in the standard jury instructions.<sup>38</sup>

Additionally, while the statutory aggravating circumstances enumerated in section 921.141(5) appear to apply to *all capital offenses* in Florida—not just first-degree murder—except capital drug trafficking, the standard jury instructions apply only to sentencing proceedings for first-degree murder. The aggravating circumstances in the standard jury instructions are worded similarly to those found in section 921.141(5), but

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* Additionally, the just must instruct the jury that “[a]mong the mitigating circumstances [it] may consider, if established by the evidence are” the eight statutory mitigating circumstances, which indicates that the list of statutory mitigating circumstances is a non-exhaustive list. *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> FLA. STAT. § 921.141(5) (2006).

<sup>38</sup> FLA. STAT. § 921.141(5)(o) (2006).

include greater detail regarding definitions of certain terms and allow the judge to exclude portions of the aggravating circumstance that are not relevant to the facts of the case.<sup>39</sup>

The statutory aggravating circumstances listed in the instructions are as follows:

- (1) The crime for which the defendant is to be sentenced was committed while s/he had been previously convicted of a felony and was under sentence of imprisonment, placed on community control, or was on felony probation;
- (2) The defendant has been previously convicted of another capital offense or of a felony involving the use or threat of violence to some person;
- (3) The defendant, in committing the crime for which s/he is to be sentenced, knowingly created a great risk of death to many persons;
- (4) The crime for which the defendant is to be sentenced was committed while s/he was engaged, or was an accomplice, in the commission of, or an attempt to commit, flight after committing or attempting to commit the crime of robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or the unlawful throwing, placing, or discharging of a destructive device or bomb;
- (5) The crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;
- (6) The crime for which the defendant is to be sentenced was committed for financial gain;
- (7) The crime for which the defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws;
- (8) The crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel;
- (9) The crime for which the defendant is to be sentenced was committed in a cold and calculated and premeditated manner, and without any pretense of moral or legal justification;
- (10) The victim of the crime for which the defendant is to be sentenced was a law enforcement officer engaged in the performance of the officer's official duties;
- (11) The victim of the crime for which the defendant is to be sentenced was an elected or appointed public official engaged in the performance of his/her official duties and the crime was related, in whole or in part, to the victim's official capacity;
- (12) The victim of the capital felony was a person less than 12 years of age;

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<sup>39</sup> Compare FLA. STAT. § 921.141(5) (2006) with FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 7.11 (5th ed. 2005).

- (13) The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim; and
- (14) The capital felony was committed by a criminal street gang member.<sup>40</sup>

The following aggravating circumstance also is included in section 921.141(5) but not in the standard jury instructions:

- (15) The capital felony was committed by a person designated as a sexual predator or a person previously designated as a sexual predator who had the sexual predator designation removed.<sup>41</sup>

b. Case Law Interpretation of the Aggravating Circumstances

- i. Aggravating Circumstance #1: Capital Offense Committed by a Defendant Previously Convicted of a Felony, Who Was Under Sentence of Imprisonment, Placed on Community Control, or Was on Felony Probation

This aggravating circumstance is commonly referred to as the “under sentence of imprisonment” aggravating circumstance.<sup>42</sup> “Imprisonment” applies to those in prison and also those individuals who should have been imprisoned for a felony at the time of the commission of the capital felony, but either did not report to jail as ordered<sup>43</sup> or escaped from prison.<sup>44</sup> Additionally, the “under sentence of imprisonment” aggravating circumstance applies to parolees,<sup>45</sup> felony probationees,<sup>46</sup> mandatory conditional releasees,<sup>47</sup> and control releasees.<sup>48</sup> However, it does not apply to a defendant who, at the time of his/her capital felony, was in or had escaped from a juvenile detention facility.<sup>49</sup>

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<sup>40</sup> FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 7.11 (5th ed. 2005). Compare FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 7.11 (5th ed. 2005) with FLA. STAT. § 921.141(5) (2006).

<sup>41</sup> FLA. STAT. § 921.141(5)(o) (2006).

<sup>42</sup> See, e.g., *Taylor v. State*, 855 So. 2d 1, 28 (Fla. 2003).

<sup>43</sup> *Taylor*, 855 So. 2d at 28 (noting that the defendant should have been serving his felony sentence in a foreign jurisdiction but did not report to jail due to an administrative mistake); *Gunsby v. State*, 574 So. 2d 1085, 1090 (Fla. 1991) (noting that the defendant should have been serving his felony sentence but failed to report for incarceration).

<sup>44</sup> Cf. *Peek v. State*, 395 So. 2d 492 (Fla. 1981).

<sup>45</sup> *Straight v. State*, 397 So. 2d 903, 910 (Fla. 1981).

<sup>46</sup> FLA. STAT. § 921.141(5)(a) (2006); *Merck v. State*, 763 So. 2d 295, 299 (Fla. 2000).

<sup>47</sup> *Haliburton v. State*, 561 So. 2d 248, 252 (Fla. 1990).

<sup>48</sup> *Davis v. State*, 698 So. 2d 1182, 1193 (Fla. 1997).

<sup>49</sup> *Williams v. State*, 707 So. 2d 683, 685-86 (Fla. 1998) (noting that the legislature has used the term “imprisonment” in setting out the penalties for adult criminal convictions, whereas the legislature has referred to the alternative for juvenile delinquency as “commitment”).

ii. Aggravating Circumstance #2: The Defendant Has Been Previously Convicted of Another Capital Offense or of a Felony Involving the Use or Threat of Violence to Some Person

When the prosecution offers evidence of this aggravating circumstance, the standard jury instructions note that “because the character of a crime . . . involving violence or the threat of violence is a matter of law,” the judge should instruct the jury, as applicable, that the previous crime: (1) is a capital felony; and/or (2) is a felony involving the use or threat of violence to another person.<sup>50</sup>

Felonies “involving the use or threat of violence” only include “life-threatening crimes in which the perpetrator comes in direct contact with a human victim.”<sup>51</sup> Whether a crime constitutes a prior violent felony is determined by the surrounding facts and circumstances of that crime.<sup>52</sup> However, the felony offense of “sexual activity with a child” is a per se crime of violence for purposes of this aggravating circumstance, because its definition includes “penetration” of or “union” with the victim’s genitals and the Florida legislature has recognized that at least some level of force and violence is inherent in accomplishing this penetration or union.<sup>53</sup> On the contrary, the felony offense of “lewd assault on a child” is not a per se crime of violence for purposes of this aggravating factor, because its definition does not include sexual battery and does not require any inherent violence or threat of violence to commit the offense.<sup>54</sup> Thus, sufficient facts surrounding the crime indicating that a prior felony of lewd assault consisted of violence or the threat of violence must be demonstrated for this aggravating factor to exist.<sup>55</sup>

Other instances of prior conduct that may not amount to a prior felony “involving the use or threat of violence” include:

- (1) prior juvenile convictions;<sup>56</sup>
- (2) prior convictions for breaking and entering, without other evidence of violence against a person;<sup>57</sup> and
- (3) prior convictions as an accessory after the fact to a crime of violence.<sup>58</sup>

<sup>50</sup> FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 7.11 (5th ed. 2005).

<sup>51</sup> *Spann v. State*, 857 So. 2d 845, 855 (Fla. 2003); *Mahn v. State*, 714 So. 2d 391, 399 (Fla. 1998) (quoting *Lewis v. State*, 398 So. 2d 432, 438 (Fla. 1981)). For example, purse snatching is not a crime of violence sufficient to constitute robbery. *See Robinson v. State*, 692 So. 2d 883 (Fla. 1997).

<sup>52</sup> *Spann*, 857 So. 2d at 855 (citing *Gore v. State*, 706 So. 2d 1328, 1333 (Fla. 1997)).

<sup>53</sup> *Hess v. State*, 794 So. 2d 1249, 1263-64 (Fla. 2001); *see also* FLA. STAT. §§ 794.005, 794.011(8)(b) (2006).

<sup>54</sup> *Hess*, 794 So. 2d at 1264; *see also* FLA. STAT. § 800.04(1) (2006).

<sup>55</sup> *Hess*, 794 So. 2d at 1264 (finding that the defendant’s prior offense of lewd assault on a child by “making the child victim masturbate” provided a sufficient basis from which the trial court could have concluded that the crime involved the use or threat of violence).

<sup>56</sup> *See State v. J.M.*, 824 So. 2d 105, 113 (Fla. 2002).

<sup>57</sup> *See Barclay v. State*, 470 So. 2d 691, 695 (Fla. 1985) (noting that offense of breaking and entering does not, on its face, prove a prior conviction of a violent felony).

<sup>58</sup> *See Donaldson v. State*, 722 So. 2d 177, 184 (Fla. 1998) (holding that a conviction for accessory after the fact to a crime of violence may not be used as a vehicle to implicate the defendant as a principal in the prior underlying crime of violence pursuant to section 921.141(5)(b) of the Florida Statutes).

Previous violent felony convictions which occurred *after* the capital felony for which the defendant is being sentenced suffice for purposes of this aggravating circumstance so long as the convictions predate the sentencing of the capital felony.<sup>59</sup> Contemporaneous convictions for offenses against another victim arising out of the same capital trial can also qualify as previous convictions of a violent felony for the purposes of this aggravating factor.<sup>60</sup>

Additionally, where a defendant pled guilty to a prior violent felony but the court withheld adjudication and did not sentence the defendant, there was a conviction for the purpose of this aggravating circumstance, because the prior criminal conduct “should be taken into consideration at the sentencing where the defendant’s plea of guilty amounted to an ‘in-court confession.’”<sup>61</sup> Even where the defendant stipulates to the existence of a prior felony involving the use or threat of violence, the court may still admit testimony during the penalty phase relevant to the prior felony involving the use or threat of violence.<sup>62</sup> On the other hand, where adjudication is withheld by the court upon a defendant’s plea of *nolo contendere* to a prior violent felony, the conviction may not later be used to satisfy this aggravating circumstance because the defendant never admitted guilt.<sup>63</sup>

iii. Aggravating Circumstance #3: The Defendant, in Committing the Crime for Which S/he Is to Be Sentenced, Knowingly Created a Great Risk of Death to Many Persons

The “great risk” necessary to establish this aggravating circumstance requires more than a showing of some degree of risk of bodily harm to a few persons.<sup>64</sup> “Great risk” of death means not a mere possibility, but a likelihood or high probability of death.<sup>65</sup>

By using the word “many,” the legislature has indicated that a great risk of death to a small number of people would not establish this aggravating circumstance.<sup>66</sup> The

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<sup>59</sup> Knight v. State, 746 So. 2d 423, 434 (Fla. 1998). However, if the prior crime(s) of violence are quite old, and the defendant has led a “comparatively crime-free” life in the interim, this aggravating circumstance will not carry the same weight with the Florida Supreme Court when it conducts its proportionality review. See Larkins v. State, 739 So. 2d 90, 94-96 (Fla. 1999).

<sup>60</sup> See Johnson v. State, 438 So. 2d 774, 778-79 (Fla. 1983) (holding that a conviction for murder of a police officer, which occurred while the defendant was attempting to flee from the scene of the instant offense, was a sufficient prior conviction for a violent felony). However, a contemporaneous conviction for a violent crime against the same victim that occurred at the time of the killing cannot be used to support this aggravating circumstance. See Elledge v. State, 613 So. 2d 434, 436-37 (Fla. 1993).

<sup>61</sup> State v. Keirn, 720 So. 2d 1085, 1087 (Fla. 1990) (citing McCrae v. State, 395 So. 2d 1145, 1153-54 (Fla. 1980)). However, when a prior conviction that was used to satisfy this aggravating factor is later vacated after sentencing, the death sentence must also be vacated in the absence of other aggravating factors. See Preston v. State, 564 So. 2d 120, 123 (Fla. 1990).

<sup>62</sup> See Conde v. State, 860 So. 2d 930, 957 (Fla. 2003); Cox v. State, 819 So. 2d 705, 716 (Fla. 2002).

<sup>63</sup> See Garron v. State, 528 So. 2d 353, 360 (Fla. 1988).

<sup>64</sup> Bello v. State, 547 So. 2d 914, 917 (Fla. 1989).

<sup>65</sup> *Id.*; see also Coney v. State, 653 So. 2d 1009, 1015 (Fla. 2000).

<sup>66</sup> *Bello*, 547 So. 2d at 917.

Florida Supreme Court has determined that great risk to four or more persons besides the victim satisfies this aggravating circumstance,<sup>67</sup> while great risk to three or fewer persons does not suffice.<sup>68</sup> For example, a great risk of death to many persons was not found where the defendant, during a bank robbery, shot and killed the guard with the intent only to kill the guard, despite the fact that there were other people in the bank.<sup>69</sup>

iv. Aggravating Circumstance #4: The Crime for Which the Defendant Is to Be Sentenced Was Committed While S/he Was Engaged, or Was an Accomplice, in the Commission of, or an Attempt to Commit, an Enumerated Felony

This aggravating circumstance is commonly referred to as the “in the course of a felony” aggravating circumstance. The standard jury instructions include the following enumerated felonies:

- (1) robbery;
- (2) sexual battery;
- (3) aggravated child abuse;
- (4) abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability or permanent disfigurement;
- (5) arson;
- (6) burglary;
- (7) kidnapping;
- (8) aircraft piracy; or
- (9) the unlawful throwing, placing, or discharging of a destructive device or bomb.<sup>70</sup>

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<sup>67</sup> See *Johnson v. State*, 696 So. 2d 317, 325 (Fla. 1997) (holding that four persons other than the victim were in immediate risk of death due to their presence in the laundromat when the defendant entered and began shooting his gun); *Raulerson v. State*, 420 So. 2d 567, 571 (Fla. 1982) (holding that the four non-participating, unarmed, and innocent people present in the restaurant during the shoot-out between appellant and the police were “many” persons for the purpose of the aggravating circumstance, regardless of the fact that they lowered their risk of death by taking refuge on the floor behind tables and counters); *Welty v. State*, 402 So. 2d 1159, 1164 (Fla. 1981) (holding that setting fire to an apartment building where six elderly persons were asleep inside created a great risk to “many” persons for the purpose of section 921.141(5)(c) of the Florida Statutes); *King v. State*, 390 So. 2d 315, 320 (Fla. 1980) (holding that, although the victim was the only person in the house, when the defendant intentionally set fire to the house, he should have reasonably foreseen that the blaze would pose a great risk to the neighbors, as well as the firefighters and the police who responded to the call), *overruled on other grounds* by 437 So. 2d 150.

<sup>68</sup> See *Bello*, 547 So. 2d at 917 (holding that there was a high probability of death to at most only three people besides the victim and that the other people considered by the trial court to have been put at risk were too far away, separated by several walls, or out of the line of fire).

<sup>69</sup> See *Williams v. State*, 574 So. 2d 136, 138 (Fla. 1991) (holding that while the defendant’s actions created some risk for the other bank patrons, they did not create an immediate and present risk of death for many persons based only on evidence of an intent to kill the bank guard and in the absence of evidence, for instance, of indiscriminate shooting).

<sup>70</sup> FLA. STAT. 921.141(5)(d) (2006); FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 7.11 (5th ed. 2005).

The prosecution does not have to actually charge the defendant with the underlying felony for the jury to find this “in the course of a felony” aggravating circumstance.<sup>71</sup> Rather, to prove this aggravating circumstance, the prosecution must prove beyond a reasonable doubt each of the elements of the underlying felony.<sup>72</sup> An enumerated felony for which the defendant was acquitted at trial may not be used as the underlying felony to prove this aggravating circumstance.<sup>73</sup> Similarly, where the defendant commits a single act that both constitutes the underlying felony and causes the victim’s death, the defendant cannot be convicted of both the underlying felony and the murder, and the underlying felony cannot be the basis for finding this aggravating circumstance.<sup>74</sup>

The constitutionality of the “in the course of a felony” aggravating circumstance has been challenged but the Florida Supreme Court has rejected these challenges by holding that the aggravator properly “narrow[s] the class of persons eligible for the death penalty” and “reasonably justif[ies] the imposition of a more severe sentence on the defendant compared to others found guilty of murder.”<sup>75</sup> To support its holding, the Court has noted that the felony murder statute contains a larger list of enumerated felonies than the list contained within the “in the course of a felony” aggravating circumstance, thus narrowing the class of individuals eligible for the death penalty.<sup>76</sup> Interestingly, the Florida Supreme Court has consistently found a death sentence to be disproportionate where the “in the course of a felony” aggravator was the only aggravating circumstance.<sup>77</sup>

v. Aggravating Circumstance #5: The Crime for Which the Defendant Is to Be Sentenced Was Committed for the Purpose of Avoiding or Preventing a Lawful Arrest or Effecting an Escape from Custody

This aggravating circumstance is commonly referred to as the “avoiding lawful arrest” aggravating circumstance. Typically, this aggravating circumstance applies to the murder

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<sup>71</sup> See *Rivera v. State*, 717 So. 2d 477, 487 (Fla. 1998); *Sochor v. State*, 619 So. 2d 285, 290, 292 (Fla. 1993).

<sup>72</sup> See, e.g., *Pearce v. State*, 880 So. 2d 561, 574-75 (Fla. 2004) (noting that to establish the “during the commission of a kidnapping” aggravating circumstance, the State must prove beyond a reasonable doubt each of the elements of kidnapping).

<sup>73</sup> See *Atkins v. State*, 452 So. 2d 529, 532-33 (Fla. 1984) (holding that because the defendant was acquitted of sexual battery, the sexual battery could not be used as a basis for finding the felony murder aggravating circumstance).

<sup>74</sup> See *Brooks v. State*, 918 So. 2d 181, 197-199 (Fla. 2005) (holding that the single act of stabbing the victim established both aggravated child abuse and felony murder, and that the aggravated child abuse charge “merged” with the felony murder, prohibiting the use of felony murder aggravating factor).

<sup>75</sup> *Parker v. State*, 873 So. 2d 270, 286 n.12 (Fla. 2004) (quoting *Zant v. Stephens*, 462 So. 2d 862, 877 (1983)).

<sup>76</sup> See *Blanco v. State*, 706 So. 2d 7, 11 (Fla. 1997). Compare FLA. STAT. § 782.04(1)(a)(2) (2006) with FLA. STAT. § 921.141(5)(d) (2006). A number of courts in other jurisdictions have found the “in the course of a felony” aggravating circumstance to be unconstitutional when the defendant is convicted of first-degree murder solely on the basis of felony murder, because it doesn’t properly narrow the class of persons eligible for the death penalty. See *State v. Middlebrooks*, 840 S.W.2d 317, 346-47 (Tenn. 1992), *overruled on other grounds*; *Enberg v. Meyer*, 820 P.2d 70, 87-89 (Wyo. 1991); *State v. Cherry*, 257 S.E.2d 551, 267-68 (N.C. 1979).

<sup>77</sup> See, e.g., *Sinclair v. State*, 657 So. 2d 1138, 1142-43 (Fla. 1995).

of law enforcement personnel in an effort to avoid a lawful arrest.<sup>78</sup> A “lawful arrest” means any legal arrest, including a citizen’s arrest.<sup>79</sup> This aggravating circumstance also applies to murders committed for the purpose of eliminating a witness to a crime.<sup>80</sup> The mere fact of the witness’ death is not enough to invoke this aggravator.<sup>81</sup> Rather, proof of the requisite intent to avoid arrest and detection must be strong and the evidence must prove that the sole or dominant motive behind the killing was to eliminate a witness.<sup>82</sup> Mere speculation on the part of the prosecution that witness elimination was the dominant motive behind a murder cannot support the “avoiding lawful arrest” aggravating circumstance.<sup>83</sup> Likewise, the simple fact that the victim knew and could identify the defendant, without more, is insufficient to prove this aggravating circumstance.<sup>84</sup>

If the victim who was killed to avoid arrest is a law enforcement officer, this aggravating circumstance cannot be doubled with Aggravating Circumstance #10—the victim of the crime was a law enforcement officer engaged in the performance of his/her official duties—found in section 921.141(5)(j) of the Florida Statutes.<sup>85</sup>

vi. Aggravating Circumstance #6: The Crime for Which the Defendant Is to Be Sentenced Was Committed for Financial Gain

The “pecuniary gain” aggravating circumstance is only applicable where the murder was motivated, at least in part, by a desire to obtain money, property, or other financial gain.<sup>86</sup> The “pecuniary gain” aggravator is also applicable where the defendant’s motivation for murder was to “improv[e his/her] financial worth.”<sup>87</sup> Even if the victim does not have any money to turn over to the defendant or the defendant does not ultimately take any money or items from the victim, the fact that the defendant initiated

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<sup>78</sup> *Consalvo v. State*, 697 So. 2d 805, 819 (1996).

<sup>79</sup> *Bryant v. State*, 901 So. 2d 810, 828 (Fla. 2005).

<sup>80</sup> *Riley v. State*, 366 So. 2d 19, 22 (Fla. 1978).

<sup>81</sup> *Urbin v. State*, 714 So. 2d 411, 415-16 (Fla. 1998).

<sup>82</sup> *Id.*; *Geralds v. State*, 601 So. 2d 1157, 1164 (Fla. 1992); *Oats v. State*, 446 So. 2d 90, 95 (Fla. 1984); *see, e.g., Harvey v. State*, 529 So. 2d 1083, 1087 (Fla. 1988) (holding that the murders were committed for the purpose of avoiding lawful arrest where the defendant was known to the victims and the defendant discussed in the victims’ presence the need to kill them to avoid being identified).

<sup>83</sup> *Scull v. State*, 533 So. 2d 1137, 1142 (Fla. 1988).

<sup>84</sup> *Geralds*, 601 So. 2d at 1164; *Davis v. State*, 604 So. 2d 794, 798 (Fla. 1992).

<sup>85</sup> *See Kearse v. State*, 662 So. 2d 677, 685-86 (Fla. 1995) (holding that the aggravating factors of “avoid arrest/hinder enforcement of laws” and “murder of a law enforcement officer” are duplicative because both factors are based on a single aspect of the offense—that the victim was a law enforcement officer).

<sup>86</sup> *See Rogers v. State*, 783 So. 2d 980, 993 (Fla. 2001); *Elam v. State*, 636 So. 2d 1312, 1314 (Fla. 1994) (holding that the murder did not facilitate pecuniary gain, because it happened long after the theft when a spontaneous fight erupted as the victim confronted the defendant concerning misappropriated funds); *Simmons v. State*, 419 So. 2d 316, 318 (Fla. 1982) (holding that there must be “a pecuniary motivation for the murder itself”); *see also Pardo v. State*, 563 So. 2d 77, 78-79 (Fla. 1990) (noting sufficient evidence of murder for pecuniary gain where the defendant killed the victim to “rip off” the victim’s drugs); *Harmon v. State*, 527 So. 2d 182, 187-88 (Fla. 1988) (holding that facts, such as the defendant telling another that he was going to rob the victim and that the victim had a large amount of money in the house, supported the “pecuniary gain” aggravating factor).

<sup>87</sup> *See Allen v. State*, 662 So. 2d 323, 330 (Fla. 1995); *Scull v. State*, 533 So. 2d 1137, 1142 (Fla. 1988).

the crime for pecuniary gain is sufficient to satisfy this aggravating circumstance.<sup>88</sup> However, there is not sufficient evidence to support the “pecuniary gain” aggravating circumstance where the defendant killed to obtain a car for the purpose of escape rather than theft,<sup>89</sup> or where the defendant killed the victim for stealing the defendant’s drugs.<sup>90</sup>

This aggravator is also applicable where the “murder was the culmination of a course of events that began when [the defendant] went into a store, robbed the clerk at gunpoint, and abducted her from the store,” where the initial offenses were motivated by pecuniary gain.<sup>91</sup>

The “pecuniary gain” aggravating circumstance may not be doubled with the “in the course of a felony” aggravator unless a second, non-pecuniary felony was also committed in the course of the killing.<sup>92</sup>

vii. Aggravating Circumstance #7: The Crime for Which the Defendant Is to Be Sentenced Was Committed to Disrupt or Hinder the Lawful Exercise of Any Governmental Function or the Enforcement of Laws

In order for this aggravating circumstance to be applicable, it is sufficient for the prosecution to show that the victim was killed while performing a legitimate governmental function.<sup>93</sup> Courts have found the existence of this aggravating factor in a variety of instances, such as where a defendant murdered: (1) a witness against him/her in an unrelated case;<sup>94</sup> (2) a law enforcement officer acting in the line of duty;<sup>95</sup> (3) the court bailiff at a hearing where the defendant was the subject;<sup>96</sup> (4) the parole officer involved with the defendant’s revocation of parole;<sup>97</sup> and (5) a confidential informant.<sup>98</sup>

This aggravating circumstance generally may not be doubled with Aggravating Circumstance #5<sup>99</sup>—the “avoiding lawful arrest” aggravating circumstance found in

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<sup>88</sup> *Shellito v. State*, 701 So. 2d 837, 842 (Fla. 1997).

<sup>89</sup> *See Rogers*, 783 So. 2d at 993. The “pecuniary gain” aggravating circumstance has been found, however, in cases where the murder was committed during the forcible taking of an automobile. *See Wyatt v. State*, 641 So. 2d 355, 358 n.4, 359 (Fla. 1994); *Lambrix v. State*, 494 So. 2d 1143, 1148 (Fla. 1986) (finding that the murder was committed for pecuniary gain where defendant killed the victim and proceeded to steal the victim’s car).

<sup>90</sup> *See Hardwick v. State*, 521 So. 2d 1071, 1075-76 (Fla. 1994).

<sup>91</sup> *Parker v. State*, 873 So. 2d 270, 290-91 (Fla. 2004) (quoting *Copeland v. State*, 457 So. 2d 1012, 1019 (Fla. 1984)).

<sup>92</sup> *Spann v. State*, 857 So. 2d 845, 856 (Fla. 2003).

<sup>93</sup> *See Jones v. State*, 440 So. 2d 570, 577-78 (Fla. 1983).

<sup>94</sup> *See Shere v. Moore*, 830 So. 2d 56, 69 (Fla. 2002); *Koon v. State*, 513 So. 2d 1253, 1256-57 (Fla. 1987); *Lara v. State*, 464 So. 2d 1173, 1180 (Fla. 1985).

<sup>95</sup> *See Patten v. State*, 598 So. 2d 60, 63 (Fla. 1992) (holding that killing a police officer in the line of duty is clearly a hindrance to the enforcement of laws).

<sup>96</sup> *See Provenzano v. State*, 497 So. 2d 1177, 1183-84 (Fla. 1986).

<sup>97</sup> *See Phillips v. State*, 705 So. 2d 1320, 1322 (Fla. 1997).

<sup>98</sup> *See Pardo v. State*, 563 So. 2d 77, 78 (Fla. 1990).

<sup>99</sup> *Bello v. State*, 547 So. 2d 914, 917 (Fla. 1989).

section 921.141(5)(e) of the Florida Statutes—except when separate factual circumstances are used to support each aggravating circumstance.<sup>100</sup>

viii. Aggravating Circumstance #8: The Crime for Which the Defendant Is to Be Sentenced Was Especially Heinous, Atrocious, or Cruel

The standard jury instructions define the terms “heinous, atrocious, or cruel” (HAC) as follows:

- (1) “Heinous” means extremely wicked or shockingly evil;
- (2) “Atrocious” means outrageously wicked and vile; and
- (3) “Cruel” means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.<sup>101</sup>

The standard jury instructions also include a limiting instruction, which states that the type of crime intended to be within the meaning of “heinous, atrocious, or cruel” is “one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.”<sup>102</sup>

Therefore, as noted in the standard jury instructions, the HAC aggravating circumstance<sup>103</sup> may only apply when the crime is both conscienceless or pitiless, *and* unnecessarily torturous to the victim.<sup>104</sup> Likewise, this aggravator is reserved for “torturous murders—those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another.”<sup>105</sup> This aggravator, however, may be found regardless of whether the defendant intended to inflict pain on the victim.<sup>106</sup>

Courts have found this aggravating circumstance to be met in a number of different circumstances. Strangulation deaths create a *prima facie* case for finding the HAC

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<sup>100</sup> *Provenzano*, 497 So. 2d at 1183-84.

<sup>101</sup> FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 7.11 (5th ed. 2005).

<sup>102</sup> *Id.*

<sup>103</sup> The HAC aggravator is among “the most weighty in Florida’s sentencing calculus.” *Serici v. State*, 825 So. 2d 882, 887 (Fla. 2002). The death penalty has been upheld where it was the only aggravator found. *Butler v. State*, 842 So. 2d 817 (Fla. 2003).

<sup>104</sup> *Nelson v. State*, 748 So. 2d 237, 245 (Fla. 1999); *Richardson v. State*, 604 So. 2d 1107, 1109 (Fla. 1992) (citing *Sochor v. Florida*, 504 U.S. 527, 536-37 (1992)).

<sup>105</sup> *Robertson v. State*, 611 So. 2d 1228, 1233 (Fla. 1993); *Cheshire v. State*, 568 So. 2d 908, 912 (Fla. 1990).

<sup>106</sup> *Morrison v. State*, 818 So. 2d 432, 455 (Fla. 2002); *Brown v. State*, 721 So. 2d 274, 277 (Fla. 1998) (“Unlike the cold, calculated and premeditated aggravator, which pertains specifically to the state of mind, intent and motivation of the defendant, the HAC aggravator focuses on the means and manner in which the death is inflicted and the immediate circumstances surrounding the death.”); *Guzman v. State*, 721 So. 2d 1155, 1159-1160 (Fla. 1998) (holding that the intention of the killer to inflict pain on the victim is not a necessary element of the HAC aggravator); *Mahn v. State*, 714 So. 2d 391, 399 (Fla. 1998) (rejecting the defendant’s contention that a finding of HAC did not apply because he did not deliberately inflict pain).

aggravator,<sup>107</sup> because “strangulation of a conscious victim involves foreknowledge of death, extreme anxiety, and fear.”<sup>108</sup> This aggravating factor has also been found in cases where the victim sustained multiple stab wounds, if the victim was alive and conscious when the wounds were inflicted and had knowledge of his/her impending death.<sup>109</sup> The existence of defensive wounds allows for the inference that the victim was alive and conscious during the stabbing, unless the evidence clearly demonstrates otherwise.<sup>110</sup> Similarly, slitting the victim’s throat has been held to be heinous, atrocious, or cruel.<sup>111</sup> The HAC aggravating circumstance has also been upheld when the victim was beaten to death and did not die or lose consciousness early in the attack,<sup>112</sup> and when the victim died after being set on fire.<sup>113</sup>

This aggravating factor has been consistently upheld where the victims are “acutely aware of their impending deaths.”<sup>114</sup> The length of awareness of impending death is not a factor in deciding whether a murder was heinous, atrocious, or cruel.<sup>115</sup> Rather, the Florida Supreme Court has upheld a finding of HAC, where the medical examiner determined that the victim was conscious for merely seconds.<sup>116</sup> Moreover, “fear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel.”<sup>117</sup>

Death by gunshot cannot generally satisfy the HAC aggravating circumstance because death in these cases is usually instantaneous. The following shooting deaths have been found not to support a finding of the HAC aggravating factor, without additional evidence of mental or physical torture of the victim: (1) execution-style killings,<sup>118</sup> including where the victim was shot several times and begged for mercy;<sup>119</sup> (2) shooting a law enforcement officer acting in the line of duty;<sup>120</sup> and (3) shootings that are cold, calculated, and premeditated and carried out stealthily.<sup>121</sup> But the HAC aggravator has been upheld for shootings where (1) the child victim suffered substantial mental anguish

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<sup>107</sup> Orme v. State, 677 So. 2d 258, 263 (Fla. 1996).

<sup>108</sup> Belcher v. State, 851 So. 2d 678, 683 (Fla. 2003).

<sup>109</sup> Cox, 819 So. 2d at 720.

<sup>110</sup> Reynolds v. State, No. SC03-1919, 2006 WL 1381880, \*19-20 (Fla. May 18, 2006).

<sup>111</sup> See Card v. State, 803 So. 2d 613, 624-25 (Fla. 2001).

<sup>112</sup> See, e.g., Lawrence v. State, 698 So. 2d 1219, 1221-22 (Fla. 1997) (holding that the beating death of the victim while the victim was pleading for his life presents competent, substantial evidence for the HAC aggravating circumstance). *But see* Zakrzewski v. State, 717 So. 2d 488, 492-93 (Fla. 1998) (holding that the murder was not heinous, atrocious, or cruel where the victim was rendered unconscious after receiving the first blow of the defendant’s crowbar).

<sup>113</sup> See Way v. State, 760 So. 2d 903, 919 (Fla. 2000).

<sup>114</sup> See, e.g., Wyatt v. State, 641 So. 2d 1336, 1341 (Fla. 1994).

<sup>115</sup> See Rolling v. State, 695 So. 2d 278, 296 (Fla. 1997).

<sup>116</sup> See *id.* (upholding a finding of HAC where the medical examiner concluded that victim was conscious anywhere between thirty and sixty seconds after she was initially attacked); Peavy v. State, 442 So. 2d 200, 202-03 (Fla. 1983) (upholding a finding of HAC where the medical examiner testified that the victim lost consciousness within seconds and bled to death in a minute or less, and there were no defensive wounds).

<sup>117</sup> See James v. State, 695 So. 2d 1229, 1235 (Fla. 1997).

<sup>118</sup> See Hartley v. State, 686 So. 2d 1316, 1323 (Fla. 1997).

<sup>119</sup> See Bonifay v. State, 626 So. 2d 1310, 1311 (Fla. 1993).

<sup>120</sup> Kearsse v. State, 662 So. 2d 677, 686 (Fla. 1995).

<sup>121</sup> Lewis v. State, 398 So. 2d 432, 438 (Fla. 1981).

from watching the murder of his mother and two siblings, was shot non-lethally with a shotgun and then shot again;<sup>122</sup> and (2) the victim was shot non-lethally numerous times, dragged by the defendant into another room, and then shot lethally.<sup>123</sup>

Nothing done to the victim after s/he is dead or unconscious, even if it would otherwise qualify as HAC, can support a finding of this aggravating circumstance.<sup>124</sup> Additionally, the HAC aggravating circumstance cannot be found to vicariously apply to a defendant who contracted the murder of the victim, even if the murder itself was HAC, unless the evidence establishes that the defendant knew how the murder would be carried out.<sup>125</sup>

In *Proffitt v. Florida*, the United States Supreme Court approved the Florida Supreme Court's attempt to narrow the class of defendants eligible for the death penalty with the above HAC limiting instruction.<sup>126</sup> Since *Proffitt*, the United States Supreme Court has found the definitions of "heinous, atrocious, or cruel" used in Mississippi, which are identical to those included in Florida's current standard jury instruction, unconstitutionally vague.<sup>127</sup> Additionally, in dicta, the United States Supreme Court expressed disapproval of the definitions of "heinous, atrocious, or cruel" used in Florida's HAC instruction, but continued to approve of the limiting portion of the Florida's HAC instruction.<sup>128</sup> However, the United States Supreme Court's decision in *Bell v. Cone*<sup>129</sup> appears to have laid the vagueness issue to rest.<sup>130</sup>

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<sup>122</sup> See *Hutchinson v. State*, 882 So. 2d 943, 958-59 (Fla. 2004).

<sup>123</sup> See *Lynch v. State*, 841 So. 2d 362, 369-70 (Fla. 2003).

<sup>124</sup> See *Jones v. State*, 569 So. 2d 1234, 1238-39 (Fla. 1990).

<sup>125</sup> *Omelus v. State*, 584 So. 2d 563, 566-67 (Fla. 1991).

<sup>126</sup> *Proffitt v. Florida*, 428 U.S. 242, 259-260 (1976). Before *Proffitt*, in *Dixon v. State*, the Florida Supreme Court attempted to remedy any perceived vagueness by defining the terms "heinous, atrocious, or cruel" and identifying the types of crimes that suffice under this aggravating circumstance. See *Dixon v. State*, 283 So. 2d 1, 9 (Fla. 1973), *superseded by statute for other reasons as stated in State v. Dene*, 533 So. 2d 265, 268 (Fla. 1988). The definitions included in *Dixon* are identical to those currently found in FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 7.11 (5th ed. 2005). After *Dixon*, however, the HAC standard jury instruction did not include the *Dixon* definitions and limiting instruction, and it still defined "heinous, atrocious, or cruel" as "especially wicked, evil, atrocious and cruel." *Espinoza v. Florida*, 505 U.S. 1079, 1081-1082 (1992). This definition was subsequently struck down as unconstitutionally vague by the United States Supreme Court in 1992. *Id.*

<sup>127</sup> See *Shell v. Mississippi*, 498 U.S. 1, 1 (1990).

<sup>128</sup> *Sochor v. Florida*, 504 U.S. 527, 536-37 (1992) (citing *Porter v. State*, 564 So. 2d 1060 (Fla. 1990)); *Cherry v. State*, 544 So. 2d 184, 187 (Fla. 1989); *Lucas v. State*, 376 So. 2d 1149, 1153 (Fla. 1979)). The *Sochor* Court stated:

*Sochor* contends, however, that the [Florida] Supreme Court's post-*Proffitt* cases have not adhered to *Dixon*'s limitation as stated in *Proffitt*, but instead evince inconsistent and overbroad constructions that leave a trial court without sufficient guidance. And we may well agree with him that the Supreme Court of Florida has not confined its discussions on the matter to the *Dixon* language we approved in *Proffitt*, but has on occasion continued to invoke the entire *Dixon* statement quoted above, perhaps thinking that *Proffitt* approved it all.

*Sochor*, 504 U.S. at 536-37. The Supreme Court did not strike down Florida's HAC aggravating circumstance because the murder in *Sochor* was by strangling, which is a type of murder which *per se* satisfies the HAC aggravating circumstance, thus rendering any error in the HAC instruction harmless. See *id.* at 537.

ix. Aggravating Circumstance #9: The Crime for Which the Defendant Is to Be Sentenced Was Committed in a Cold and Calculated and Premeditated Manner, and Without Any Pretense of Moral or Legal Justification

Before 1994, the standard jury instructions did not explain that the “cold, calculated, and premeditated” (CCP) aggravating factor required a “heightened form of premeditation” to differentiate certain murders satisfying this aggravating circumstance from all other first-degree murders.<sup>131</sup> In *Jackson v. State*, the Florida Supreme Court determined that the CCP aggravating circumstance was unconstitutionally vague and required the definition of the terms to be read to the jury and used by the judge in applying this aggravating circumstance.<sup>132</sup>

The following definitions are now included in the current standard jury instructions<sup>133</sup> and have passed constitutional muster:<sup>134</sup>

- (1) “Cold” means the murder was the product of calm and cool reflection.
- (2) “Calculated” means having a careful plan or pre-arranged design to commit murder.
- (3) A killing is “premeditated” if it occurs after the defendant consciously decides to kill. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.
- (4) However, in order for this aggravating circumstance to apply, a heightened level of premeditation, demonstrated by a substantial period of reflection is required.
- (5) A “pretense of moral or legal justification” is any claim of justification or excuse that, though insufficient to reduce the degree of murder, nevertheless, rebuts the otherwise cold, calculated, or premeditated nature of the murder.<sup>135</sup>

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<sup>129</sup> 543 U.S. 447 (2005).

<sup>130</sup> *Bell v. Cone*, 543 U.S. 447, 456 (2005) (finding that the Tennessee Supreme Court had construed the HAC aggravator—which was defined as “the conscienceless or pitiless crime which is necessarily torturous to the victim— “narrowly and had followed that precedent numerous times”).

<sup>131</sup> *See Jackson v. State*, 648 So. 2d 85, 87-90 (Fla. 1994).

<sup>132</sup> *See id* at 87-88.

<sup>133</sup> FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 7.11 (5th ed. 2005).

<sup>134</sup> *See Bowles v. State*, 804 So. 2d 1173, 1177 (Fla. 2002) (citing *Donaldson v. State*, 722 So. 2d 177, 187 n.12 (Fla. 1998)).

<sup>135</sup> FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 7.11 (5th ed. 2005).

The definition of “cold” does not include any “act prompted by emotional frenzy, panic or fit of rage.”<sup>136</sup> Likewise, the definition of “calculated” includes a careful plan or prearranged design to kill, but a killing that occurs during another carefully planned crime will not meet this definition.<sup>137</sup> Under Florida law, emotionally or mentally disturbed or even mentally ill defendants may still have the ability to “experience cool, and calm reflection, make a careful plan or prearranged design to commit murder, and exhibit heightened premeditation.”<sup>138</sup>

Beyond contract murders and execution-style killings, which always satisfy a finding of the CCP aggravating circumstance,<sup>139</sup> determining the application of the CCP aggravating circumstance is a fact specific analysis. The Florida Supreme Court has upheld the CCP aggravating circumstance and rejected the “pretense of moral justification” argument where the defendant: (1) murdered an abortion doctor for religious reasons;<sup>140</sup> (2) shot and killed a police officer based only on the subjective belief that the police officer would rape her;<sup>141</sup> (3) killed the victim because the victim rejected the defendant as a lover and refused to pay his credit card debt;<sup>142</sup> and (4) murdered his wife and children with a machete to save them from going through a divorce.<sup>143</sup> Conversely, the CCP aggravating circumstance has been rejected on the basis of “pretense of moral justification” where the victim had a history of violence and continued to threaten the defendant up until the victim’s death.<sup>144</sup>

Before 1996, the CCP aggravator could not apply to domestic murder cases, because the Florida Supreme Court deemed that domestic murders were more likely “mad acts prompted by wild emotion,” than the product of “calm, cool reflection.”<sup>145</sup> The Florida Supreme Court has since decided, however, to evaluate domestic murders in the same way as other cases and allow the application of the CCP aggravating circumstance to domestic murders.<sup>146</sup>

Unlike the HAC aggravating circumstance, the CCP aggravator can be applied vicariously to other victims because heightened premeditation “does not have to be directed towards the specific victim. . . . It is the manner of the killing, not the target

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<sup>136</sup> Richardson v. State, 604 So. 2d 1107, 1009 (Fla. 1992).

<sup>137</sup> See Pomeranz v. State, 703 So. 2d 465, 471 (Fla. 1997).

<sup>138</sup> Evans v. State, 800 So. 2d 182, 193 (Fla. 2001).

<sup>139</sup> See Gordon v. State, 704 So. 2d 107, 114 (Fla. 1997) (also including murder of witnesses); McCray v. State, 416 So. 2d 804, 807 (Fla. 1982).

<sup>140</sup> See Hill v. State, 688 So. 2d 901 (Fla. 1997) (noting that sanctioning murder based on moral or religious justifications would lead to lawlessness, state-sanctioned vigilantism, and utter chaos).

<sup>141</sup> See Jackson v. State, 704 So. 2d 500, 505 (Fla. 1997).

<sup>142</sup> See Lynch v. State, 841 So. 2d 362 (Fla. 2003).

<sup>143</sup> See Zakrewski v. State, 717 So. 2d 488, 492 (Fla. 1998).

<sup>144</sup> See Cannaday v. State, 427 So. 2d 723, 730-31 (Fla. 1983); Christian v. State, 550 So. 2d 450, 452 (Fla. 1989).

<sup>145</sup> See, e.g., Santos v. State, 591 So. 2d 160, 163 (Fla. 1991).

<sup>146</sup> See Lawrence v. State, 698 So. 2d 1219 (Fla. 1997); Cummings-El v. State, 684 So. 2d 729 (Fla. 1996).

which is the focus of this aggravator.”<sup>147</sup> Also, the CCP aggravating circumstance may be doubled with the HAC aggravator.<sup>148</sup>

Additionally, even though the CCP aggravating circumstance was enacted in 1979, it may still apply to murders occurring prior to the date of its enactment without constituting a Florida or federal constitutional *ex post facto* violation, as long as sentencing or resentencing takes place after the enactment of the CCP aggravator.<sup>149</sup>

- x. Aggravating Circumstance #10: The Victim of the Crime for Which the Defendant Is to Be Sentenced Was a Law Enforcement Officer Engaged in the Performance of the Officer’s Official Duties

The Florida Supreme Court has not yet dealt with the issue of whether the defendant must know or should have known before the murder that the victim was a law enforcement officer in order for this aggravating factor to apply.<sup>150</sup> This aggravating factor may not be doubled with the “avoiding arrest” aggravator or the “disrupting or hindering a law enforcement officer” aggravator.<sup>151</sup> In some instances, even where the murder of a law enforcement officer was committed before this aggravating circumstance was enacted in 1987, it can still be applied retroactively where the prosecution proves the elements of the aggravating factors of murder to prevent lawful arrest and murder to hinder the lawful exercise of any governmental function or the enforcement of laws.<sup>152</sup> By proving the elements of these two other aggravators, any potential constitutional infirmity in the retroactive application of this aggravating circumstance is alleviated because the prosecution “has essentially proven the elements necessary to prove the murder of a law enforcement officer aggravating circumstance.”<sup>153</sup>

- xi. Aggravating Circumstance #11: The Victim of the Crime for Which the Defendant Is to Be Sentenced Was an Elected or Appointed Public Official Engaged in the Performance of His/Her Official Duties and the Crime Was Related, in Whole or in Part, to the Victim’s Official Capacity

A thorough and exhaustive review of the relevant published Florida case law has not revealed a judicial interpretation of this aggravating circumstance at the time of the release of this report.

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<sup>147</sup> See *Bell v. State*, 699 So. 2d 674, 677-78 (Fla. 1997); see also *Howell v. State*, 707 So. 2d 674, 682 (Fla. 1998) (holding the CCP aggravator applied in a contract killing because the “key factor is the level of planning rather than the success or failure of the plan”); *Sweet v. State*, 624 So. 2d 1138, 1142 (Fla. 1993); *Provenzano v. State*, 497 So. 2d 1177, 1183 (Fla. 1986).

<sup>148</sup> See *Jackson v. State*, 530 So. 2d 269, 273 (Fla. 1988).

<sup>149</sup> See *Zeigler v. State*, 580 So. 2d 127, 130 (Fla. 1991); *Combs v. State*, 403 So. 2d 418 (Fla. 1981).

<sup>150</sup> O.H. EATON, JR., FLORIDA COLLEGE OF ADVANCED JUDICIAL STUDIES, CONDUCTING THE PENALTY PHASE OF A CAPITAL CASE 62 (2006), available at <http://www.flcourts18.org/PDF/2006%20AJS%20Materials.pdf> (last visited Aug. 14, 2006).

<sup>151</sup> See *Kearse v. State*, 662 So. 2d 677 (Fla. 1995).

<sup>152</sup> See *Valle v. State*, 581 So. 2d 40, 47 (Fla. 1991).

<sup>153</sup> See *id.*

xii. Aggravating Circumstance #12: The Victim of the Capital Felony Was a Person Less Than 12 Years of Age

This aggravating circumstance may not be doubled with the “in the course of a felony” aggravator where the underlying felony is aggravated child abuse.<sup>154</sup>

xiii. Aggravating Circumstance #13: The Victim of the Capital Felony Was Particularly Vulnerable Due to Advanced Age or Disability, or Because the Defendant Stood in a Position of Familial or Custodial Authority Over the Victim

In *Francis v. State*, the Florida Supreme Court defined the following terms:

- (1) “Particularly” means “to an unusual degree.”
- (2) “Vulnerable” means “open to attack or damage.”
- (3) “Advanced” means “far on in time or course.”
- (4) “Age” means “the length of an existence extending from the beginning to any time.”<sup>155</sup>

Finding this aggravating circumstance is not dependent on the defendant targeting the victim because of the victim’s age or disability.<sup>156</sup> The only relevant inquiry is whether the victim was particularly vulnerable due to advanced age. For example in *Francis*, although the victims were sixty-six years old, the Court determined that this aggravating factor did not apply because the victims were in good health, able to get around on their own, and there was no evidence that the victims needed assistance attending to their daily needs.<sup>157</sup>

This aggravating factor cannot apply to murders which were committed before its enactment on May 30, 1996.<sup>158</sup>

xiv. Aggravating Circumstance #14: The Capital Felony Was Committed by a Criminal Street Gang Member

A thorough and exhaustive review of the relevant published Florida case law has not revealed a judicial interpretation of this aggravating circumstance at the time of the release of this report. However, this aggravating circumstance may be unconstitutional if the defendant’s gang membership is not relevant to the murder.<sup>159</sup>

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<sup>154</sup> See *Lukehart v. State*, 776 So. 2d 906, 925 (Fla. 2000).

<sup>155</sup> *Francis v. State*, 808 So. 2d 110, 138 (Fla. 2002).

<sup>156</sup> See *Woodel v. State*, 804 So. 2d 316, 325-26 (Fla. 2001) (noting that one victim led a sedentary life because of triple bypass surgery and multiple knee replacements, while the other victim had arthritis and had lost use of one arm).

<sup>157</sup> *Id.* at 325.

<sup>158</sup> *Hootman v. State*, 709 So. 2d 1357, 1358-60 (Fla. 1998).

<sup>159</sup> EATON, JR., *supra* note 150, at 59-60.

xv. Aggravating Circumstance #15: The Capital Felony Was Committed by a Person Designated as a Sexual Predator or a Person Previously Designated as a Sexual Predator Who Had the Sexual Predator Designation Removed

This aggravating circumstance was recently added to section 921.141(5) of the Florida Statutes in 2005 and has not yet been added to the standard jury instructions.<sup>160</sup> Although there are no reported cases interpreting this aggravator, the fact that it does not require that the sexual predator designation be related to the offense or that it does nothing to narrow the class of cases eligible for the death penalty calls its constitutionality into question.<sup>161</sup>

c. Case Law Interpretation of Future Dangerousness and Other Factors as Non-Statutory Aggravating Circumstances

The only aggravating circumstances that may be asserted and considered by the judge and jury are those which are set out in section 921.141(5) of the Florida Statutes.<sup>162</sup> Thus, there are no non-statutory aggravating factors in Florida.<sup>163</sup> Specifically, the Florida Supreme Court has found that future dangerousness<sup>164</sup> and lack of remorse<sup>165</sup> may not be argued in aggravation. The prosecution, however, can argue these factors to rebut an argument by the defense in mitigation that the defendant has a low probability of future dangerousness or that the defendant is very remorseful.<sup>166</sup>

d. Burden of Proof and Non-Unanimity of Finding as to Statutory Aggravating Circumstances

i. Burden of Proof for Aggravating Circumstances

The standard jury instructions require the jury to find “beyond a reasonable doubt” at least one aggravating circumstance before it may be considered by the jury in arriving at an advisory sentence of death.<sup>167</sup> The standard jury instructions do not require the judge to instruct the jury on the definition of reasonable doubt in every instance, but the instructions do include the following definition of “reasonable doubt” and explain how to apply the definition, which should be given where a new jury was empanelled for the penalty phase:

A reasonable doubt is not a mere possible doubt, a speculative, imaginary or forced doubt. Such a doubt must not influence you to disregard an

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<sup>160</sup> FLA. STAT. § 921.141(5)(o) (2006).

<sup>161</sup> EATON, JR., *supra* note 150, at 65-66.

<sup>162</sup> *See* FLA. STAT. § 921.141(5) (2006); Moore v. State, 701 So. 2d 545, 552 (Fla. 1997) (Anstead, J., concurring in part and dissenting in part).

<sup>163</sup> Knight v. State, 746 So. 2d 423, 431 n.10 (Fla. 1998).

<sup>164</sup> *See* Kormondy v. State, 703 So. 2d 454, 463 (Fla. 1997).

<sup>165</sup> Pope v. State, 441 So. 2d 1073, 1078 (Fla. 1983).

<sup>166</sup> EATON, JR., *supra* note 150, at 106.

<sup>167</sup> FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 7.11 (5th ed. 2005).

aggravating circumstance if you have an abiding conviction that it exists. On the other hand, if, after carefully considering, comparing, and weighing all the evidence, you do not have an abiding conviction that the aggravating circumstance exists, or if, having a conviction, it is one which is not stable but one which wavers and vacillates, then the aggravating circumstance has not been proved beyond a reasonable doubt and you should disregard it, because the doubt is reasonable.

It is to the evidence introduced in this proceeding, and it alone, that you are to look for that proof.

A reasonable doubt as to the existence of an aggravating circumstance may arise from the evidence, conflicts in the evidence or lack of evidence.

If you have a reasonable doubt as to the existence of an aggravating circumstance, you should find that it does not exist. However, if you have no reasonable doubt, you should find that the aggravating circumstance does exist and give it whatever weight you feel it should receive.<sup>168</sup>

ii. Lack of a Unanimity Requirement for Finding Aggravating Circumstances

The instructions require the judge to tell the jury that it need not be unanimous in its advisory sentence,<sup>169</sup> nor does it have to find the existence or non-existence of an aggravating circumstance unanimously. The Florida Supreme Court has consistently rejected the claims that, under the United States Supreme Court's decision in *Ring v. Arizona*,<sup>170</sup> the jury must make a unanimous advisory sentence,<sup>171</sup> and that it must unanimously find aggravating circumstances beyond a reasonable doubt.<sup>172</sup> Specifically, the instructions inform the jury that "[i]f a majority [of the jury] determine[s] that [the defendant] should be sentenced to death," it may advise and recommend to the court such a sentence.<sup>173</sup> Likewise, "[i]f by six or more votes [it] determine[s] that [the defendant] should not be sentenced to death," it must advise and recommend to the court that the defendant be sentenced to life without the possibility of parole.<sup>174</sup> Despite Florida's failure to require a unanimous jury recommendation, the Florida Supreme Court has found that even if a majority of the jury finds that the aggravating circumstances

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<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> 536 U.S. 584 (2002).

<sup>171</sup> See *Whitfield v. State*, 706 So. 2d 1 (Fla. 1997) (holding that a simple majority is sufficient for a jury to recommend a death sentence); *Thompson v. State*, 648 So. 2d 692 (Fla. 1994); *Brown v. State*, 565 So. 2d 304 (Fla. 1990).

<sup>172</sup> See *Parker v. State*, 904 So. 2d 370, 383 (Fla. 2005); *Hodges v. State*, 885 So. 2d 338, 359 n.9 (Fla. 2004).

<sup>173</sup> FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 7.11 (5th ed. 2005).

<sup>174</sup> FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 7.11 (5th ed. 2005).

outweigh the mitigating circumstances, the jury is not required to recommend a sentence of death.<sup>175</sup>

Recently, the Florida Supreme Court, in *State v. Steele*,<sup>176</sup> recognized that “Florida is now the only state in the country that allows a jury to find that aggravators exist *and* to recommend a sentence of death by a mere majority vote.”<sup>177</sup> Based on this information, the Florida Supreme Court called on the Florida Legislature “to revisit Florida’s death penalty statute to require some unanimity in the jury’s recommendations.”<sup>178</sup> However, to date, the Legislature has not made any of the recommended changes.

e. Case Law Interpretation of Whether Aggravating Circumstances Must Be Set Forth in Writing

Neither the standard jury instructions nor section 921.141 of the Florida Statutes require the jury to make specific findings on aggravating circumstances,<sup>179</sup> much less set out those findings in writing. In fact, the Florida Supreme held that a trial court that requires the jury to use a special verdict form to specify that, by a majority vote, it found specific aggravating circumstances beyond a reasonable doubt was departing from the essential requirements of the law in death penalty cases.<sup>180</sup>

Specifically, Florida law only requires a majority of the jury find any statutory aggravating circumstance beyond a reasonable doubt.<sup>181</sup> The Florida Supreme Court noted that “the Sixth Amendment does not require explicit jury findings on aggravating circumstances,” and when a jury makes a sentencing recommendation of death, it “necessarily engage[s] in the fact[-]finding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor ha[s] been proved.”<sup>182</sup> Florida law, however, requires the judge, when imposing a sentence of death, to “set forth in writing its findings upon which the sentence of death is based,” including “that sufficient [statutory] aggravating circumstances exist” and that there are “insufficient mitigating circumstances to outweigh the aggravating circumstances.”<sup>183</sup>

3. Mitigating Circumstances in a First-Degree Murder Case

a. Standard Jury Instructions

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<sup>175</sup> *Franqui v. State*, 804 So. 2d 1185, 1192 (Fla. 2001); *see also* *Brooks v. State*, 762 So. 2d 879, 902 (Fla. 2000); *Garron v. State*, 528 So. 2d 353, 358 (Fla.1988); *Henyard v. State*, 689 So. 2d 239, 249-50 (Fla. 1996).

<sup>176</sup> 921 So. 2d 538 (Fla. 2005).

<sup>177</sup> *State v. Steele*, 921 So. 2d 538, 548-49 (Fla. 2005).

<sup>178</sup> *Id.*

<sup>179</sup> *See* *Kormondy v. State*, 845 So. 2d 41, 54 (Fla. 2003) (holding that *Ring v. Arizona* does not require the jury to make a special verdict regarding which aggravating circumstances it found beyond a reasonable doubt); *see also* *Steele*, 921 So. 2d at 544-46.

<sup>180</sup> *Steele*, 921 So. 2d at 547-48.

<sup>181</sup> *Id.* at 545-46.

<sup>182</sup> *Id.*

<sup>183</sup> FLA. STAT. § 921.141(3) (2005).

The standard jury instructions advise the jury that if it finds that sufficient aggravating circumstances exist, then the jury must determine whether the mitigating circumstances outweigh the aggravating circumstances.<sup>184</sup> Neither section 921.141(6) of the Florida Statutes nor the standard jury instructions define mitigation but the jury instructions list eight statutory mitigating circumstances.<sup>185</sup> “The mitigating circumstances [the jury] may consider, if established by the evidence,” include:

- (1) The defendant has no significant history of prior criminal activity;
- (2) The crime for which the defendant is to be sentenced was committed while s/he was under the influence of extreme mental or emotional disturbance;
- (3) The victim was a participant in the defendant’s conduct or consented to the act;
- (4) The defendant was an accomplice in the offense for which s/he is to be sentenced but the offense was committed by another person and the defendant’s participation was relatively minor;
- (5) The defendant acted under extreme duress or under the substantial domination of another person;
- (6) The capacity of the defendant to appreciate the criminality of his/her conduct or to conform his/her conduct to the requirements of law was substantially impaired;
- (7) The age of the defendant at the time of the crime; and
- (8) Any of the following circumstances that would mitigate against the imposition of the death penalty:
  - (a) Any other aspect of the defendant’s character, record, or background; and/or
  - (b) Any other circumstance of the offense.<sup>186</sup>

This list is not exhaustive, as the eighth statutory mitigating circumstance, by its own terms, appears to act as a catch-all provision,<sup>187</sup> and the Florida Supreme Court has considered other non-statutory mitigating circumstances.

#### b. Case Law Interpretation of Statutory Mitigating Circumstances

##### i. The Defendant Has No Significant History of Prior Criminal Activity

If the defendant offers evidence on this circumstance and the prosecution, in rebuttal, offers evidence of other crimes, the standard jury instructions require the court to tell the jury that the defendant’s “[c]onviction of (previous crime) is not an aggravating circumstance to be considered in determining the penalty to be imposed on the defendant, but a conviction of that crime may be considered by the jury in determining whether the

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<sup>184</sup> FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 7.11 (5th ed. 2005).

<sup>185</sup> *Id.*; FLA. STAT. § 921.141(6) (2006).

<sup>186</sup> STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 7.11 (5th ed. 2005).

<sup>187</sup> *Id.*; FLA. STAT. § 921.141(6)(h) (2006).

defendant has a significant history of prior criminal activity [for the sole purpose of rebutting the defendant's evidence of this mitigator].”<sup>188</sup>

The word “prior” means that the prosecution can only rebut this mitigator with evidence of criminal conduct that occurred before the murder; criminal conduct occurring contemporaneous to the murder<sup>189</sup> or between the time of the murder and sentencing will not be sufficient to rebut this mitigating circumstance.<sup>190</sup> “Criminal activity” includes violent felonies and non-violent felonies,<sup>191</sup> misdemeanors,<sup>192</sup> juvenile records of delinquent acts,<sup>193</sup> and arrests and other evidence of criminal activity, without a conviction.<sup>194</sup>

Certain conduct has been held not to be “significant” criminal activity, such as when the defendant's only criminal activity consisted of traffic violations, passing worthless checks, and grand theft,<sup>195</sup> and stealing a \$10 bill from the dashboard of a truck through an open window when the defendant was seventeen years old, where the conviction was withheld, and the defendant completed an alternative program.<sup>196</sup>

- ii. The Crime for Which the Defendant Is to Be Sentenced Was Committed While S/he Was Under the Influence of Extreme Mental or Emotional Disturbance

To satisfy this mitigating circumstance, the defendant need not prove insanity or the lack of legal responsibility.<sup>197</sup> Rather, the defendant can merely argue, with or without expert testimony, that his/her behavior shows that his/her mental condition contributed to the criminal behavior.<sup>198</sup> For example, courts have found this mitigator where the defendant (1) was intoxicated at the time of the offense and had a history of alcohol or drug abuse that compromised his/her reasoning;<sup>199</sup> (2) had post-traumatic stress disorder, chronic depression and anxiety, poor impulse control and defective judgment; and attention

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<sup>188</sup> FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 7.11 (5th ed. 2005).

<sup>189</sup> See *Bello v. State*, 547 So. 2d 914, 917-18 (Fla. 1989).

<sup>190</sup> See *Hess v. State*, 794 So. 2d 1249, 1265 (Fla. 2001); *Scull v. State*, 533 So. 2d 1137, 1143 (Fla. 1988).

<sup>191</sup> EATON, JR., *supra* note 150, at 73.

<sup>192</sup> See *Perry v. State*, 522 So. 2d 817, 821 (Fla. 1988) (noting that the defendant was convicted of a misdemeanor involving a violent attack on a young woman).

<sup>193</sup> See *Quince v. State*, 414 So. 2d 185, 188 (Fla. 1982).

<sup>194</sup> See *Dennis v. State*, 817 So. 2d 741, 763-64 (Fla. 2002); *Walton v. State*, 547 So. 2d 622, 625 (Fla. 1989); *Lucas v. State*, 568 So. 2d 18, 22 n.6 (Fla. 1990); see also *Raleigh v. State*, 705 So. 2d 1324, 1327 (Fla. 1997) (noting that although the defendant had no arrest record, he had engaged in significant illegal drug activity); *Johnson v. State*, 442 So. 2d 185, 188-89 (Fla. 1983) (noting that the defendant had conviction for only a single, but serious offense).

<sup>195</sup> *Penn v. State*, 574 So. 2d 1079, 1083 n.6 (Fla. 1991).

<sup>196</sup> *Ramirez v. State*, 739 So. 2d 568, 582 (Fla. 1999).

<sup>197</sup> See *Francis v. State*, 808 So. 2d 110, 140 (Fla. 2002); *Huckaby v. State*, 343 So. 2d 29, 33-34 (Fla. 1997); *Morgan v. State*, 639 So. 2d 6, 13 (Fla. 1994); *Knowles v. State*, 632 So. 2d 62, 67 (Fla. 1993).

<sup>198</sup> *Francis*, 808 So. 2d at 140.

<sup>199</sup> See *Nibert v. State*, 574 So. 2d 1059, 1062-63 (Fla. 1990); *Holsworth v. State*, 522 So. 2d 348, 354 (1988); *Ross v. State*, 474 So. 2d 1170, 1174 (Fla. 1985).

deficit hyperactivity disorder;<sup>200</sup> (3) was border-line mentally retarded;<sup>201</sup> and (4) had extensive brain damage with symptoms resembling schizophrenia and exhibited goofy and psychotic behavior.<sup>202</sup>

Where expert opinions conflict regarding the existence of this mitigating circumstance and the judge determines that it does not exist, the judge's determination will not generally be disturbed on appeal.<sup>203</sup> For example, the following are instances where the court, amidst conflicting evidence, found that this mitigating circumstance did not exist:

- (1) the defendant used alcohol and drugs but there was no showing of intoxication or impairment at the time of the offense;<sup>204</sup>
- (2) the defendant offered testimony of hallucinations and depression, which was inconsistent with observations of lay witnesses before and after the murder;<sup>205</sup> and
- (3) the defendant had brain damage that could cause impulse problems, but not to the level of precipitating a bank robbery and murder of a police officer.<sup>206</sup>

Even where the expert opinions in favor of mitigation are uncontroverted, the court can still reject the existence of this mitigator if its existence cannot be reconciled with other evidence in the case.<sup>207</sup>

### iii. The Victim Was a Participant in the Defendant's Conduct or Consented to the Act

This mitigating circumstance may be found when, from the view of a reasonable person, a victim "knowingly and voluntarily participated with the defendant in a transaction that, in and of itself, would likely lead to the victim's death."<sup>208</sup> However, this factor does not simply exist "whenever the victim engages in some unlawful or even dangerous transaction that merely provided the killer a better opportunity to commit murder, which the victim did not intend."<sup>209</sup>

This mitigator most often exists in cases of self-defense, and even where such defense was rejected during the guilt/innocence phase of the capital trial, the jury or judge may still consider the victim's participation in mitigation of the defendant's sentence.<sup>210</sup> This

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<sup>200</sup> See *Davis v. State*, 875 So. 2d 359, 372 (Fla. 2003).

<sup>201</sup> See *Crook v. State*, 813 So. 2d 68, 76-77 (Fla. 2002).

<sup>202</sup> See *Fitzpatrick v. State*, 527 So. 2d 809, 811-12 (Fla. 1988).

<sup>203</sup> See *Walker v. State*, 707 So. 2d 300, 318 (Fla. 1998).

<sup>204</sup> *Koon v. State*, 513 So. 2d 1253, 1257 (Fla. 1987).

<sup>205</sup> *Nelson v. State*, 850 So. 2d 514, 529-30 (Fla. 2003).

<sup>206</sup> *Gonzalez v. State*, 786 So. 2d 559, 564 (Fla. 2001).

<sup>207</sup> *Foster v. State*, 679 So. 2d 747, 755 (Fla. 1996).

<sup>208</sup> See *Wournos v. State*, 676 So. 2d 972, 975 (Fla. 1996).

<sup>209</sup> *Id.*

<sup>210</sup> *EATON, JR.*, *supra* note 150, at 75.

mitigator may also be present in cases of consensual violent relationships<sup>211</sup> and mercy killings, where the victim asked to be killed.<sup>212</sup>

- iv. The Defendant Was an Accomplice in the Offense for Which S/he Is to Be Sentenced But the Offense Was Committed by Another Person and the Defendant's Participation Was Relatively Minor

This mitigator is not applicable to a defendant who (1) hired another person to commit the murder, even if the defendant is not present at the time of and does not participate in the homicide;<sup>213</sup> or (2) participated in the subduing of victims, ransacked the victim's home, stood by and watched an accomplice shoot the victims, and divided up the stolen property.<sup>214</sup>

- v. The Defendant Acted Under Extreme Duress or Under the Substantial Domination of Another Person

"Duress" refers "not to internal pressures but rather to external provocations such as imprisonment or [the] use of force or threats."<sup>215</sup> This mitigator often applies when one co-defendant is significantly younger than another and under the domination of the older co-defendant.<sup>216</sup>

- vi. The Capacity of the Defendant to Appreciate the Criminality of His/Her Conduct or to Conform His/Her Conduct to the Requirements of Law Was Substantially Impaired<sup>217</sup>

A rejection of the insanity defense during the guilt/innocence phase of the capital trial does not preclude a finding that this mitigator exists, despite the fact that both insanity and this mitigator focus on a defendant's knowledge of wrongfulness.<sup>218</sup>

Where the only evidence to support this factor is the consumption of alcohol, without more, the judge need not charge the jury on this mitigating circumstance.<sup>219</sup> Similarly,

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<sup>211</sup> See *Chambers v. State*, 339 So. 2d 204 (Fla. 1976).

<sup>212</sup> EATON, JR., *supra* note 150, at 76.

<sup>213</sup> See *Atone v. State*, 382 So. 2d 1205, 1216 (Fla. 1980).

<sup>214</sup> See *White v. State*, 403 So. 2d 331, 339 (1981).

<sup>215</sup> *Toole v. State*, 479 So. 2d 731, 733-34 (Fla. 1985).

<sup>216</sup> *Witt v. State*, 342 So. 2d 497, 500-01 (Fla. 1977).

<sup>217</sup> This mitigating circumstance is similar to Mitigating Circumstance #2 in that certain conditions, such as alcoholism, can cause a defendant to be both under the "influence of extreme mental or emotional disturbance" and have his/her capacity to conform his/her conduct to the requirements of law "substantially impaired." However, the difference between the two mitigating circumstances is that one does not need to demonstrate diminished culpability to prove Mitigating Circumstance #2, whereas this mitigating circumstance, by its own terms, requires proof of an impairment causing diminished ability to adhere to the law.

<sup>218</sup> See *Campbell v. State*, 571 So. 2d 415, 418-19 (Fla. 1990).

<sup>219</sup> *Duest v. State*, 855 So. 2d 33, 42 (Fla. 2003).

where the only evidence in support of this factor is expert testimony based on unsupported facts, the judge may reject the existence of this mitigating circumstance.<sup>220</sup>

#### vii. The Age of the Defendant at the Time of the Crime

In order for the judge or jury to consider this mitigating circumstance, the defendant's age must be "linked with some other characteristic of the defendant or the crime, such as significant emotional immaturity or mental problems."<sup>221</sup> Although there is no clear bright line for what age is advanced enough to require the application of this mitigating circumstance, courts have found that the ages of fifty-four<sup>222</sup> and fifty-eight<sup>223</sup> are not advanced enough to require special consideration.

The Florida Supreme Court has noted that a "better practice" is to always instruct a jury on this mitigating circumstance when it is requested by the defense.<sup>224</sup>

#### viii. Any Other Aspect of the Defendant's Character, Record, or Background, or Any Other Circumstance of the Offense That Would Mitigate Against the Imposition of the Death Penalty

This mitigating circumstance was added in 1996 to simply bring recognized non-statutory "background" mitigating circumstances within the statutory mitigators.<sup>225</sup> Among the "background" circumstances that are considered in mitigation of a death sentence are:

- (1) Family Background—This circumstance may be considered when the defendant has a "troubled background with a family history of instability, poverty, or abuse."<sup>226</sup> A good family background may also be considered in mitigation.<sup>227</sup>
- (2) Employment Background—The fact that a defendant was (1) "a willing worker and a good employee,"<sup>228</sup> (2) a "thoughtful friend and employer,"<sup>229</sup> and (3) "a contributing member of society, . . . [and] a good employee,"<sup>230</sup> have been held to be mitigating.
- (3) Alcoholism or Drug Use/Dependency—This can be a mitigating factor as long as the alcoholism or drug use had an effect on the defendant in the case at hand.<sup>231</sup>

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<sup>220</sup> Gudinas v. State, 693 So. 2d 953, 966-67 (Fla. 1997).

<sup>221</sup> Hurst v. State, 819 So. 2d 689, 698 (Fla. 2002); *see also* Campbell v. State, 679 So. 2d 720, 725-26 (Fla. 1996).

<sup>222</sup> Agan v. State, 445 So. 2d 326, 328 (Fla. 1984).

<sup>223</sup> Echols v. State, 484 So. 2d 568, 575 (Fla. 1986).

<sup>224</sup> Archer v. State, 673 So. 2d 17, 21 (Fla. 1996).

<sup>225</sup> EATON, JR., *supra* note 150, at 80-82.

<sup>226</sup> Besaraba v. State, 656 So. 2d 441, 446 (Fla. 1995); Parker v. State, 643 So. 2d 1032, 1035 (Fla. 1994).

<sup>227</sup> *See* Hurst v. State, 819 So. 2d 689, 699 (Fla. 2002).

<sup>228</sup> Smalley v. State, 546 So. 2d 720, 723 (Fla. 1989).

<sup>229</sup> Mordenti v. State, 894 So. 2d 161, 166 (Fla. 2004).

<sup>230</sup> Hodges v. State, 885 So. 2d 338, 366 (Fla. 2004).

<sup>231</sup> *See* Miller v. State, 770 So. 2d 1144, 1150 (Fla. 2000). In weighing this mitigating circumstance, the court should consider whether the defendant was under the influence of alcohol or drugs at the time of the murder, which lessened his/her culpability; whether his/her addiction is in the remote past and had nothing

- (4) Military Service—Such service in the defendant’s background is mitigating.<sup>232</sup>
- (5) Mental Problems That Do Not Qualify Under Other Statutory Mitigating Circumstances—Evidence establishing this circumstance does not have to rise to the level of “extreme” mental or emotional disturbance, or “substantial” incapacity to be considered in mitigation.<sup>233</sup>
- (6) Abuse of Defendant by Parents (Physical, Mental, or Sexual)—Evidence of abuse can be considered in mitigation,<sup>234</sup> even if the defendant demonstrated good behavior in adult life.<sup>235</sup>
- (7) Community Service—Evidence that the defendant has made a contribution to the community or society through charitable or humanitarian deeds can be considered in mitigation.<sup>236</sup>
- (8) Parental Skills—Evidence that the defendant is a caring parent can be considered in mitigation.<sup>237</sup>
- (9) Religious Beliefs—Evidence that defendant regularly attends church, has a strong religious devotion, or is a deacon in the church can be considered in mitigation.<sup>238</sup>

c. Case Law Interpretation of Non-Statutory Mitigating Circumstances

The United States Constitution requires the sentencing judge and jury to consider as mitigation any aspect of the defendant’s character or record and any of the circumstances of the offense, which the defendant proffers as a basis for a sentence less than death,<sup>239</sup> regardless of whether it is enumerated in section 921.141(6) of the Florida Statutes. In addition to the circumstances discussed above, a number of non-statutory mitigating circumstances have been considered in Florida, such as:

- (1) the defendant’s remorse;<sup>240</sup>
- (2) the defendant’s potential for rehabilitation (lack of future dangerousness);<sup>241</sup>

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to do with the murder; and whether alcohol or drug abuse have caused difficulties that would tend to be mitigating. *EATON, JR., supra* note 150, at 80-81.

<sup>232</sup> See *Card v. State*, 803 So. 2d 613, 626-27 (Fla. 2001).

<sup>233</sup> See, e.g., *Amazon v. State*, 487 So. 2d 8, 13 (Fla. 1986) (noting that a psychologist presented testimony that the defendant was an “emotional cripple” who had been brought up in a negative family setting and had the emotional maturity of a 13-year-old).

<sup>234</sup> See *Elledge v. State*, 613 So. 2d 434, 436 (Fla. 1993); *Clark v. State*, 609 So. 2d 513, 516 (Fla. 1992).

<sup>235</sup> *Walker v. State*, 707 So. 2d 300, 318 (Fla. 1998).

<sup>236</sup> *Campbell v. State*, 571 So. 2d 415, 420 n.4 (Fla. 1990).

<sup>237</sup> The fact that a defendant is the father of two children and cared for them may be a mitigating factor. *Tafero v. Wainwright*, 796 F.2d 1314, 1321 (11th Cir. 1986); *Jacobs v. State*, 396 So. 2d 713, 718 (Fla. 1981). However, the mere fact that a defendant is a parent does not provide sufficient mitigation to outweigh three valid aggravating circumstances. *Holton v. State*, 573 So. 2d 284, 293 (Fla. 1991).

<sup>238</sup> See *Walker*, 707 So. 2d at 318.

<sup>239</sup> See *Lockett v. Ohio*, 438 U.S.586, 604 (1978).

<sup>240</sup> See *Smalley v. State*, 546 So. 2d 720, 723 (Fla. 1989). The remorse must be genuine and merely expressing sorrow for the victim is insufficient. *Beasley v. State*, 774 So. 2d 649, 672-73 (Fla. 2000). While lack of remorse may not be used as an aggravating factor, it may be argued by the prosecution to rebut this mitigating circumstance. See *Walton v. State*, 547 So. 2d 622, 625 (Fla. 1989).

- (3) the sentencing of a co-defendant to life or some lesser term;<sup>242</sup>
- (4) good jail conduct, including on death row;<sup>243</sup>
- (5) voluntary confessions/cooperation with police;<sup>244</sup>
- (6) defendant's lack of intent to kill;<sup>245</sup>
- (7) the length of the defendant's potential mandatory sentence;<sup>246</sup>
- (8) the defendant's positive family relations;<sup>247</sup> and
- (9) the defendant's artistic ability.<sup>248</sup>

#### d. Case Law Interpretation of Circumstances Not Considered Mitigating

The Florida Supreme Court has determined that a number of factors do not constitute mitigating circumstances. For example, “residual” or “lingering doubt” has been consistently rejected as a non-statutory mitigating circumstance in Florida, and trial courts may not instruct on it.<sup>249</sup> Additionally, the Florida Supreme Court has rejected as mitigation: (1) evidence that the death penalty is not a deterrent, that it costs more than life imprisonment, and that the prosecution offered the defendant a plea deal for life in

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<sup>241</sup> See *Valle v. State*, 502 So. 2d 1225, 1226 (Fla. 1987) (holding it error to exclude testimony regarding the defendant's future positive adjustment to prison life).

<sup>242</sup> A co-defendant's life sentence is a factor which the trial court may consider in mitigation of a defendant's death sentence. *Evans v. State*, 808 So. 2d 92, 109 (Fla. 2002). If a co-defendant receives a life sentence, it may be impossible to sentence to death an equally culpable, or less culpable, co-defendant, regardless of the existing aggravating and mitigating circumstances. *Ray v. State*, 755 So. 2d 604, 611 (Fla. 2000); see also *Slater v. State*, 316 So. 2d 539, 542 (Fla. 1975) (holding that a less culpable non-triggerman cannot receive a death sentence when the more culpable triggerman received a life sentence). However, if the defendant is more culpable than the co-defendant who received a lesser sentence, this mitigating circumstance may be rejected. *Evans*, 808 So. 2d at 109. Likewise, if the co-defendant received a lesser sentence as a result of a plea to a lesser offense, the defendant's death sentence cannot be disparate because the defendant and co-defendant have not been convicted of the same offense. See *Knight v. State*, 784 So. 2d 396, 400-01 (Fla. 2001).

<sup>243</sup> *EATON, JR.*, *supra* note 150, at 85.

<sup>244</sup> *Id.* at 785-86; *Caruthers v. State*, 465 So. 2d 496, 498 (Fla. 1985) (considering the defendant's voluntary confession in mitigation); *Boyett v. State*, 688 So. 2d 308, 310 (Fla. 1996) (considering the defendant's cooperation with law enforcement in mitigation).

<sup>245</sup> This mitigating circumstance is primarily asserted to outweigh the “in the course of a felony” aggravating circumstance where the defendant was convicted of felony murder. *EATON, JR.*, *supra* note 150, at 86-91.

<sup>246</sup> This mitigating circumstance may be strong because the alternative to a death sentence is life in prison without the possibility of parole. *EATON, JR.*, *supra* note 150, at 91.

<sup>247</sup> Evidence of positive “family relationships and the support (the defendant) provided his family are admissible as non-statutory mitigation.” *Card v. State*, 803 So. 2d 613, 627 (Fla. 2001). However, negative family relations, such as abandonment as a child, are not always mitigating. See *Franqui v. State*, 804 So. 2d 1185, 1196 (Fla. 2001).

<sup>248</sup> Although this has been recognized as a non-statutory mitigating circumstance, it is not “compelling and may receive little weight. See *Evans v. State*, 808 So. 2d 92, 108 (Fla. 2002).

<sup>249</sup> See *Duest v. State*, 855 So. 2d 33, 40-41 (Fla. 2003); *Darling v. State*, 808 So. 2d 145, 162 (Fla. 2002) (citing *Franklin v. Lynaugh*, 487 U.S. 164, 173-74 (1988), and holding that the defendant has no right to present evidence of lingering doubt). See generally, *Oregon v. Guzek*, 126 S.Ct. 1226, 1231-1232 (2006) (noting that the Court has yet to interpret the Eighth Amendment as providing a capital defendant the right to introduce evidence of “residual doubt”).

prison;<sup>250</sup> (2) testimony by the victim’s family that the defendant should not be executed;<sup>251</sup> and (3) testimony that the victim was opposed to the death penalty;<sup>252</sup> because all of these factors are irrelevant to the defendant’s character and background.

e. Lack of the Unanimity of Findings as to Mitigating Circumstances

There does not need to be unanimity of findings as to mitigating circumstances.

4. Availability and Definitions of the Sentencing Options

The standard jury instructions do not define “life imprisonment without the possibility of parole” and only explain the circumstances under which the jury may impose either a sentence of death or life imprisonment without the possibility of parole.<sup>253</sup> In fact, the Florida Supreme Court held that, in response to a jury question of whether “life in prison without parole really mean[s] ‘no parole’ under any circumstances . . . [and whether the defendant] will never be allowed back into society again,” the judge may simply reread the standard jury instruction stating that the sentence is “either death or life imprisonment without the possibility of parole.”<sup>254</sup> Thus, the standard jury instructions have been found to be sufficient to inform the jury of the possible sentences they may impose and no further definitions regarding those possible sentences are needed by law.<sup>255</sup>

5. Additional Instructions After Jury Deliberations Have Begun

a. Standard Jury Instructions

The United States Supreme Court, in *Allen v. United States*,<sup>256</sup> authorized judges to provide additional instructions to jurors after judges have rendered the main charge to the jury and jury deliberations have begun.<sup>257</sup> The Court upheld for that purpose the following instruction, which is known as the *Allen* charge:

in substance, that in a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's

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<sup>250</sup> See *Hitchcock v. State*, 578 So. 2d 685, 690 (Fla. 1990), *rev'd on other grounds* by 505 U.S. 1215 (1992).

<sup>251</sup> *Floyd v. State*, 569 So. 2d 1225, 1229-30 (Fla. 1990).

<sup>252</sup> *Campbell v. State*, 679 So. 2d 720, 725 (Fla. 1996).

<sup>253</sup> FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 7.11 (5th ed. 2005).

<sup>254</sup> *Whitfield v. State*, 706 So. 2d 1, 5 (Fla. 1997).

<sup>255</sup> *Id.*

<sup>256</sup> *Allen v. United States*, 164 U.S. 492, 501 (1896).

<sup>257</sup> *Id.*

arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.<sup>258</sup>

The standard jury instructions contain a version of the *Allen* charge that may be used in all death penalty cases.<sup>259</sup> The instructions provide that if a jury has been deliberating for a considerable amount of time and is deadlocked, the judge may provide the jury with the following instruction:

I know that all of you have worked hard to try to find a verdict in this case. It apparently has been impossible for you so far. Sometimes an early vote before discussion can make it hard to reach an agreement about the case later. The vote, not the discussion, might make it hard to see all sides of the case.

We are all aware that it is legally permissible for a jury to disagree. There are two things a jury can lawfully do: agree on a verdict or disagree on what the facts of the case may truly be.

There is nothing to disagree about on the law. The law is as I told you. If you have any disagreements about the law, I should clear them for you now. That should be my problem, not yours.

If you disagree over what you believe the evidence showed, then only you can resolve that conflict, if it is to be resolved.

I have only one request of you. By law, I cannot demand this of you, but I want you to go back into the jury room. Then, taking turns, tell each of the other jurors about any weakness of your own position. You should not interrupt each other or comment on each other's views until each of you has had a chance to talk. After you have done that, if you simply cannot reach a verdict, then return to the courtroom and I will declare this case mistried, and will discharge you with my sincere appreciation for your services.

You may now retire to continue with your deliberations.<sup>260</sup>

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<sup>258</sup> *Id.*

<sup>259</sup> *See, e.g.*, Thomas v. State, 748 So. 2d 970, 978 (Fla. 1999).

<sup>260</sup> FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 4.1 (5th ed. 2005).

Although it is recommended that a judge give this *Allen* charge when a jury is deadlocked, the judge is not required to do so.<sup>261</sup> If the judge chooses to give a modified *Allen* charge, which is different from the charge contained in the standard jury instructions, such instruction must be “examined together with the judge’s other statements throughout the jury deliberations and the other prevailing circumstances to determine if [these statements and circumstances] combine to create a serious risk of [jury] coercion.”<sup>262</sup> Various Florida courts have held that instructions which stray too far from the parameters announced in *Allen* and expressed in the standard jury instructions are coercive in nature and constitute fundamental or harmful error.<sup>263</sup> Some “modified” *Allen* charges have been held, however, to be permissible where the judge provides a balanced instruction to the jury.<sup>264</sup>

## 6. Form of Instructions

The standard jury instructions do not indicate whether the judge may provide the jury with a written copy of the jury instructions. However, Florida Rule of Criminal Procedure 3.990(b) states that “every charge to a jury shall be orally delivered, and [that] charges in capital cases shall . . . also be in writing.”<sup>265</sup> Additionally, Florida Rule of Criminal Procedure 3.400(b) requires that, in capital cases, the court must permit the jury to take a written copy of all charged instructions into the jury room during their deliberations.<sup>266</sup>

### *D. Use of Victim Impact Evidence in All Capital Sentencing Proceedings*

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<sup>261</sup> *State v. Bryan*, 290 So. 2d 482 (Fla. 1974).

<sup>262</sup> *Thomas*, 748 So. 2d at 978 (citing *Watson v. Alabama*, 841 F.2d 1074, 1076 (11th Cir. 1988)).

<sup>263</sup> *See Young v. State*, 711 So. 2d 1379, 1379-80 (Fla. 2d DCA 1998) (holding that the judge’s deviation from the *Allen* charge was error because it gave the appearance that the jury had to render a verdict); *Webb v. State*, 519 So. 2d 748, 749 (Fla. 4th DCA 1988) (holding that the judge’s statement that the jury verdict had to be unanimous and rendered on that night was coercive and fundamental error); *Heddleson v. State*, 512 So. 2d 957, 959 (Fla. 4th DCA 1987) (holding that the trial judge’s comments, which led the jury to believe that it had to reach a verdict in the time allotted for the trial, or otherwise the defendant would not be retried and would escape prosecution were reversible error); *Warren v. State*, 498 So. 2d 472, 476-78 (Fla. 3d DCA 1986) (holding that the judge’s comments, that he did not wish to try the case again, that retrial would be very costly and that he sincerely hoped the jury would return a verdict if at all possible, infected the integrity of the fact finding process and constituted fundamental error); *Nelson v. State*, 438 So. 2d 1060, 1061-62 (Fla. 4th DCA 1983) (holding that the judge’s comments, that no one would be served by the jury’s inability to reach a verdict and that the jury was wasting its time, resulted in jury coercion and constituted reversible error).

<sup>264</sup> *See State v. Bryan*, 290 So. 2d 482, 483-84 (Fla. 1974) (holding that the trial judge’s modified instruction was a balanced charge, which encouraged neither acquittal nor conviction and stated that no juror was to abandon his conscientious convictions; therefore, it was not error); *State v. Roberts*, 616 So. 2d 79, 81 (Fla. 2d DCA 1993) (holding that the trial judge’s comments to the jury after six and a half hours of jury deliberations, that it was very important yet not essential to reach a verdict on that day, did not impermissibly coerce the guilty verdict); *Tejeda-Bermudez v. State*, 427 So. 2d 1096, 1097-98 (Fla. 3d DCA 1983) (holding that even if the defendant had objected to the modified *Allen* charge, the judge’s instruction to the jury to continue after six hours of deliberation and after the jury reported deadlock was not coercive and did not constitute error).

<sup>265</sup> FLA. R. CRIM. P. 3.390(b).

<sup>266</sup> FLA. R. CRIM. P. 3.400(b).

The standard jury instructions do not address victim impact evidence. However, sections 921.141(7) and 921.142(8) of the Florida Statutes allow the prosecution, after evidence of one or more aggravating circumstances has been provided to the jury, to introduce and argue victim impact evidence to the jury.<sup>267</sup> This evidence is only offered to “demonstrate the victim’s uniqueness as an individual human being and the resultant loss to the community’s members by the victim’s death,”<sup>268</sup> and should not be mentioned in the prosecutor’s closing argument.<sup>269</sup> In providing victim impact evidence, the prosecution may not present characterizations and opinions about the crime, the defendant, or the appropriate sentence as part of the victim impact evidence.<sup>270</sup>

There are no reported cases where the Florida Supreme Court reversed the penalty phase of a capital trial because of improper victim impact evidence,<sup>271</sup> and the Florida Supreme Court has approved its admissibility in a number of cases.<sup>272</sup> The Court has ruled, however, that victim impact testimony does have limits and must conform to the parameters set out in sections 921.141(7) and 921.142(8), as well as Florida jurisprudence.<sup>273</sup>

If the defendant requests that an instruction be given to the jury regarding victim impact testimony, the court should give one.<sup>274</sup> The Florida Supreme Court Criminal Court Steering Committee, chaired by Circuit Judge O.H. Eaton, Jr., has proposed a set of model penalty phase jury instructions, which contain a instruction on victim impact testimony, stating:

You have heard evidence about the impact of this homicide on the

1. family,
2. friends,
3. colleagues

of (decedent). This evidence was presented to show the victim’s uniqueness as an individual and the resultant loss by (decedent’s) death. However, you may not consider this evidence as an aggravating circumstance. Your recommendation to the court must be based on the aggravating circumstances and the mitigating circumstances upon which you have been instructed.<sup>275</sup>

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<sup>267</sup> FLA. STAT. §§ 921.141(7), 921.142(8) (2006).

<sup>268</sup> *Id.*

<sup>269</sup> EATON, JR., *supra* note 150, at 104.

<sup>270</sup> *Id.*

<sup>271</sup> EATON, JR., *supra* note 150, at 71.

<sup>272</sup> *See, e.g.,* Bonifay v. State, 680 So. 2d 413, 419-20 (Fla. 1996); Branch v. State, 685 So. 2d 1250, 1253 (Fla. 1996); Farina v. State, 680 So. 2d 392, 399 (Fla. 1996); Allen v. State, 662 So. 2d 323, 328 (Fla. 1995); Windom v. State, 656 So. 2d 432, 438 (Fla. 1995).

<sup>273</sup> *Id.*; *see also* Sexton v. State, 775 So. 2d 923, 931, 933 (Fla. 2000) (discussing proper and improper victim impact testimony).

<sup>274</sup> EATON, JR., *supra* note 150, at 120.

<sup>275</sup> *See* Proposed Revisions to *Florida Standard Jury Instructions in Criminal Cases*, Proposed Standard Jury Instruction 7.11 Penalty Proceedings—Capital Cases, SC05-1890, App. 1-Proposal One (last amended on Sept. 7, 2006) (on file with author); *see also* FLORIDA COLLEGE OF ADVANCED JUDICIAL STUDIES,

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MODEL PENALTY PHASE JURY INSTRUCTIONS (2006) [hereinafter MODEL INSTRUCTIONS], *available at* <http://www.flcourts18.org/PDF/Model%20Penal%20Phase%20Instr%2006.pdf> (last visited on Aug. 14, 2006).

## II. ANALYSIS

### A. Recommendation #1

**Each capital punishment jurisdiction should work with attorneys, judges, linguists, social scientists, psychologists, and jurors themselves to evaluate the extent to which jurors understand capital jury instructions, revise the instructions as necessary to ensure that jurors understand applicable law, and monitor the extent to which jurors understand the revised instructions to permit further revision as necessary.**

In 1999, the Jury Innovations Committee of the Judicial Management Council was appointed by the Florida Supreme Court to perform a comprehensive review and evaluation of Florida's jury system.<sup>276</sup> In its final report, the Florida Jury Innovation Committee, noting the "high rate of failure of jurors to fully understand jury instructions," recommended, among other things, the use of "plain English" in instructions and the formation of a committee composed of linguists, communication experts, and former jurors to review all standard jury instructions (Simple and Clear Instructions recommendation).<sup>277</sup> On October 17, 2003, the Florida Supreme Court issued an administrative order approving most of the forty-eight recommendations of the Jury Innovations Committee.<sup>278</sup> However, the Court approved the "Simple and Clear Instructions" recommendation as an "aspirational goal" and referred it to the "standard jury instruction committees," including the Committee on Standard Jury Instructions in Criminal Cases.<sup>279</sup> The Committee on Standard Jury Instructions in Criminal Cases has since proposed an amendment to the capital sentencing instructions<sup>280</sup> and the Florida Supreme Court Criminal Court Steering Committee, chaired by Circuit Judge O.H. Eaton, Jr., has proposed a set of model penalty phase jury instructions.<sup>281</sup> Both proposals are awaiting action by the Florida Supreme Court.

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<sup>276</sup> *In re* Final Report of the Jury Innovations Committee, No. AOSC03-41 (Fla. Oct. 17, 2003), available at [http://www.floridasupremecourt.org/pub\\_info/summaries/briefs/03/03-41/Filed\\_10-17-2003\\_AdministrativeOrder.pdf](http://www.floridasupremecourt.org/pub_info/summaries/briefs/03/03-41/Filed_10-17-2003_AdministrativeOrder.pdf) (last visited on Aug. 14, 2006).

<sup>277</sup> SUPREME COURT OF FLORIDA JUDICIAL MANAGEMENT COUNCIL, JURY INNOVATIONS COMMITTEE, FINAL REPORT 56 (2003) [hereinafter FINAL REPORT], available at [http://www.flcourts.org/gen\\_public/pubs/bin/JuryInnovationsFinalReport.pdf](http://www.flcourts.org/gen_public/pubs/bin/JuryInnovationsFinalReport.pdf) (last visited on Aug. 14, 2006).

<sup>278</sup> *In re* Final Report of the Jury Innovations Committee, No. AOSC03-41 (Fla. Oct. 17, 2003), available at [http://www.floridasupremecourt.org/pub\\_info/summaries/briefs/03/03-41/Filed\\_10-17-2003\\_AdministrativeOrder.pdf](http://www.floridasupremecourt.org/pub_info/summaries/briefs/03/03-41/Filed_10-17-2003_AdministrativeOrder.pdf) (last visited on Aug. 14, 2006).

<sup>279</sup> *Id.*

<sup>280</sup> *Proposed Jury Instruction for Penalty Phase of Capital Cases*, FLA. B. NEWS, Dec. 12, 2005, available at <http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/cb53c80c8fabd49d85256b5900678f6c/ee1b67861e59d5d2852570c700541c3b?OpenDocument> (last visited on Aug. 16, 2006). The Committee on Standard Jury Instructions in Criminal Cases has finished accepting comments on the proposed changes to the capital sentencing instructions and is awaiting the Florida Supreme Court's consideration.

<sup>281</sup> See Proposed Standard Jury Instruction 7.11 Penalty Proceedings—Capital Cases, *supra* note 275; see also FLORIDA COLLEGE OF ADVANCED JUDICIAL STUDIES, MODEL PENALTY PHASE JURY INSTRUCTIONS (2006) [hereinafter MODEL INSTRUCTIONS], available at <http://www.flcourts18.org/PDF/Model%20Penal%20Phase%20Instr%2006.pdf> (last visited on Aug. 14, 2006).

Because the Florida Supreme Court has not yet acted on the proposed instructions, we cannot determine full compliance with this Recommendation. Therefore, the State of Florida is only in partial compliance with Recommendation #1.

*B. Recommendation #2*

**Jurors should receive written copies of “court instructions” (referring to the judge’s entire oral charge) to consult while the court is instructing them and while conducting deliberations.**

The Florida Rules of Criminal Procedure states that “every charge to a jury shall be orally delivered, and [that] charge[] in capital cases shall . . . also be in writing.”<sup>282</sup> Moreover, in capital cases, the court must permit the jury to take a written copy of all charged instructions into the jury room during their deliberations.<sup>283</sup> The State of Florida, therefore, is in compliance with Recommendation #2.

*C. Recommendation #3*

**Trial courts should respond meaningfully to jurors’ requests for clarification of instructions by explaining the legal concepts at issue and meanings of words that may have different meanings in everyday usage and, where appropriate, by directly answering jurors’ questions about applicable law.**

Capital jurors commonly have difficulty understanding jury instructions.<sup>284</sup> This can be attributed to a number of factors, including, but not limited to, the length of the instructions, the use of complex legal concepts and unfamiliar words without proper explanation, and insufficient definitions.<sup>285</sup> Given that jurors have difficulty understanding jury instructions, judges must respond meaningfully to jurors’ requests for clarification to ensure juror comprehension of the applicable law.

The Florida Supreme Court and its committees have acknowledged the high level of misunderstanding of standard jury instructions among jurors and have taken the first steps towards making the standard jury instructions more simple and clear by appointing a committee of linguists, communications experts and former jurors to review all of the

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<sup>282</sup> FLA. R. CRIM. P. 3.390(b).

<sup>283</sup> FLA. R. CRIM. P. 3.400(b).

<sup>284</sup> Susie Cho, *Capital Confusion: The Effect of Jury Instructions on the Decision to Impose Death*, 85 J. CRIM. L. & CRIMINOLOGY 532, 549-551 (1994) (discussing juror comprehension, or lack thereof, of jury instructions); Shari Seidman Diamond & Judith N. Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 JUDICATURE 224, 225 (1996); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 12-15 (1993) (focusing on South Carolina capital juries’ understanding or misunderstanding of jury instructions).

<sup>285</sup> James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L. J. 1161, 1169-1170 (1995); Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1, 7 (discussing jurors’ understanding of the concept of mitigation evidence, including the scope, applicable burden of proof, and the requisite number of jurors necessary to find the existence of a mitigating factor).

standard jury instructions.<sup>286</sup> Studies have shown that Florida capital jurors have difficulty understanding two main concepts: (1) mitigation evidence, and (2) the effect of finding certain aggravating circumstances.<sup>287</sup> While neither Florida law nor the standard jury instructions define the term “mitigation,” the standard jury instructions do help to define the overall concept of mitigation by listing seven possible mitigating circumstances and help the jury understand the scope of mitigation by requiring the judge to instruct the jury that they may consider any other evidence regarding the defendant’s background or character in mitigation. Despite the list of mitigating circumstances in the standard jury instructions<sup>288</sup> and instructions informing the jury that any mitigating circumstance may be considered,<sup>289</sup> 14.6 percent of Florida capital jurors interviewed by the Capital Jury Project thought that only a specific list of mitigating factors could be considered,<sup>290</sup> while 35 percent answered that they did not know that any evidence could be considered in mitigation.<sup>291</sup>

Moreover, although the standard jury instructions clearly state that unlike aggravating circumstances, mitigating circumstances need not be proven beyond a reasonable doubt, and if the jury is reasonably convinced of the existence of a mitigating circumstance, they may consider it established,<sup>292</sup> 48.7 percent of interviewed Florida capital jurors believed that the defense had to prove mitigating factors beyond a reasonable doubt.<sup>293</sup> Based on these figures, Florida capital jurors clearly have difficulty in understanding the concept of mitigation evidence—they are not only confused with the scope of mitigation evidence that they may consider, but also with the applicable burden of proof for mitigating factors.

Florida capital jurors also have had difficulty understanding the effect of finding the existence of the statutory aggravating factor involving “heinous, atrocious or cruel”<sup>294</sup> conduct and the non-statutory aggravating factor involving future dangerousness, which is prohibited in Florida. Approximately 36 percent of interviewed Florida capital jurors

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<sup>286</sup> See *supra* notes 276-279.

<sup>287</sup> Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse*, 66 BROOK. L. REV. 1011, 1077 (2001); William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law’s Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51, 68 (2003). The interviews conducted in the Bowers & Foglia study took place after Florida reformed its jury instructions. See William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043 (1995). Although many of these interviews took place a year after the relevant trial, most jurors claimed to remember their deliberations “very well” or “fairly well,” and studies in other states have consistently replicated these types of results. *Id.* at 1086 tbl. 2.

<sup>288</sup> FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 7.11 (5th ed. 2005).

<sup>289</sup> See *id.*; see also *Lockett v. Ohio*, 438 U.S. 536 (1978); *supra* notes 184-187 and accompanying text.

<sup>290</sup> Bowers and Foglia, *supra* note 287, at 68.

<sup>291</sup> William J. Bowers et al., *The Decision Makers: An Empirical Examination of the Way the Role of the Judge and Jury Influence Death Penalty Decision-Making*, 63 WASH. & LEE L. REV. (forthcoming Dec. 2006).

<sup>292</sup> FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 7.11 (5th ed. 2005).

<sup>293</sup> *Id.*

<sup>294</sup> Bowers & Foglia, *supra* note 287, at 72. We note that the Bowers and Foglia study uses the term “heinous, vile and depraved” instead of the proper term “heinous, atrocious or cruel,” which is an aggravating circumstance in Florida, without accounting for this difference. *Id.*

believed that they were required to sentence the defendant to death if they found the defendant's conduct to be "heinous, vile, or depraved" beyond a reasonable doubt.<sup>295</sup> Similarly, despite the fact that future dangerousness is not a statutory aggravating circumstance,<sup>296</sup> that the standard jury instructions make clear that the only aggravating circumstances that the jury may consider are those in the standard jury instructions,<sup>297</sup> and that case law expressly prohibits consideration of future dangerousness as a non-statutory aggravating factor,<sup>298</sup> 25.2 percent of interviewed Florida capital jurors still believed that if they found the defendant to be a future danger to society, they were required by law to sentence him/her to death.<sup>299</sup>

Although the standard jury instructions appear to clearly explain the relevant mitigating and aggravating circumstances and juries are given copies of the instructions during the charge and deliberations, capital jurors in Florida still appear to have difficulties understanding mitigating and aggravating circumstances, an understanding which is absolutely necessary to properly recommend a sentence in a capital case. Additionally, despite the data showing a severe misunderstanding of the jury instructions regarding mitigating and aggravating circumstances, a mere 6 percent of the Florida capital jurors interviewed admitted to having difficulty understanding the jury instructions and only 21.6 percent asked the judge to clarify the instructions.<sup>300</sup>

Not only are jurors misunderstanding jury instructions, but also another study posits that Florida's practice of not requiring a unanimous recommendation in order for the jury to recommend a death sentence precludes meaningful deliberation by the jury in fulfilling its sentencing responsibility.<sup>301</sup> Specifically, a survey of Florida capital jurors, who were not required to reach a unanimous vote to recommend a death sentence, were much less

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<sup>295</sup> Bowers & Foglia, *supra* note 287, at 72; see also William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 27-28, 40-41 (1988) (explaining the findings of jury interviews and noting that among the factors that appear to influence jury results is the presumptive, or mandatory, view of the application of the death penalty).

<sup>296</sup> FLA. STAT. § 921.141(5) (2006); FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 7.11 (5th ed. 2005).

<sup>297</sup> FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 7.11 (5th ed. 2005).

<sup>298</sup> See *Kormondy v. State*, 703 So. 2d 454, 463 (Fla. 1997).

<sup>299</sup> Bowers & Foglia, *supra* note 287, at 72.

<sup>300</sup> *Id.* For an additional, but older, study of juror confusion in Florida, see David U. Strawn & Raymond W. Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUDICATURE 478, 480 (1976) (finding that the experimental jurors scored an average of only 70% on their comprehension of the given instructions, and failed to show any improved comprehension over the control group for four of nine crucial content areas addressed by the instruction). This study also found that despite the instruction that the defendant must be proved guilty beyond a reasonable doubt, only half of the jurors understood that the defendant did not have to present evidence establishing his innocence. *Id.* In addition, forty-three percent of the subjects misunderstood the instruction on circumstantial evidence, erroneously believing that circumstantial evidence held no probative value. *Id.* The reliability of Strawn and Buchanan's methodology has been questioned because the experiment tested comprehension through multiple choice and true-false questions, was conducted in an artificial setting, and failed to show the subjects the actual trial accompanying the instructions. See Firoz Dattu, *Illustrated Jury Instructions: A Proposal*, 22 LAW & PSYCHOL. REV. 67, 70 n.15, 71 (1998).

<sup>301</sup> Bowers et al., *supra* note 291.

likely to take longer than three hours to reach a sentencing decision than jurors in states that require unanimous sentencing decisions.<sup>302</sup>

Narrative accounts of interviewed Florida capital jurors also indicate that (1) they did not devote much time, energy, or emotional commitment to the punishment decision; and (2) pro-death sentence jurors were able to mute the concerns of undecided or life sentence jurors by simply noting that a mere majority was needed to impose death. One juror noted that they “pretty much had [their] minds made up” and that they took a “vote in 30 minutes,”<sup>303</sup> while another stated that “[t]here seemed to be very little discussion at all” and some of the jurors took [the sentencing decision] too lightly.”<sup>304</sup> Another juror noted that when a few jurors were opposed to recommending death, the jury simply “discuss[ed] that [the] decision did not have to be unanimous” and then called for a vote.<sup>305</sup>

The same study also posits that juries in “judicial override” states, like Florida, pay less attention to jury instructions because they are only required to make an advisory sentence and the ultimate sentencing decision is left to the judge.<sup>306</sup> In essence, the practice of “judicial override” makes jurors feel less personally responsible for the sentencing decision, resulting in shorter juror sentencing deliberations and less disagreement among jurors.<sup>307</sup> In response to questions regarding their sentencing responsibility, interviewed Florida capital jurors felt they had secondary responsibility for sentencing the defendant. One juror stated that the fact that the judge could override the jury’s recommendation made their “minds feel better” and took the responsibility for sentencing “off [their] shoulders.” Another noted it was a good thing that the jury sentence was only advisory because s/he “didn’t want this on [his/her] conscience.”<sup>308</sup> One Florida capital juror even went so far as to say s/he felt “off the hook.”<sup>309</sup> Based on this data, while certain states have chosen to institute “judicial override” as a way to protect against arbitrary sentencing by juries, the practice of “judicial override” has had the opposite effect in Florida.

In 1991, the Florida Supreme Court’s Racial and Ethnic Bias Commission recognized the detrimental effects that judicial override was having on Florida’s capital sentencing system when it found that, since 1972, 18 percent of all capital cases have involved a judicial override of a jury’s recommendation of life imprisonment.<sup>310</sup> As a result, the

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<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> *Id.* (noting that 38.3 percent of Florida capital jurors deliberated for less than an hour; only 16.5 percent deliberated for three hours or more; 43 percent reported the jury sentence being decided on only one vote; 84.1% reported that no juror was undecided on the first vote; and only 19.6 percent reported asking for additional review of testimony or transcripts).

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> EXECUTIVE SUMMARY: REPORTS & RECOMMENDATION OF THE FLORIDA SUPREME COURT RACIAL & ETHNIC BIAS COMMISSION, “WHERE THE INJURED FLY FOR JUSTICE”: REFORMING PRACTICES WHICH IMPEDE THE DISPENSATION OF JUSTICE TO MINORITIES IN FLORIDA 15 (Deborah Hardin Wagner ed. 1991).

Racial and Ethnic Bias Commission recommended that the Florida Legislature amend the Florida Statutes to prohibit judges from imposing the death penalty in cases where the jury has recommended a sentence of life imprisonment.<sup>311</sup> Despite legislative efforts to abolish the practice of judicial override of a jury recommendation of life imprisonment, however, no such bill has been passed.<sup>312</sup>

The Florida Supreme Court's Jury Innovations Committee has also recognized that juror misunderstanding is not being remedied by judges during trials. This Committee recommended that trial judges should be "as responsive as possible and fully answer deliberating jurors' questions, consistent with applicable case law . . . [and] respond more directly to their inquiries."<sup>313</sup> The Court has approved this recommendation "in concept" and referred it to the Rules of Judicial Administration Committee and the jury instructions committees for consideration and recommendation.<sup>314</sup> Additionally, two jury instructions committees have proposed separate amendments to the capital sentencing jury instructions that are designed to stress to the jury the importance of its sentencing responsibility and the need to fulfill that responsibility in a careful and deliberate manner. Both instruct the jury that although the jury's sentencing verdict is advisory, the judge will nonetheless give it "great weight in determining what sentence to impose . . . [and] only under rare circumstances [will the judge] impose a sentence other than the sentence" recommended by the jury.<sup>315</sup> Moreover, the proposed model instructions urge the jury to avoid acting hastily or without regard for the gravity of the proceedings, and to "carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake."<sup>316</sup> These proposals have yet to be adopted by the Florida Supreme Court.

Despite the clear need for trial courts to make efforts to clarify juror confusion, generally, judges simply reread instructions when jurors ask for clarification.<sup>317</sup> Consequently, it does not appear that the State of Florida is in compliance with Recommendation #3.

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<sup>311</sup> FLORIDA SUPREME COURT, PRELIMINARY ASSESSMENT: A FIRST LOOK AT REPORTING ON IMPLEMENTATION PROGRESS AND IDENTIFYING ISSUES THAT REQUIRE ADDITIONAL ACTION 29 (2000) (listing the recommendations of the Florida Supreme Court's Commission on Racial and Ethnic Bias and the compliance with those recommendations).

<sup>312</sup> *Id.*

<sup>313</sup> FINAL REPORT, *supra* note 277, at 65. This recommendation could require judges to respond meaningfully to jurors' questions regarding the meaning of life without the possibility of parole, where the applicable law only requires the judge to reread the standard jury instructions listing the sentencing options. *Whitfield v. State*, 706 So. 2d 1, 5 (Fla. 1997).

<sup>314</sup> *In re* Final Report of the Jury Innovations Committee, No. AOSC03-41 (Fla. Oct. 17, 2003), available at [http://www.floridasupremecourt.org/pub\\_info/summaries/briefs/03/03-41/Filed\\_10-17-2003\\_AdministrativeOrder.pdf](http://www.floridasupremecourt.org/pub_info/summaries/briefs/03/03-41/Filed_10-17-2003_AdministrativeOrder.pdf) (last visited on Mar. 28, 2006).

<sup>315</sup> *Proposed Jury Instruction for Penalty Phase of Capital Cases*, FLA. B. NEWS, Dec. 12, 2005, available at <http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/cb53c80c8fabd49d85256b5900678f6c/ee1b67861e59d5d2852570c700541c3b?OpenDocument> (last visited on Aug. 16, 2006); MODEL INSTRUCTIONS, *supra* note 281.

<sup>316</sup> MODEL INSTRUCTIONS, *supra* note 281.

<sup>317</sup> *See Whitfield v. State*, 706 So. 2d 1 (Fla. 1997); *Kennedy v. State*, 455 So. 2d 351, 354 (Fla. 1984).

Based on the above findings, the Florida Death Penalty Assessment Team makes the following recommendations:

- (1) The State of Florida should redraft its capital jury instructions with the objective of preventing common juror misconceptions that have been identified in the research literature referenced herein.
- (2) The State of Florida should require that the jury's sentencing verdict in capital cases be unanimous and, when the sentencing verdict is a death sentence, that the jury reach unanimous agreement on at least one aggravating circumstance.
- (3) The State of Florida should give the jury final decision-making authority in capital sentencing proceedings, and thus should eliminate judicial override in cases where the jury recommends life imprisonment without the possibility of parole.

*D. Recommendation #4*

**Trial courts should instruct jurors clearly on applicable law in the jurisdiction concerning alternative punishments and should, at the defendant's request during the sentencing phase of a capital trial, permit parole officials or other knowledgeable witnesses to testify about parole practices in the state to clarify jurors' understanding of alternative sentences.**

Recommendation #4 is composed of two parts. The first part requires judges to provide clear jury instructions on alternative punishments; the second requires judges to provide instructions and allow the introduction of evidence on parole practices, including witness testimony, upon the defendant's request. However, the second part of this Recommendation is irrelevant to a Florida capital sentencing proceeding because section 775.082(1) of the Florida Statutes provides for only one alternative punishment to death—life imprisonment without the possibility of parole.<sup>318</sup>

Regarding the first aspect, in all death penalty cases where the offense was committed on or after May 25, 1994, the standard jury instructions require judges to instruct juries on two sentencing options—life without the possibility of parole and death.<sup>319</sup> The judge's instructions, however, need only mention the sentencing options and need not include the meaning of life imprisonment without the possibility of parole.<sup>320</sup> In fact, the Florida Supreme Court held that, in response to a jury question of whether “life in prison without parole really mean[s] ‘no parole’ under any circumstances . . . [and whether the defendant] will never be allowed back into society again,” the judge may simply reread the standard jury instruction stating that the sentence is “either death or life imprisonment without the possibility of parole.”<sup>321</sup> Thus, this standard jury instruction has been found

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<sup>318</sup> See FLA. STAT. § 775.082(1) (2006).

<sup>319</sup> FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 7.11 (5th ed. 2005).

<sup>320</sup> *Id.*

<sup>321</sup> *Whitfield v. State*, 706 So. 2d 1, 5 (Fla. 1997).

to be sufficient to inform the jury of the possible sentences they may impose, and no further definitions regarding these possible sentences are needed.<sup>322</sup>

In all death penalty cases where the offense was committed before May 25, 1994, prior to the enactment of life without the possibility of parole, the standard jury instructions clearly require judges to instruct juries on a different alternative punishment to death—life without the possibility of parole for twenty-five years, but without requiring a definition of that sentencing option or allowing evidence of parole practices.<sup>323</sup> For example, in these earlier instances, the Florida Supreme Court also approved of trial judges simply referring the jury back to the standard jury instructions already given in response to questions such as (1) whether the jury is “limited to the two recommendations of life with a minimum of 25 years or the death penalty . . . or can [the jury] recommend life without a possibility of parole,”<sup>324</sup> and (2) if the defendant “is sentenced to life, when would he be eligible for parole,” “[d]oes this time count towards the parole time,” and “[i]f paroled from [Florida] would the defendant then be returned to [New York] to finish his sentence there.”<sup>325</sup>

The Florida Supreme Court, while not requiring a more comprehensive answer to jury questions about the meaning of life without the possibility of parole for twenty-five years, has allowed the following answer: “The defendant, if sentenced to life without the possibility for parole for 25 years, would be entitled to credit for all jail time served against a life sentence. However, there is no guarantee that the defendant would be granted parole at or after 25 years.”<sup>326</sup> Additionally, after a thorough review of Florida law, we were unable to determine whether the court was required to permit parole officials or other knowledgeable witnesses to testify about parole practices in the state to clarify jurors’ understanding of “life without the possibility of parole for 25 years,” nor were we able to identify any instances of such evidence being admitted in a capital sentencing proceeding.

Data compiled by the Capital Jury Project from interviews of jurors in capital trials that took place before the institution of life without the possibility of parole as the only alternative sentencing option demonstrates that the median estimate by Florida capital jurors of the time served before release from prison by capital murderers in Florida not sentenced to death was twenty years.<sup>327</sup> This figure underscores the importance of allowing judges to define the available alternative punishments to aid jury comprehension of the sentencing options.

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<sup>322</sup> *Id.*

<sup>323</sup> *In re Standard Jury Instructions in Criminal Cases*, 678 So. 2d 1224, 1224-25 (Fla. 1996); *see also* FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 7.11 (5th ed. 2005).

<sup>324</sup> *Bates v. State*, 750 So. 2d 6, 11 (Fla. 1999).

<sup>325</sup> *Waterhouse v. State*, 596 So. 2d 1008, 1015 (Fla. 1992).

<sup>326</sup> *Green v. State*, 2005 WL 977018, \*6 (Fla. 2005).

<sup>327</sup> *Bowers & Foglia*, *supra* note 287, at 82; *see also* Geimer & Amsterdam, *supra* note 295 (explaining the findings of jury interviews and noting that among the factors that appear to influence jury results is the fear of early release).

Because judges in the State of Florida are required to instruct the jury on the sentencing options, but are not required to define “life without the possibility of parole” or respond meaningfully to juror questions regarding the meaning of this sentencing option, the State of Florida is only in partial compliance with Recommendation #4.

*E. Recommendation #5*

**Trial courts should instruct jurors that a juror may return a life sentence, even in the absence of any mitigating factor and even where an aggravating factor has been established beyond a reasonable doubt, if the juror does not believe that the defendant should receive the death penalty.**

The State of Florida does not require judges to instruct the jury that it could recommend life imprisonment without the possibility of parole even in the absence of finding a mitigating circumstance.<sup>328</sup> Nor must courts (1) instruct jurors that they are to make individual determinations regarding mitigating circumstances,<sup>329</sup> or (2) provide the jury with examples of non-statutory mitigating circumstances.<sup>330</sup> The State of Florida, therefore, does not meet Recommendation #5.

We note that two jury instructions committees have proposed separate amendments to the capital sentencing instructions that instruct the jury that “regardless of [the jury’s] findings with respect to aggravating and mitigating circumstances [the jury] is *never* required to recommend a sentence of death.”<sup>331</sup> Neither of these proposals, however, has been approved by the Florida Supreme Court at the time of the release of this report.

*F. Recommendation #6*

**Trial courts should instruct jurors that residual doubt about the defendant’s guilt is a mitigating factor. Further, jurisdictions should implement the provision of Model Penal Code Section 210.6(1)(f),<sup>332</sup> under which residual**

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<sup>328</sup> Dufour v. State, 495 So. 2d 154, 163 (Fla. 1986) (holding that the court has no duty to instruct the jury that a life sentence could be imposed even in the absence of any mitigating circumstances); Kennedy v. State, 455 So. 2d 351, 354 (Fla. 1984).

<sup>329</sup> Waterhouse v. State, 596 So. 2d 1008, 1017 (Fla. 1992).

<sup>330</sup> Campbell v. State, 571 So. 2d 415 (Fla. 1990).

<sup>331</sup> *Proposed Jury Instruction for Penalty Phase of Capital Cases*, FLA. B. NEWS, Dec. 12, 2005, available at <http://www.floridabar.org/DIVCOM/JN/JNNNews01.nsf/cb53c80c8fabd49d85256b5900678f6c/ee1b67861e59d5d2852570c700541c3b?OpenDocument> (last visited on Aug. 16, 2006); MODEL INSTRUCTIONS, *supra* note 281.

<sup>332</sup> Section 210.6(1) of the Model Penal Code states as follows:

- (1) Death Sentence Excluded. When a defendant is found guilty of murder, the Court shall impose sentence for a felony of the first degree [rather than death] if it is satisfied that:
  - (a) none of the aggravating circumstances enumerated in Subsection (3) of this Section was established by the evidence at the trial or will be established if further proceedings are initiated under Subsection (2) of this Section; or

**doubt concerning the defendant's guilt would, by law, require a sentence less than death.**

The State of Florida fails to meet the requirements of Recommendation #6, as it does not require judges to instruct jurors that residual doubt concerning the defendant's guilt is a mitigating circumstance nor does it have a state law requiring a sentence less than death in cases in which residual doubt concerning the defendant's guilt is present.<sup>333</sup> In fact, the Florida Supreme Court has consistently rejected "residual" or "lingering doubt" as a non-statutory mitigating circumstance, and held that the trial courts may not instruct on it.<sup>334</sup> Interestingly, despite the Florida Supreme Court's refusal to allow for the instruction of residual or lingering doubt, a study conducted of Florida capital jurors in the 1980s found that sixty-nine percent of them identified lingering doubt as a factor in their recommendation for a sentence of life imprisonment.<sup>335</sup> This study underscores the importance of this recommendation.

### *G. Recommendation #7*

**In states where it is applicable, trial courts should make clear in juror instructions that the weighing process for considering aggravating and mitigating factors should not be conducted by determining whether there are a greater number of aggravating factors than mitigating factors.**

Florida is a weighing state in that the jury must assess whether aggravating circumstances found beyond a reasonable doubt outweigh the existing mitigating circumstances in order to sentence the defendant to death. The Florida Supreme Court has stated that this weighing process should not be "a comparison between the number of aggravating and mitigating circumstances."<sup>336</sup> Rather, "the procedure to be followed by trial judges and juries is . . . a reasoned judgment as to what factual situations require the imposition of

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- (b) substantial mitigating circumstances, established by the evidence at the trial, call for leniency; or
  - (c) the defendant, with the consent of the prosecuting attorney and the approval of the Court, pleaded guilty to murder as a felony of the first degree; or
  - (d) the defendant was under 18 years of age at the time of the commission of the crime; or
  - (e) the defendant's physical or mental condition calls for leniency; or
  - (f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt.

See MODEL PENAL CODE § 210.6(1); see also James R. Acker & Charles S. Lanier, *In Fairness and Mercy: Statutory Mitigating Factors in Capital Punishment Laws*, 30 CRIM. L. BULL. 299, 311-313 (1994) (discussing the mitigating factors included in the Model Penal Code and the statutory factors under modern death penalty laws).

<sup>333</sup> *McPherson*, 553 S.E.2d at 578 (discussing specifically residual doubt).

<sup>334</sup> See *Duest v. State*, 855 So. 2d 33, 40-41 (Fla. 2003); *Darling v. State*, 808 So. 2d 145, 162 (Fla. 2002) (citing *Franklin v. Lynaugh*, 487 U.S. 164, 173-74 (1988), and holding that the defendant has no right to present evidence of lingering doubt).

<sup>335</sup> William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 Am. J. Crim. L. 1, 28 (1987/1988).

<sup>336</sup> *Beasley v. State*, 774 So. 2d 649, 673-74 (Fla. 2000).

death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.”<sup>337</sup>

Yet, the Florida Supreme Court does not require the jury to be instructed on the appropriate method of weighing the evidence to reach their advisory sentence, as the Court made these pronouncements in the context of its proportionality review.<sup>338</sup> In fact, the standard jury instructions do not forbid the practice of simply comparing the number of aggravating and mitigating circumstances; the instructions only instruct the jury that if it finds that sufficient aggravating factors exist beyond a reasonable doubt, then the jury must determine whether any mitigating circumstances exist that outweigh the aggravating circumstances.<sup>339</sup>

Because there is no requirement, either in case law, statutes, or the standard jury instructions, that the judge instruct the jury that the weighing process should not be conducted by determining whether there are a greater number of aggravating factors than mitigating factors, the State of Florida is not in compliance with Recommendation #7.

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<sup>337</sup> *Id.* at 674 (citing *State v. Dixon*, 283 So. 2d 1, 10 (Fla. 1973)).

<sup>338</sup> *See id.* at 673-74.

<sup>339</sup> FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 7.11 (5th ed. 2005); *see also* FLA. STAT. § 921.141(3).

## CHAPTER ELEVEN

### JUDICIAL INDEPENDENCE

#### INTRODUCTION TO THE ISSUE

Our criminal justice system relies on the independence of the Judicial Branch to ensure that judges decide cases to the best of their abilities without political or other bias and notwithstanding official and public pressure. However, in some states, judicial independence is increasingly being undermined by judicial elections, appointments and confirmation proceedings that are affected by nominees' or candidates' purported views on the death penalty or by judges' decisions in capital cases.

During judicial election campaigns, voters often expect candidates to assure them that they will be "tough on crime," that they will impose the death penalty whenever possible, and that, if they are or are to be appellate judges, they will uphold death sentences. In retention campaigns, judges are asked to defend decisions in capital cases and sometimes are defeated because of decisions that are unpopular, even where these decisions are reasonable or binding applications of the law or reflect the predominant view of the Constitution. Prospective and actual nominees for judicial appointments often are subjected to scrutiny on these same bases. Generally, when this occurs, the discourse is *not* about the Constitutional doctrine in the case, but rather about the specifics of the crime.

All of this increases the possibility that judges will decide cases not on the basis of their best understanding of the law, but rather on the basis of how their decisions might affect their careers, and makes it less likely that judges will be vigilant against prosecutorial misconduct and incompetent representation by defense counsel. For these reasons, judges must be cognizant of their obligation to take corrective measures both to remedy the harms of prosecutorial misconduct and defense counsel incompetence and to prevent such harms in the future.

## I. FACTUAL DISCUSSION

### A. *Selection of Judicial Candidates and Judges*

#### 1. Election of Trial Court Judges

In the State of Florida, circuit and county judges are selected in nonpartisan elections<sup>1</sup> and may stand for reelection after each six-year term.<sup>2</sup> The voters in each circuit may exercise a “local option” for merit selection and retention of circuit court judges by filing with the Secretary of State a petition signed by a number of voters equal to at least 10 percent of the votes cast in that circuit during the most recent presidential election.<sup>3</sup> Similarly, voters in each county may exercise a local option for merit selection and retention of county court judges by filing with the county supervisor of elections a petition signed by a number of voters equal to at least 10 percent of the votes cast in the county during the most recent presidential election.<sup>4</sup> The measure must then be approved by a majority of circuit or county voters.<sup>5</sup>

#### 2. Appointment to Fill Vacancies on Courts Subject to Retention Elections

The Governor has the authority to fill judicial vacancies by appointment, which occur “when new positions are created, or when a judge dies, resigns,<sup>6</sup> is removed from office, or is promoted to another position.”<sup>7</sup> Justices on the Florida Supreme Court and judges on the district courts of appeal and trial courts, in jurisdictions whose voters have opted for merit selection, are selected for an initial term by the Governor through a merit selection process<sup>8</sup> and are subject to retention elections.<sup>9</sup>

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<sup>1</sup> FLA. CONST. art. V, § 10(b)(1), (2); American Judicature Society, *Judicial Selection in the States, Florida*, at [http://www.ajs.org/js/FL\\_methods.htm](http://www.ajs.org/js/FL_methods.htm) (last visited on Aug. 4, 2006). If two or more candidates qualify for the ballot, they compete in the first primary election. If no candidate receives a majority of the vote, the top two candidates run in the general election. *Id.*

<sup>2</sup> FLA. CONST. art. V, § 10(b)(3)(c).

<sup>3</sup> FLA. CONST. art. V, § 10(b)(3)(b).

<sup>4</sup> FLA. CONST. art. V, § 10(b)(3)(c).

<sup>5</sup> FLA. CONST. art. V, § 10(b)(1)(a), (b)(2)(a).

<sup>6</sup> Florida has a mandatory retirement requirement for all trial and appellate jurists that occurs on or after their 70th birthdays. *See* FLA. CONST. art. V, § 8. The exact date of retirement depends upon when the 70th birthday occurs. If it occurs during the first half of a judge’s six-year term, then the mandatory retirement age is the same as his/her birthday. *Id.* If the 70th birthday occurs in the second half of a six-year term, then the judge can remain in office until the full term expires. *Id.*

<sup>7</sup> State of Florida Governor’s Office, *Judicial Appointments by the Governor*, at <http://www.myflorida.com/myflorida/government/governorinitiatives/judicial/appointment.html> (last visited on Aug. 4, 2006); *see generally* FLA. CONST. art. V, § 11.

<sup>8</sup> FLA. CONST. art. V, § 10(a). The commentary to this constitutional provision stated that the 1976 Florida constitutional amendment presented by the Florida Senate introduced the concept of “merit selection.” *Id.* at cmt. “The resolution altered the system of selecting and retaining justices of the [Florida] Supreme Court and judges of the district courts of appeal . . . involving a general election by the voters (electorate) to one of appointment by the governor and subsequent retention elections by the electorate within the territorial jurisdiction of the respective courts.” *Id.*

<sup>9</sup> *See* FLA. CONST. art. V, § 11.

The Governor is constitutionally required to appoint these justices or judges by choosing from a list of at least three but no more than six persons that have been nominated by the appropriate Judicial Nominating Commission (JNC).<sup>10</sup> A separate JNC must be formed for the Florida Supreme Court, each district court of appeal, and each circuit court.<sup>11</sup> Currently, there are twenty-six JNCs that screen applicants for judicial vacancies and recommend qualified candidates to the Governor.<sup>12</sup> Each JNC is composed of nine members appointed by the Governor—four members must be members of The Florida Bar<sup>13</sup> and five members must reside in the territorial jurisdiction, two of which must be members of The Florida Bar currently engaged in the practice of law.<sup>14</sup> Judges are not permitted to sit on the JNC.<sup>15</sup>

The appropriate JNC must present to the Governor a list of nominees in alphabetical order within thirty days of the judicial vacancy and cannot present the nominations in rank order.<sup>16</sup> When the Governor receives the list, s/he may select a nominee, or reject the recommended nominees and request another list from the appropriate JNC. Regardless of whether the Governor chooses a nominee from the first list or rejects the first list, s/he must select a nominee from a list presented by the appropriate JNC.<sup>17</sup>

#### a. Timing and Length of Appointments

The Governor must receive the list of nominations from the appropriate JNC within thirty days after the Governor accepts a judicial resignation unless the Governor extends the

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<sup>10</sup> *See id.*

<sup>11</sup> FLA. CONST. art. V, § 11(d). The commentary states that “the purpose of the commissions is to advertise judicial vacancies, accept and screen applicants to fill those vacancies, and recommend to the governor at least three nominees for each judicial vacancy.” *Id.* at cmt. The section further provides that the judicial nominating commissions shall be established by general law. *Id.*

<sup>12</sup> State of Florida Governor’s Office, Judicial Appointments by the Governor, at <http://www.myflorida.com/myflorida/government/governorinitiatives/judicial/appointment.html> (last visited on Aug. 6, 2006) (noting that there is a JNC for the Florida Supreme Court, a JNC for each of the five district courts of appeal, and a JNC for each of the twenty circuit courts, for a total of twenty-six JNCs).

<sup>13</sup> FLA. STAT. § 43.291(1)(a) (2006).

<sup>14</sup> FLA. STAT. § 43.291(1)(a)-(b), (2), (3) (2006). The JNC members are chosen from a list of three candidates for each JNC position and have been nominated by The Florida Bar Board of Governors. *See Id.*; Fla. Staff Ann., S.B. 2048 (2005) (discussing the composition of the JNC stating that “Judicial Nominating Commissions are made up of nine members. The Governor has the sole authority to appoint JNC members. Four of the six Florida Bar members must be selected from nominees from the Board of Governors of The Florida Bar. The Board of Governors must submit a list of three recommended nominees for each of the positions, from which the Governor may select his appointment. The Governor may reject all nominees and request a new list of person who have not been previously nominated. For the remaining five JNC positions, the Governor directly appoints the members, of who at least two must be Florida Bar members.”). JNC members serve a four-year term of office and are ineligible for consecutive re-appointment. FLA. STAT. § 43.291(3) (2006). A member of the JNC may hold any public office other than a judicial position. FLA. STAT. § 43.291(2) (2006).

<sup>15</sup> FLA. STAT. § 43.291(2) (2006). In addition, a JNC member is not eligible for an appointment to any state judicial office for which the JNC has the authority to make nominations during his/her term of office or two years thereafter. *Id.*

<sup>16</sup> FLA. UNIF. RULES OF PROC. FOR CIR. JUD. NOM. COMM’N. R. 6.

<sup>17</sup> FLA. STAT. § 43.291(1)(a) (2006).

period.<sup>18</sup> If the Governor extends the period, s/he may not extend the period beyond an additional thirty days.<sup>19</sup> When the Governor receives the list, s/he must fill the judicial vacancy through the procedure mentioned above within sixty days.<sup>20</sup> If a judicial vacancy occurs in a position subject to retention elections,<sup>21</sup> the Governor must fill the vacancy by an appointment to an initial term that ends on the first Tuesday after the first Monday in January following the general election that occurs more than one year after the initial appointment.<sup>22</sup> Thus, if the first general election occurs within one year after the appointment date, the initial term of the justice or judge will end on the first Tuesday after the first Monday in January immediately after the following general election.

#### b. Retention Elections

Appellate judges and trial court judges, in jurisdictions that have chosen to institute merit selection and retention, are subject to a retention election which takes place in the general election immediately preceding the end of their term.<sup>23</sup> New judges face their first merit retention vote in the next general election that occurs more than one year after their appointment.<sup>24</sup> The retention ballot must read: “Shall Justice (or Judge) . . . (name of justice or judge) . . . of the . . . (name of the court) . . . be retained in office?”<sup>25</sup> If a majority of the voters “within the territorial jurisdiction of the court vote to retain, the [ ] judge shall be retained for a term of six years.”<sup>26</sup>

If retained, the judge will commence a new six-year term on the first Tuesday after the first Monday in January following the general election and the judge will again face an up or down retention vote in the general election occurring just before his/her six-year term expires.<sup>27</sup> However, if a majority of the voters within the territorial jurisdiction of the court vote to not retain, a vacancy, which is to be filled by the Governor through the judicial nominating commission process, will be created in that office when that term

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<sup>18</sup> FLA. CONST. art. V, § 11(c); *see also* *Jud. Nominating Comm’n Ninth Circuit v. Graham*, 424 So. 2d 10, 11 (Fla. 1982) (citing *Spector v. Glisson*, 305 So. 2d 777 (Fla. 1974)) (standing for the principle that “when a letter of resignation to be effective at a later date is received [from a sitting judge] and accepted by the [Governor], a vacancy in that office occurs and actuates the process to fill it. The duties of the [judicial] nominating commission start when a [judicial vacancy occurs] and its list [of candidates] should be submitted within thirty days of [the Governor’s] acceptance of the resignation unless [the Governor] extends the period for an additional thirty days.”).

<sup>19</sup> FLA. CONST. art. V, § 11(c); *see also* *Jud. Nominating Comm’n*, 424 So. 2d at 11.

<sup>20</sup> FLA. CONST. art. V, § 11(c); *see also* *Jud. Nominating Comm’n*, 424 So. 2d at 11 (stating “[t]he Governor shall make the appointment within sixty days after the nominations have been certified to him”).

<sup>21</sup> FLA. CONST. art. V, § 11(a), (b); *see also* *Jud. Nominating Comm’n*, 424 So. 2d at 11 (Fla. 1982) (citing to *Spector v. Glisson*, 305 So. 2d 777 (Fla. 1974)); *In re* Advisory Opinion to the Governor, 600 So. 2d 460, 462 (Fla. 1992) (citing to *In re* Advisory Opinion, 276 So. 2d 25 (Fla. 1973)). Retention applies to appellate court justices and judges and trial court judges in territorial jurisdictions that have chosen to institute merit selection and retention. FLA. CONST. art. V, § 11(a), (b).

<sup>22</sup> FLA. CONST. art. V, § 11(a), (b) (stating that the term should not last more than one year and will end “on the first Tuesday after the first Monday in January of each year following the next general election”).

<sup>23</sup> *See* FLA. CONST. art. V, § 10(a).

<sup>24</sup> *See* FLA. CONST. art. V, §§ 10(a), 11(a).

<sup>25</sup> *See* FLA. CONST. art. V, § 10(a).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

ends on the first Tuesday after the first Monday in January following the retention election loss.<sup>28</sup>

### 3. Appointment or Election of Judges to Fill Vacancies on Trial Courts Subject to Contested Public Elections

If a judicial vacancy occurs on a trial court to which a primary election or general election applies,<sup>29</sup> the Governor has the authority to fill the vacancy by a merit selection appointment of an interim judge for a term ending on the first Tuesday after the first Monday in January one year after the date of the appointment.<sup>30</sup> If the Governor is aware of a judicial vacancy in a trial court in sufficient time to allow the electorate to fill the vacancy, the Governor may call a special election rather than choose a candidate nominated by the JNC.<sup>31</sup> If a special election would be impractical and an appointment would avoid an unreasonably long vacancy, it is the Governor's duty to appoint an interim judge to serve until an elected judge fills the vacancy.<sup>32</sup>

#### B. *Conduct of Judicial Candidates and Judges*

##### 1. Judicial Qualifications Commission (JQC)

The Judicial Qualifications Commission (JQC), created by constitutional amendment in 1968,<sup>33</sup> is vested with the jurisdiction to (1) investigate the conduct of judicial candidates and sitting judges, including during elections, that demonstrates a current unfitness to hold office; and (2) recommend to the Florida Supreme Court the appropriate discipline.<sup>34</sup> A judge or judicial candidate may be disciplined, as appropriate, in the following ways: reprimand, fine, suspension with or without pay, removal from office, or lawyer discipline.<sup>35</sup> The JQC may also investigate allegations of incapacity during a judge's term of service.<sup>36</sup>

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<sup>28</sup> *Id.*

<sup>29</sup> FLA. CONST. art. V, § 11(b).

<sup>30</sup> *See id.*; *see also Jud. Nominating Comm'n*, 424 So. 2d at 11 (citing to *Spector v. Glisson*, 305 So. 2d 777 (Fla. 1974)); *In re Advisory Opinion to the Governor*, 600 So. 2d 460, 462 (Fla. 1992) (citing to *In re Advisory Opinion*, 276 So. 2d 25 (Fla. 1973)).

<sup>31</sup> *Jud. Nom. Comm'n*, 424 So. 2d at 12 (stating "if the vacancy is known in sufficient time to schedule a special election during the already scheduled primary and general election dates, then a special election [shall] be held.").

<sup>32</sup> *See In re Advisory Opinion to the Governor*, 600 So. 2d at 463; *Jud. Nominating Comm'n*, 424 So. 2d at 12.

<sup>33</sup> *See* FLA. CONST. art. V, § 12.

<sup>34</sup> *See* FLA. CONST. art. V, § 12(a)(1); *see also* FLA. STAT. § 43.20 (2006). The JQC has jurisdiction over justices and judges regarding allegations that misconduct occurred both before and during their service on the bench as long as the complaint is made no later than one year following their service on the bench. FLA. CONST. art. V, § 12(a)(1).

<sup>35</sup> *See* FLA. CONST. art. V, § 12(a)(1).

<sup>36</sup> *See id.*; *see also* FLA. JUD. QUAL. COMM'N R. 6(a).

Members of the JQC are selected by district court of appeal judges, circuit court judges, county court judges, and The Florida Bar Board of Governors.<sup>37</sup> The selection of JQC members must take place by a majority of the voting members of the respective voting bodies.<sup>38</sup> The JQC is composed of fifteen members:

- (1) two judges from the district courts of appeal, two judges from the circuit courts, and two judges from the county courts.<sup>39</sup> (Each court selects judges to serve on the Commission);<sup>40</sup>
- (2) four electors who reside in the state, are members of The Florida Bar, and are chosen by The Florida Bar Board of Governors;<sup>41</sup> and
- (3) five electors who reside in the state, have never held judicial office or been members of The Florida Bar, and are appointed by the Governor.<sup>42</sup>

Members of the JQC must serve staggered terms not to exceed six years.<sup>43</sup> Except for sitting judges, members that serve on the JQC are ineligible for state judicial office during that service and cannot serve as a state judicial officer for up to two years thereafter.<sup>44</sup> Members of the JQC may not hold office with a political party.<sup>45</sup> Except for judges serving on the JQC, no member may participate in any campaign for judicial office or hold any public office during their tenure on the JQC.<sup>46</sup> JQC members are required to elect one member as the Chairperson of the Commission.<sup>47</sup>

## 2. Conduct of Judicial Candidates, Including Incumbent Judges, During Judicial Elections

### a. General Rules of Conduct

Canon 7 of the Code of Judicial Conduct requires all judicial candidates, including incumbent judges, to maintain a certain standard of conduct during the campaign process.<sup>48</sup> Canon 7(A) specifically requires judicial candidates, including incumbent judges, to:

- (1) maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary, and encourage members of the candidate's family to adhere to the same

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<sup>37</sup> FLA. STAT. § 43.20(4) (2006).

<sup>38</sup> *See id.*; FLA. CONST. art. V, § 12(a)(1)(a)-(c); *see also* FLA. STAT. § 43.20(4) (2006).

<sup>39</sup> *See* FLA. CONST. art. V, § 12(a)(1)(a).

<sup>40</sup> *Id.*

<sup>41</sup> *See* FLA. CONST. art. V, § 12(a)(1)(b).

<sup>42</sup> *See* FLA. CONST. art. V, § 12(a)(1)(c).

<sup>43</sup> *See* FLA. CONST. art. V, § 12(a)(2).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> FLA. CODE OF JUD. CONDUCT CANON 7(A).

- standards of political conduct in support of and as apply to the candidate;<sup>49</sup>
- (2) prohibit employees and officials subject to the candidate's direction and control from doing on the candidate's behalf what the Canons prohibit the candidate from doing;<sup>50</sup>
  - (3) refrain from making pledges or promises of conduct in office other than the faithful and impartial performance of the adjudicative duties of the office;<sup>51</sup>
  - (4) refrain from making statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court;<sup>52</sup>
  - (5) refrain from knowingly misrepresenting the identity, qualifications, present position, or other facts concerning the candidate or an opponent;<sup>53</sup> and
  - (6) refrain from making any public comment that might reasonably be expected to affect the outcome or impair the fairness of a case or proceeding or any nonpublic comment that might substantially interfere with a fair trial or hearing, while it is pending in any court.<sup>54</sup>

A judicial candidate, including an incumbent judge, may respond to personal attacks or attacks on his/her record, as long as the response does not violate the Canon requirements listed in (3)-(6) above.<sup>55</sup>

b. Additional Rules of Conduct for Candidates Seeking Judicial Office by Public Election

Competing judicial candidates, including incumbent judges, for publicly elected judicial office are prohibited from soliciting campaign funds, or soliciting attorneys for publicly-stated support.<sup>56</sup> Candidates may, however, establish committees to secure and manage the expenditure of funds for the candidate's campaign and to obtain public statements of support for his/her candidacy from any person or corporation authorized by law.<sup>57</sup> A candidate may not use or permit the use of campaign contributions for his/her own private benefit or for the benefit of family members.<sup>58</sup>

Judicial candidates, including incumbent judges, involved in an election or reelection are also prohibited from:

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<sup>49</sup> FLA. CODE OF JUD. CONDUCT CANON 7(A)(3)(a).  
<sup>50</sup> FLA. CODE OF JUD. CONDUCT CANON 7(A)(3)(b).  
<sup>51</sup> FLA. CODE OF JUD. CONDUCT CANON 7(A)(3)(d)(i).  
<sup>52</sup> FLA. CODE OF JUD. CONDUCT CANON 7(A)(3)(d)(i).  
<sup>53</sup> FLA. CODE OF JUD. CONDUCT CANON 7(A)(3)(d)(ii).  
<sup>54</sup> FLA. CODE OF JUD. CONDUCT CANON 7(A)(3)(d)(iii). This prohibition, however, does not include comments about a proceeding in which the judge or judicial candidate is a party. *Id.*  
<sup>55</sup> FLA. CODE OF JUD. CONDUCT CANON 7(A)(3)(e).  
<sup>56</sup> FLA. CODE OF JUD. CONDUCT CANON 7(C)(1).  
<sup>57</sup> *Id.*  
<sup>58</sup> *Id.*

- (1) attending fundraisers;
- (2) accepting invitations to speak that do not include the other candidates, if any, for that office;
- (3) commenting on his/her affiliation with any political party or other candidate;
- (4) expressing a position on any political issue; and
- (5) suggesting or appearing to suggest support of or opposition to a political party, a political issue, or another candidate.<sup>59</sup>

In addition to these prohibitions for all judges seeking election or reelection, incumbent judges seeking reelection must not engage in any political activity, except for the previously discussed allowances<sup>60</sup> making public statements on behalf of measures to improve the law, the legal system or the administration of justice.<sup>61</sup>

c. Additional Rules of Conduct for Candidates Seeking Appointment to Judicial or Other Governmental Office or Standing for Retention

A candidate for appointment through merit selection to judicial office or a judge seeking other governmental office may not solicit or accept any funds, directly or indirectly, to support his/her candidacy,<sup>62</sup> or engage in any political activity to secure the appointment, except that the candidate for appointment may:

- (1) communicate with the appointing authority, including any selection or nominating commission or other agency designated to screen candidates;
- (2) seek support or endorsement for the appointment from organizations that regularly make recommendations for reappointment or appointment to the office, and from individuals; and
- (3) provide to the nominating commission, selection body, endorsees, or other individuals information as to his/her qualifications for the office.<sup>63</sup>

A person who is not a member of the judiciary, but is a candidate for appointment by merit selection to judicial office may, in addition to the above allowances, (1) retain an office in a political organization, (2) attend political events, and (3) continue to pay ordinary contributions to a political organization or candidate and purchase tickets for political party dinners or other functions.<sup>64</sup>

Judges standing for retention may engage in “limited campaign activities” until certification of their candidacy has drawn opposition.<sup>65</sup> Limited campaign activities include only:

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<sup>59</sup> FLA. CODE OF JUD. CONDUCT CANON 7(C)(3).

<sup>60</sup> *See supra* note 57 and accompanying text.

<sup>61</sup> FLA. CODE OF JUD. CONDUCT CANON 7(D).

<sup>62</sup> FLA. CODE OF JUD. CONDUCT CANON 7(B)(1).

<sup>63</sup> FLA. CODE OF JUD. CONDUCT CANON 7(B)(2)(a)(i)-(iii).

<sup>64</sup> FLA. CODE OF JUD. CONDUCT CANON 7(B)(2)(b)(i)-(iii).

<sup>65</sup> FLA. CODE OF JUD. CONDUCT CANON 7(C)(2).

- (1) establishing a committee to secure and maintain campaign funds and seek endorsements;<sup>66</sup>
- (2) interviewing with reporters and editors of the print, audio and visual media;
- (3) appearing and speaking at events before public gatherings and organizations;<sup>67</sup> and
- (4) attending a political party function to speak on behalf of his/her candidacy or on a matter that relates to the law, the improvement of the legal system, or the administration of justice.<sup>68</sup>

Judges standing for retention, however, are prohibited from:

- (1) attending fundraisers;
- (2) expressing an opinion on any political issue; and
- (3) commenting on the candidate's affiliation with any political party, or appearing to support or oppose a particular political party or political issue when attending a political party function.<sup>69</sup>

### 3. Conduct of Sitting Judges

#### a. Judicial Duties in General

Canon 3 of the Code of Judicial Conduct specifically outlines rules of conduct for sitting judges, including, but not limited to the following:

- (1) a judge is required to perform judicial duties without bias or prejudice;<sup>70</sup>
- (2) a judge in the performance of his/her duties must not manifest by words or conduct bias or prejudice on the basis of race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status;<sup>71</sup>
- (3) a judge is responsible for his/her conduct and must require that the conduct of others associated with the judge or before the judge manifest integrity and respect for the law;<sup>72</sup>
- (4) a judge must require attorneys in proceedings before the judge not to manifest by words, gestures, or other conduct, any bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, against parties, witnesses, counsel, or others;<sup>73</sup>

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> FLA. CODE OF JUD. CONDUCT CANON 7(C)(3).

<sup>69</sup> *Id.*

<sup>70</sup> FLA. CODE OF JUD. CONDUCT CANON 3(B)(5).

<sup>71</sup> *Id.*

<sup>72</sup> FLA. CODE OF JUD. CONDUCT CANON 3(B)(6).

<sup>73</sup> *Id.*

- (5) a judge must accord to every person with a legal interest in a proceeding, or that person's attorney, the right to be heard according to the law;<sup>74</sup> and
- (6) a judge must not initiate, permit, or consider *ex parte* communications or consider other communications made to him/her outside the presence of the parties concerning a pending or impending proceeding.<sup>75</sup>

#### b. Judicial Impartiality

A judge must maintain impartiality when presiding over any legal proceeding.<sup>76</sup> A judge must recuse him/herself from presiding over a proceeding in instances where s/he is unable to be impartial or where his/her impartiality may be reasonably questioned, including, but not limited to:

- (1) the judge having a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;
- (2) the judge having served as a lawyer or as the lower court judge in the matter in controversy, or a lawyer with whom the judge previously practiced law serving during such association as a lawyer concerning the matter, or the judge having been a material witness concerning the matter;
- (3) the judge having knowledge that s/he individually or a family member has more than a minimal interest in the outcome of the proceeding;
- (4) the judge or his/her spouse, or a close family member being either:
  - (a) a party to the proceeding;
  - (b) acting as a lawyer in the proceeding; or
  - (c) likely to be a material witness to the proceeding;
- (5) the judge's spouse or family member having participated as the lower court judge in a decision reviewed by the judge; or
- (6) the judge, while a judge or candidate for judicial office, made public statements that commit, or appear to commit, the judge to a party in the proceeding or to a position on an issue in the proceeding.<sup>77</sup>

Additionally, Canon 5 of the Code of Judicial Conduct regulates a judge's extra-judicial activities so as to prevent these activities from casting reasonable doubt on the judge's capacity to act impartially as a judge; demeaning the judicial office; and interfering with the proper performance of judicial duties.<sup>78</sup>

#### c. Disciplinary Responsibilities

If a judge has actual knowledge or receives information that a substantial likelihood exists that another judge has violated the Code of Judicial Conduct, the judge has an

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<sup>74</sup> FLA. CODE OF JUD. CONDUCT CANON 3(B)(7).

<sup>75</sup> *Id.*

<sup>76</sup> FLA. CODE OF JUD. CONDUCT CANON 3(E).

<sup>77</sup> FLA. CODE OF JUD. CONDUCT CANON 3(E)(1)(a)-(f).

<sup>78</sup> FLA. CODE OF JUD. CONDUCT CANON 5(A).

affirmative duty to take appropriate action.<sup>79</sup> In addition, a judge who has actual knowledge or receives information that a substantial likelihood exists that an attorney has violated the Rules Regulating The Florida Bar,<sup>80</sup> has an affirmative duty to take appropriate action.<sup>81</sup>

4. Complaints and Disciplinary Action Against Judicial Candidates, Including Incumbent Judges

a. Authority and Jurisdiction of the JQC

The JQC is vested with the authority to receive, investigate, and hear formal charges against judicial candidates, including incumbent judges, relating to the violation of any of the above rules of judicial conduct.<sup>82</sup> In order to perform its duty, the JQC has access to all information from all executive, legislative, and judicial agencies, which includes grand juries.<sup>83</sup> In addition, the JQC has the power to issue subpoenas.<sup>84</sup>

For purposes of handling complaints, the JQC is divided into two panels: an investigative panel and a hearing panel.<sup>85</sup> No member serving on both panels may vote on the same proceeding.<sup>86</sup> Also, each panel must employ separate staff members.<sup>87</sup>

b. JQC Investigative Panel

The JQC is required to investigate formal complaints against judicial candidates, including incumbent judges.<sup>88</sup> The JQC investigative panel is composed of nine members: four judges; two members of The Florida Bar; and three non-lawyers.<sup>89</sup>

The investigative panel has the authority to receive complaints, initiate investigations on its own authority, or dismiss complaints.<sup>90</sup> If the investigative panel concludes that there is probable cause to proceed with formal charges, it must file a “Notice of Formal Charges” with the Clerk of the Florida Supreme Court and submit the formal charges to

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<sup>79</sup> FLA. CODE OF JUD. CONDUCT CANON 3(D)(1).

<sup>80</sup> Florida Bar, Rules of Regulating Conduct, available at <http://www.floridabar.org/divexe/rtrfb.nsf/WContents?OpenView> (last visited on Apr. 17, 2006).

<sup>81</sup> FLA. CODE OF JUD. CONDUCT CANON 3(D)(2).

<sup>82</sup> FLA. CONST. art. V, § 12(a)(1).

<sup>83</sup> FLA. CONST. art. V, § 12(a)(5); *see also* FLA. JUD. QUAL. COMM’N R. 6(e) (stating that the JQC “investigative panel shall have access [to] information from the executive, judicial, and legislative agencies, including grand juries”). This information must also be made available for use in impeachment hearings upon request of the Governor or Speaker of the House of Representative. FLA. CONST. art. V, § 12(a)(5).

<sup>84</sup> FLA. CONST. art. V, § 12(a)(4).

<sup>85</sup> FLA. CONST. art. V, § 12(b); *see also* FLA. JUD. QUAL. COMM’N R. 6, 7 (stating that the JQC Chairperson determines how the panels duties are divided.).

<sup>86</sup> FLA. JUD. QUAL. COMM’N R. 6, 7.

<sup>87</sup> FLA. CONST. art. V, § 12(f)(2)(e).

<sup>88</sup> FLA. CONST. art. V, § 12(a)(1), (b); *see also* FLA. JUD. QUAL. COMM’N R. 6(a).

<sup>89</sup> FLA. CONST. art. V, § 12(f)(2)(b)(1)-(3).

<sup>90</sup> FLA. CONST. art. V, § 12(b); *see also* FLA. JUD. QUAL. COMM’N R. 6(a).

the hearing panel.<sup>91</sup> The investigative panel also has the authority to request the suspension of a judge with or without compensation pending a final determination by the JQC hearing panel.<sup>92</sup>

### c. JQC Hearing Panel

The JQC is also required to hear formal complaints against judicial candidates, including incumbent judges.<sup>93</sup> The JQC hearing panel is composed of six members: two judges; two members of The Florida Bar; and two non-lawyers.<sup>94</sup>

When the hearing panel receives the formal charge from the investigative panel, it will decide whether to hear the formal charge.<sup>95</sup> If the hearing panel decides to go forward with a hearing, then a formal proceeding is initiated.<sup>96</sup>

After the JQC receives, investigates, and hears a formal complaint, the hearing panel must send a recommendation to the Florida Supreme Court.<sup>97</sup> Upon a two-thirds vote of the hearing panel, it may recommend to the Florida Supreme Court that the judge or justice should be (1) publicly reprimanded, (2) levied a fine, (3) suspended from office, (4) removed from office, or (5) forced into retirement due to a permanent disability that seriously interferes with the performance of his/her judicial duties.<sup>98</sup> Upon a simple majority of the hearing panel, it may recommend to the Florida Supreme Court that the judge be subject to the “appropriate discipline” as to be decided by the Florida Supreme Court.<sup>99</sup>

### d. Florida Supreme Court

When the Florida Supreme Court receives the hearing panel’s final recommendation, it may decide to accept, reject, or modify in whole or in part the JQC’s findings, conclusions, and recommendations.<sup>100</sup> It may also order:

- (1) “appropriate discipline;”
- (2) removal from office with termination of compensation for willful or persistent failure to perform judicial duties or for conduct unbecoming a

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<sup>91</sup> See FLA. JUD. QUAL. COMM’N R. 6(f). Before a determination of probable cause is made and the “Notice of Formal Charges” is filed, the accused judge must be notified of the investigation and its subject matter, and must be given a reasonable opportunity to make statements in front of the investigative panel. FLA. JUD. QUAL. COMM’N R. 6(b). The accused judge must submit to informal appearances before the investigative panel and must be informed in writing if the panel has found no probable cause to charge him/her. FLA. JUD. QUAL. COMM’N R. 6(c), (d).

<sup>92</sup> FLA. CONST. art. V, § 12(c)(1).

<sup>93</sup> FLA. CONST. art. V, § 12(a)(1); see also FLA. JUD. QUAL. COMM’N R. 6(a)-(f), 7.

<sup>94</sup> FLA. CONST. art. V, § 12(f)(2)(c)(1)-(3).

<sup>95</sup> See FLA. CONST. art. V, § 12(b).

<sup>96</sup> See *id.*

<sup>97</sup> See FLA. CONST. art. V, § 12(b), (c).

<sup>98</sup> See FLA. CONST. art. V, § 12(b).

<sup>99</sup> See FLA. CONST. art. V, § 12(b), (c)(1).

<sup>100</sup> FLA. CONST. art. V, § 12(c)(1).

- member of the judiciary demonstrating a present unfitness to hold office;  
or
- (3) Involuntary retirement for any pertinent disability that seriously interferes with the performance of judicial duties.

### *C. Required Training of Judges Who Handle Capital Cases*

Before any trial or appellate judge<sup>101</sup> may sit on a capital case in which the state is seeking the death penalty or any capital collateral proceeding, the judge must have a minimum of six months experience working in the felony criminal division and have successfully completed the “Handling Capital Cases” course offered by the Florida College of Advanced Judicial Studies.<sup>102</sup> The course must be completed as soon as practicable.<sup>103</sup> Once a judge completes the required course, the judge must attend a refresher course during each subsequent three-year continuing legal education reporting period.<sup>104</sup>

The Chief Judge and Chief Justice is required to ensure that each judge or justice on his/her court meets the standards listed above before being allowed to preside over a capital case.<sup>105</sup> The Chief Justice of the Florida Supreme Court may waive the course requirements in extraordinary circumstances at the request of the Chief Judge of a lower court.<sup>106</sup> The refresher course requirement may not preclude a judge from presiding over a capital collateral proceeding in a case in which s/he presided over the trial or a previous collateral proceeding.<sup>107</sup>

In addition to the “Handling Capital Cases” course, the Commission on Capital Cases, created by the Florida legislature, offers annual continuing legal education (CLE) courses for both attorneys and judges.<sup>108</sup> The Commission on Capital Cases offers an annual CLE on litigating capital cases that is optional and satisfies the general CLE requirement for judges.<sup>109</sup>

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<sup>101</sup> FLA. R. OF JUD. ADMIN R. 2.050(b)(10).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*; see also *In re* Amendment to the Florida Rules of Judicial Administration Rule 2.050(b)(10), 688 So. 2d 320, 321 (Fla.1997).

<sup>105</sup> See *id.*; see also FLA. R. OF JUD. ADMIN R. 2.050(b)(10).

<sup>106</sup> *In re Amendment to the Florida Rules of Judicial Administration Rule 2.050(b)(10)*, 688 So. 2d at 320; see also FLA. R. OF JUD. ADMIN R. 2.050(b)(10).

<sup>107</sup> FLA. R. OF JUD. ADMIN R. 2.050(b)(10).

<sup>108</sup> Florida Legislature, Commission on Capital Cases, Home Page, available at <http://www.floridacapitalcases.state.fl.us/> (last visited on Aug. 4, 2006) (including an advertisement for a seminar on mental retardation and the death penalty); Florida Legislature, Commission on Capital Cases, Continuing Legal Education, available at <http://www.floridacapitalcases.state.fl.us/c-cle.cfm> (last visited on Apr. 17, 2006) (including online seminars from 2004 and 2005).

<sup>109</sup> Florida Legislature, Commission on Capital Cases, Home Page, available at <http://www.floridacapitalcases.state.fl.us/> (last visited on Aug. 4, 2006).

## II. ANALYSIS

### A. Recommendation # 1

**States should examine the fairness of their processes for the appointment/election of judges and should educate the public about the importance of judicial independence to the fair administration of justice and the effect of unfair practices in compromising the independence of the judiciary.**

To the best of our knowledge, it does not appear that the State of Florida is currently examining the fairness of its processes for appointment and election of justices and judges, nor has it established any programs or commissions to educate the public about the importance of judicial independence to the fair administration of justice and the effect of unfair practices in compromising the independence of the judiciary.

We note, however, that the Florida Supreme Court's Racial and Ethnic Bias Study Commission has called into question the fairness of the merit selection process as it relates to the racial makeup of the Florida's appellate bench. In 1991, the Racial and Ethnic Bias Study Commission found that "only 5.6 % and 3.6% of the membership of the [Judicial Nominating Commissions (JNCs)] are, respectively, African-American and Hispanic. Almost half of the commissions have no minority members at all."<sup>110</sup> Indeed, "[w]hile over 63% of the membership of the JNCs are attorneys, not a single African-American attorney serves as a member of any of the 22 judicial nominating commissions. [Minorities] hold only lay appointments."<sup>111</sup> Therefore, it is not surprising that in 1991, minorities, in proportion to their numbers in the general population, were significantly underrepresented in the Florida judiciary, comprising only 5.5% of the 723 judges in the state; four of the five district courts of appeal had no minority judges at all.<sup>112</sup> Based on these figures, the Racial and Ethnic Bias Commission concluded that the merit selection system had "failed to achieve racial diversity, in large measure because minorities [we]re not included in the selection process and [we]re underrepresented in the pool from which judges are drawn."<sup>113</sup>

As a result, the Florida Supreme Court made the following recommendations:

- (1) The Florida Legislature should mandate representative minority attorney and citizen membership on each JNC;<sup>114</sup>

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<sup>110</sup> EXECUTIVE SUMMARY: REPORTS & RECOMMENDATIONS OF THE FLORIDA SUPREME COURT RACIAL & ETHNIC BIAS COMMISSION, "WHERE THE INJURED FLY FOR JUSTICE": REFORMING PRACTICES WHICH IMPEDE THE DISPENSATION OF JUSTICE TO MINORITIES IN FLORIDA 4 (Deborah Hardin Wagner ed. 1991).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> FLORIDA SUPREME COURT, PRELIMINARY ASSESSMENT: A FIRST LOOK AT REPORTING ON IMPLEMENTATION PROGRESS AND IDENTIFYING ISSUES THAT REQUIRE ADDITIONAL ACTION 1 (2000) (listing the recommendations of the Florida Supreme Court's Commission on Racial and Ethnic Bias and any compliance with those recommendations). The legislature enacted this legislation in 1991 but it was

- (2) The Florida Supreme Court should instruct each JNC to provide explicitly, by rule, that racial and ethnic diversity on Florida's bench is a desirable objective and, as such, an element which shall be considered by all JNCs when making recommendations on appointments to the bench;
- (3) Each JNC should, by rule, establish a model plan for recruiting qualified minority candidates for judicial appointment, updating the plan as appropriate to account for experience gained in the recruitment process. Particular attention should be paid to the recruitment of minority females for judicial appointment. JNCs should be required to provide the Governor a statement certifying compliance with the JNC's minority recruitment plan when submitting recommendations for judicial appointments. In addition, the Florida Supreme Court should require the Judicial Nominating Procedures Committee of The Florida Bar and each JNC to submit an annual report detailing each JNC's record of increasing the number of minorities recommended for appointment to Florida's bench;<sup>115</sup>
- (4) The Governor should establish, as a top priority, the increase of minorities among his/her appointments to Florida's bench;<sup>116</sup> and
- (5) The Florida Bar, through the decisions of its Board of Governors and the efforts of its Judicial Nominating Procedures Committee, should expressly establish, as a top priority, the increase of minority representation among the Bar's appointees to the JNCs.<sup>117</sup>

Between 1990 and 2000, the efforts of both Governor Jeb Bush and former Governor Lawton Chiles significantly improved the diversity of Florida's appellate bench. Specifically, minority judges at the trial court level increased from 5.8 percent in 1990 to 14.7 percent in 2000, and minority justices on the Florida Supreme Court increased from 14.2 percent to 28.5 percent during that same period.<sup>118</sup> Despite these improvements, the Florida Supreme Court determined that as of 2000, the judiciary as a whole still did not accurately reflect Florida's rich cultural diversity.<sup>119</sup> Unfortunately, we were unable to assess the current level of minority representation on Florida's appellate bench.

Apart from diversity, politicization of both contested and retention judicial elections also greatly affects the judiciary.

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later struck down as unconstitutional. *Id.* However, while in force, it led to twenty-three minority appointment out of twenty-six total appointments by former Governor Lawton Chiles. *Id.*

<sup>115</sup> *Id.* at 1-2. In 2000, after Governor Bush chastised the JNCs for sending him lists of recommended appointees with very few minorities and women listed and urged the JNCs to remove the "barriers that may affect the diversity of the[se] lists," the JNCs amended their rules to provide training and alternate advertising procedures that would lead to increased minority recommendations. *Id.* at 2.

<sup>116</sup> *Id.* at 2. In 2000, Governor Bush told members of The Florida Bar that his efforts to appoint minority judges were hindered by the lack of diversity in the pools of applicants and in the recommendation lists he received from the JNCs. *Id.*

<sup>117</sup> *Id.* at 3.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

## Politicization of Contested Public Elections

The nature of public elections, including the influx of political funds into campaigns and the impact of public opinion on judges' decisions, serves to undermine the impartiality of the judiciary. The Code of Judicial Conduct states that a judge has a duty to act impartially and fairly in any judicial proceeding.<sup>120</sup> The influx of money into judicial elections—regardless of whether they are partisan or, as in Florida, nonpartisan—from parties interested in cases that may come before the judicial candidate creates the impression that the candidate may be less than impartial on the bench. Since Floridians rejected a constitutional amendment in 2000 that would have replaced the nonpartisan election of trial judges with a system of merit selection and retention, “the average amount of money [that] campaigns of circuit judges and circuit judicial candidates have raised has increased more than 10 percent,” while the average amount from “sources other than the candidate, such as lawyers and businesses, has increased more than 36 percent.”<sup>121</sup> One circuit court judge, who spent the most (more than \$423,000) of any judge or candidate in 2003, said, “I don’t think judicial races should be politicized, but you are running for an office, and you have to get your message out to the voters about your qualifications to be judge.”<sup>122</sup> While incumbent trial court judges are rarely contested,<sup>123</sup> in elections in which they are contested, campaign funds from interest groups and parties that may come before the judicial candidate have the potential to undermine the impartiality of the judiciary.

Additionally, trial court judges subject to election and reelection by the public are consistently mindful of how their decisions in criminal cases may be viewed by their constituents. One Florida Supreme Court Justice recalled that when he was responsible for assignments as a trial court judge, judges facing reelection asked him for assignments to criminal cases because it would help get their names in the press.<sup>124</sup> In another instance, a candidate for a trial court vacancy televised endorsements from the father of a child slain in a high-profile rape/murder case and from the county sheriff in an effort to appear tough on crime.<sup>125</sup>

Similarly, a study of death penalty cases in Florida and nationwide found that trial judges also take into account the potential “repercussions of an unpopular decision in a capital

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<sup>120</sup> FLA. CODE OF JUD. CONDUCT CANONS 3, 7

<sup>121</sup> Mike Schneider, *Judges Raking in Campaign Funds*, TALLAHASSEE DEMOCRAT, July 14, 2003.

<sup>122</sup> *Id.*

<sup>123</sup> Howard Unger, *Verdict: Judge Races Add Up*, SARASOTA HERALD-TRIBUNE, Oct. 6, 2002 (stating that although only two of the 127 sitting judges in Florida faced a challenger in the 2002 elections, the eight candidates for those two seats “spent more than \$415,000 in . . . primaries”).

<sup>124</sup> Justice Ben F. Overton, *Electing Judges Is Poor Policy: Overton Tells Panel*, FLA. B. NEWS, May 1, 1989, at 4.

<sup>125</sup> *12th Circuit Judge: We Recommend Either Susan Chapman or Diana Moreland*, SARASOTA HERALD-TRIBUNE, Oct. 22, 2004 (“We still think Moreland’s a good candidate, but we’re increasingly uncomfortable with aspects of her campaign. We have been troubled by some of her advertising, including televised endorsements by Joe Brucia and Manatee Sheriff Charlie Wells. Brucia is the father of a slain Sarasota girl—a murder that stirred national outrage. Joseph Smith, the man charged in the killing, is expected to be tried in the 12th Circuit. It’s a death-penalty case, and as with everything else that comes before the court, impartiality—real and perceived—is paramount. Ads like this do not help that cause.”).

case” when deciding whether to override a jury’s recommendation of a life sentence without the possibility of parole.<sup>126</sup> Such unpopular decisions “could be ruinous to a judge’s career [and cause] voters to remove them from office,”<sup>127</sup> which encourages judges in “judicial override” states, like Florida, to override jury recommendations of life, “especially so in the run up to judicial elections.”<sup>128</sup> A second study similarly found that judges in Florida are much more likely to override a jury’s decision to impose a life sentence rather than a jury sentence to impose death, and found a significant correlation between the override of life sentences and the occurrence of judicial elections.<sup>129</sup> This study also identified three Florida judges<sup>130</sup> who may have been less than neutral about the death penalty,<sup>131</sup> and were influenced by the political pressure of reelection to impose the death penalty.<sup>132</sup>

Interestingly, in 1991, the Florida Supreme Court’s Racial and Ethnic Bias Commission recognized the detrimental effects that judicial override was having on Florida’s capital sentencing system when it found that, since 1972, 18 percent of all capital cases have involved a judicial override of a jury recommendation of life imprisonment.<sup>133</sup> As a result, the Racial and Ethnic Bias Commission recommended that the Florida Legislature amend the Florida Statutes to prohibit judges from imposing the death penalty in cases where the jury has recommended a sentence of life imprisonment without parole.<sup>134</sup>

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<sup>126</sup> William J. Bowers et al., *The Decision Makers: An Empirical Examination of the Way the Role of the Judge and Jury Influence Death Penalty Decision-Making*, 63 WASH. & LEE L. REV. (forthcoming Dec. 2006).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 766-769, 779, 792-96 (1995) (noting that between 1972 and early 1992, Florida trial judges imposed death sentences in 134 cases where the jury had recommended life, but only overrode fifty-one death recommendations).

<sup>130</sup> See *Barclay v. Florida*, 463 U.S. 939, 980-981 n.12 (1983) (Marshall, J., dissenting) (discussing the judge’s overrides of jury life sentence recommendations in four cases, in all of which he found aggravating factors in clear violation of Florida law); DAVID VON DREHLE, *AMONG THE LOWEST OF THE DEAD: THE CULTURE OF DEATH* ROW 413-18 (1995) (describing the judge’s override of a unanimous life sentence recommendation in the case of Doug McCray, and the eventual reversal of that conviction after seventeen years in the Florida state courts; also discussing the judges’ protestation against the United States Supreme Court’s *Furman v. Georgia* decision ruling the death penalty unconstitutional); *Porter v. Singletary*, 49 F.3d 1483, 1487 (11th Cir. 1995) (describing a judge’s statement to a clerk that he was changing the venue to another county that had “good, fair minded people here who would listen and consider the evidence and then convict the son-of-a-bitch. Then, [the judge] said, he would send Porter to the chair;” the judge eventually overrode the jury’s subsequent unanimous recommendation for a life sentence).

<sup>131</sup> Bright & Keenan, *supra* note 129, at 794-97.

<sup>132</sup> See *id.* at 797. Another example of judicial impartiality is the case of Joseph Spaziano. In this case, the jury deadlocked twice during the guilt phase, but eventually returned with a guilty verdict, and then quickly sentenced Spaziano to life. See *Spaziano v. State*, 393 So. 2d 1119 (Fla. 1981). The trial judge overrode the jury recommendation and, two decades later when Spaziano’s conviction was overturned, “offered to come back from his retired status to hear the case, despite the fact that he had made recent comments to the press about Spaziano’s guilt.” *Id.*; Richard Dieter, *Killing for Votes: The Dangers of Politicizing the Death Penalty Process*, DEATH PENALTY INFORMATION CENTER (1996).

<sup>133</sup> EXECUTIVE SUMMARY, *supra* note 110, at 15.

<sup>134</sup> FLORIDA SUPREME COURT, *supra* note 114, at 29.

Despite legislative efforts to abolish the practice of judicial override of a jury recommendation of life imprisonment, no such bill has yet been passed.<sup>135</sup>

Because judges may feel pressured by an imminent judicial election to use the practice of “judicial override” as a tool to bolster their political standing with the public, the Florida Death Penalty Assessment Team reiterates its recommendation that the State of Florida should give the jury final decision-making authority in capital sentencing proceedings, and thus should eliminate judicial override in cases where the jury recommends life imprisonment without the possibility of parole.<sup>136</sup>

### Politicization of the Merit Selection Process and Retention Elections

In Florida, the merit selection system used for the appointment of Florida Supreme Court Justices, district court of appeal judges, and certain trial court judges generally mutes the influence of political dollars on these judicial seats. Some believe that merit selection systems like that of Florida—which include a list prepared by the appropriate JNC of three to six qualified persons from which the Governor must appoint to fill a judicial vacancy—provide an “alternative to the specter of expensive, contentious, and highly partisan races.”<sup>137</sup> In fact, there was no money raised or spent by candidates in 2004 for appointments by merit selection in Florida.<sup>138</sup>

Even the merit selection process is not immune from politicization, however. At least one Florida judge has attempted to put public pressure on the Governor to appoint him to the Florida Supreme Court. This judge launched his own internet website in order to seek public support for his appointment to the Court.<sup>139</sup> The website noted that the judge has “imposed the death penalty and ‘seen the gaping wound left in the hearts of the murder victim’s family.’”<sup>140</sup>

Although the amount of money raised or spent is not an issue for candidates for appointment by merit selection, it appears that political funds have played a roll in the retention elections of appellate judges. Judges subject to retention, while not personally able to solicit contributions, may set up a committee to do so on their behalf.<sup>141</sup> These judges generally have little problem succeeding in retention elections and Floridians have never voted against retaining an appellate jurist.<sup>142</sup>

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<sup>135</sup> *Id.*

<sup>136</sup> For a discussion of the effects of judicial override on capital jurors’ understanding of their role in sentencing, see *supra*, at 304-05 (Chapter 10: Capital Jury Instructions).

<sup>137</sup> DEBORAH GOLDBERG ET AL., *THE NEW POLITICS OF JUDICIAL ELECTIONS* 2004, at 37 (2005).

<sup>138</sup> *Id.* at 14.

<sup>139</sup> Lucy Morgan, *Judge Uses Website to Seek Top Seat*, ST. PETERSBURG TIMES, June 18, 2002.

<sup>140</sup> *Id.*

<sup>141</sup> FLA. CODE OF JUD. CONDUCT CANON 7(C)(1).

<sup>142</sup> See generally Ann W. O’Neill, *Supreme Court Justices Face Voter Review*, S. FLA. SUN-SENTINEL, Aug. 4, 2004 (“Conservatives have long sought justices more in step with their stands on hot-button issues such as the death penalty and abortion. Despite several spirited campaigns driven by conservative interest groups, Florida voters have not removed a single appellate judge during almost three decades of judicial merit retention.”); see also Jan Pudlow, *Law Enforcement Splits on Barkett*, TALLAHASSEE DEMOCRAT, Sept. 9, 1992.

Thus, there is not generally a need to raise funds for retention elections. However, in at least two instances, committees established by Florida Supreme Court Justices had to raise significant sums of political dollars and seek significant endorsements to be successfully retained. In 1992, during Florida Supreme Court Justice Rosemary Barkett's retention election, the National Rifle Association, law enforcement groups, and related groups criticized her decisions in death penalty cases, arguing that she was soft on crime.<sup>143</sup> Similarly, in 1990, then-Florida Supreme Court Chief Justice Leander Shaw faced opposition during his retention election from anti-abortion activists and "law-and-order" groups upset with the rulings of the Court, including those involving the death penalty.<sup>144</sup> As a result of these attacks during retention elections, Justices Barkett and Shaw each felt the need to raise nearly \$300,000 to defend against these attacks,<sup>145</sup> and were retained with only approximately 60 percent of the vote.<sup>146</sup>

While it is difficult to discern whether political attacks during retention elections have an appreciable affect on how judges decide cases, one scholar has noted that:

[O]ne survey of judges subject to periodic retention elections revealed that "three-fifths believe[d] judicial retention elections have a pronounced effect on judicial behavior." Many judges subject to periodic retention affirm that this is true.<sup>147</sup>

Two other scholars posit that political attacks on the Florida Supreme Court's death penalty decisions have had a negative affect on how the Court performs its proportionality review:

In the early 1990s, the Florida Supreme Court, a highly visible institution, especially with respect to its death penalty jurisprudence, developed a meaningful system of comparative proportionality review that relied on a rich and transparent database with well reasoned opinions . . . . [D]uring the 1990s, the court vacated 19% (32/170) of the death cases it reviewed on [the proportionality] issue . . . . However, the practice was scaled back dramatically in 2000 after the Florida court came under severe political

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<sup>143</sup> See Victoria Cecil, *Merit Selection and Retention: The Great Compromise? Not Necessarily*, COURT REV., Fall 2002, at 21, available at <http://aja.ncsc.dni.us/courtrv/cr39-3/CR39-3Cecil.pdf> (last visited on Aug. 4, 2006); Lucy Morgan, *Persistence Marks Barkett Fray*, ST. PETERSBURG TIMES, Oct. 21, 1992, at 1B (describing how the National Rifle Association and other groups vigorously lobbied against Barkett in her retention election because of her alleged softness on crime, despite the fact that she voted with the Court's majority 91% of the time); Diane Rado, *Fierly Debate Rages Ever Hotter Over Chief Justice's Keeping Job*, ST. PETERSBURG TIMES, Sept. 9, 1992, at 4B; *Barkett's Friends and Foes to Try All Tricks*, ST. PETERSBURG TIMES, Oct. 31, 1992, at 1B.

<sup>144</sup> Randolph Pendleton, *Victim's Brother Wants Chief Justice Removed*, FLA. TIMES-UNION, Sept. 11, 1990, at B1.

<sup>145</sup> Cecil, *supra* note 143, at 25-26.

<sup>146</sup> *Id.*; Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 37 (1995).

<sup>147</sup> Webster, *supra* note 146, at 37. The survey cites included judge respondents from ten states who were subject to retention elections. See Larry T. Aspin & William K. Hall, *Retention Elections and Judicial Behavior*, 77 JUDICATURE 306, 307 n.3 (1994). However, no judges from Florida were included. *Id.*

attack from the Governor and the Republican-controlled legislature for allegedly slowing unreasonably the pace of the executions in state. The 19% vacation rate on the proportionality issue in the 1990s dropped to 3% (3/97) between 2000 and 2003. The message from the experience of the Florida court is clear. Whatever a court's commitment to selective and consistent death sentencing may be, top-down, highly visible, and aggressive review practices may carry distinct political risks.<sup>148</sup>

Justice Barkett's experience when she was nominated for a position on the United States Court of Appeal for the Eleventh Circuit provides further evidence of the pressures that might affect judicial decisions in death penalty cases. During her confirmation process, she endured numerous political attacks because of her decisions in Florida death penalty cases.<sup>149</sup> In his questioning during Justice Barkett's confirmation hearings, Senator Orrin Hatch questioned whether she was "serious enough about the death penalty," despite the fact that she had upheld death sentences in more than 200 cases.<sup>150</sup> Some Republicans even branded Barkett as a "liberal who coddles criminals."<sup>151</sup>

In 1994, Michael Huffington, a candidate for the United States Senate from California and opponent of current Senator Diane Feinstein (who voted to confirm Barkett to the Eleventh Circuit), issued an advertisement that illustrates the nature of harsh political criticisms of judges' decisions in capital cases.<sup>152</sup> The misleading commercial stated, "Feinstein's judges let killers live after [the] victims died."<sup>153</sup> Huffington also took out a full-page newspaper advertisement stating, "[h]ere are the facts in a *real* murder case. See if you can agree with the judge's decision."<sup>154</sup> The advertisement described "the grisly details" of the murders in three cases in which Justice Barkett had voted to reverse the death penalty, but neglected to give the legal grounds that required these reversals.<sup>155</sup>

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<sup>148</sup> David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411, 1463 (2004).

<sup>149</sup> See, e.g., Jeanne Cummings, *Republicans Grill Clinton Nominee; Senators Hone In on Death Penalty Views*, ATLANTA J. CONST., Feb. 4, 1994, at A10 (noting that conservatives accused the judge of being too "soft on crime" and criticized her opinions on the death penalty, among other issues); see also Craig Crawford, *Senate Confirms Florida Chief Justice Barkett for Federal Judgeship*, ORLANDO SENTINEL, Apr. 15, 1994, at A1 (noting that Barkett's Senate confirmation for the federal judgeship sparked the most heated debate to date over President Clinton's bench nominees).

<sup>150</sup> See Neil A. Lewis, *G.O.P. to Challenge Judicial Nominees Who Oppose Death Penalty*, N.Y. TIMES, Oct. 15, 1993, at A26.

<sup>151</sup> Paul Anderson, *Barkett Caught in Senate Cross-Fire On Crime; Foes Target Move to US Appeals Bench*, MIAMI HERALD, Mar. 1, 1994, at 1A.

<sup>152</sup> See William Endicott, *'Feinstein's Judges': A False Link*, L.A. DAILY J., Oct. 19, 1994, at 6 (commenting that Huffington's advertisements regarding Feinstein's votes for Barkett were both "irresponsible and untruthful"); David Leshner, *Huffington Attacks Rival on Judges*, L.A. TIMES, Sept. 30, 1994, at A3.

<sup>153</sup> See Stephen B. Bright, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 BOSTON UNIV. L. REV. 759, 790 (1995).

<sup>154</sup> Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 315 (1997)

<sup>155</sup> Richard C. Dieter, *Killing for Votes: The Dangers of Politicizing the Death Penalty Process* (1996), available at <http://www.deathpenaltyinfo.org/article.php?scid=45&did=260> (last visited on Apr. 19, 2006).

Although not a member of the judiciary, the Governor also experiences substantial political pressure to appoint judges who will swiftly administer the death penalty. A former Florida Governor appointed a circuit court judge<sup>156</sup> only after the Governor's Chief of Staff allegedly received a letter addressed to the Governor referring to the judge as one who would impose the death penalty.<sup>157</sup> The Bright and Keenan Study also noted that Florida governors have often made the signing of death warrants a part of their campaign strategy.<sup>158</sup> This political pressure on governors during the appointment process has the potential to affect the way judges who wish to gain appointment to the appellate bench administer the death penalty.

## Conclusion

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The first case discussed in the advertisement criticized Barkett for voting to let capital defendant Jacob Dougan "off the hook" even though in that case, she merely joined the dissenting opinion of Justice Parker Lee McDonald, a relatively conservative member of the Florida Supreme Court. *See Dougan v. State*, 595 So. 2d 1, 6-8 (Fla. 1992) (McDonald, J., dissenting). In 1996, presidential candidate Robert Dole repeated the criticism of her dissent in the *Dougan* case when he named Barkett to his "Judicial Hall of Shame." Bright, *supra* note 154, at 316. The advertisement also cited *Adams v. State*, and stated that Justice Barkett had voted to "spare the life of the killer of an eight-year-old girl because he had 'learning problems,'" when in fact her dissent from the decision in *Adams* focused on the trial judge's failure to instruct the jury that it could consider non-statutory mitigating circumstances in deciding punishment. *See Adams v. State*, 543 So. 2d 1244, 1249-50 (Fla. 1989) (Barkett, J., dissenting); Bright, *supra* note 154, at n.43; Endicott, *supra* note 152 (commenting that Huffington's advertisements regarding Feinstein's votes for Barkett were both "irresponsible and untruthful"). Finally, the advertisement stated that, in *Hall v. State*, Justice Barkett voted against the death penalty for a man who had "raped, beaten and killed a woman" because "[t]he killer had experienced 'emotional deprivation,'" while in fact her dissent had pointed out that Hall "has an IQ of 60; he suffers from organic brain damage, chronic psychosis, a speech impediment, and a learning disability; he is functionally illiterate; and he has a short-term memory equivalent to that of a first grader." *Hall v. State*, 614 So. 2d 473, 479 (Fla. 1993) (Barkett, C.J., dissenting); Bright, *supra* note 154, at n.43.

<sup>156</sup> *See For the Record: Legal News Brief*, 14 NAT'L L.J. 8 (Oct. 28, 1991) (noting that this judge was suspended without pay along with three other Dade County Circuit Court Criminal Division judges who pled guilty to accepting bribes while serving on the bench); *see also* Rosalind Resnick, *Greyhound, Miami-Style: "Operation Court Broom" Strikes*, 13 NAT'L L.J. 42 (June 24, 1991) (noting that this judge was one of four former judges from the Dade County Circuit Court's Criminal Division who was accused of taking bribes in June of 1991 and three of them, including this judge, were suspended without pay by the Florida Supreme Court in October of 1991).

<sup>157</sup> *See* Martin Dyckman, *Secrets You Might Never Know*, ST. PETERSBURG TIMES, Nov. 12, 1991, at 11A.

<sup>158</sup> Bright & Keenan, *supra* note 129, at 772 (discussing how there is an increase in Florida governors signing death warrants during gubernatorial elections). A prime example of this phenomenon is during Bob Graham's tenure as Governor of Florida. He ran "television advertisements in 1990 showing the face of serial killer Ted Bundy, who was executed during Graham's tenure as governor. [He] stated that he had signed over ninety death warrants in his four years in office. The death penalty has been a dominant political issue in Florida for over fifteen years. [He] demonstrated in two terms as governor and a successful race for the United States Senate that, as one observer noted, 'nothing [sells] on the campaign trail like promises to speed up the death penalty.'" *Id.* Cf. Jeffery D. Kubik & John R. Moran, *Lethal Elections: Gubernatorial Politics and the Timing of Executions*, 46 J.L. & ECON 1 (2003) (finding that states are 25% more likely to conduct executions in gubernatorial election years than in other years, that the total number of executions performed is higher in election years, and that the relationship between elections and executions is strongest in the South).

Because the State of Florida is not currently examining the fairness of the judicial appointment/election process or undertaking a public education effort to ensure the public is aware of the importance of judicial independence to the fair administration of justice and the effect of unfair practices in compromising the independence of the judiciary, it fails to meet the requirements of Recommendation #1.

*B. Recommendation # 2*

**A judge who has made any promise—public or private—regarding his/her prospective decisions in capital cases that amounts to prejudgment should not preside over any capital case or review any death penalty decision in the jurisdiction.**

Canon 7(A)(3)(d)(i) of the Florida Code of Judicial Conduct states that a candidate for a judicial office “shall not with respect to parties or classes of parties, cases, controversies or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.”<sup>159</sup> Canon 3(B)(5) also states that a judge shall act impartially, fairly, and respectfully towards the rule of law by performing “judicial duties without bias or prejudice.”<sup>160</sup>

While there are no reported instances of judicial candidates or incumbent judges specifically making promises in public or in private regarding their views on the death penalty, at least some judicial candidates have completed questionnaires designed and distributed by special interest groups.<sup>161</sup> Until recently, political questionnaires from interest groups have routinely been sent only to legislative candidates but not to judicial candidates. Since the United State Supreme Court’s 2002 decision in *Republican Party v. White*,<sup>162</sup> holding unconstitutional a judicial conduct rule in Minnesota that prohibited speech by judicial candidates that announce “their views on disputed legal and political issues,”<sup>163</sup> special interest groups in Florida have been sending out judicial questionnaires to gauge the views of judicial candidates on a variety of controversial issues.<sup>164</sup> The Florida Supreme Court Judicial Ethics Advisory Committee (Committee) issued a subsequent opinion in February 2004 stating that “judicial candidates may announce their views on disputed issues as long as they stress that, as judges, they will

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<sup>159</sup> FLA. CODE OF JUD. CONDUCT CANON 7(A)(3)(d)(i).

<sup>160</sup> FLA. CODE OF JUD. CONDUCT CANON 3(B)(5).

<sup>161</sup> See Julie Kay, *Christian Group’s Survey Reveals Judicial Candidates’ Opinions*, DAILY BUS. REV., Oct. 28, 2004, available at <http://www.law.com/jsp/article.jsp?id=1098907051693> (last visited on Aug. 3, 2006); Fla. Sup. Ct., Jud. Ethics Advisory Comm., Advisory Op. 2006-18 (Aug. 7, 2006), available at <http://www.jud6.org/LegalPractice/opinions/judicialethicsadvisoryopinions/2006/2006-18.html> (last visited on Aug. 29, 2006) (discussing two questionnaires from two different organizations—the Florida Family Policy Council and the Christian Coalition of Florida).

<sup>162</sup> 536 U.S. 765 (2002).

<sup>163</sup> *Id.* at 788

<sup>164</sup> Kay, *supra* note 161.

uphold the law.”<sup>165</sup> In August 2006, the Committee issued another opinion specifically stating that judicial candidates may respond to questionnaires as long as:

- (1) the candidate clearly indicates that the answers do not constitute a promise that the candidate will rule a certain way in a case;
- (2) the candidate clearly acknowledges his/her obligation to follow binding legal precedent anywhere it exists;
- (3) the candidate does not appear to endorse any other individual who is likely to stand for election or retention in any public office or any platform of a political party; and
- (4) any commentary on past judicial decisions is analytical, informed, respectful, and dignified.<sup>166</sup>

We could only locate questionnaires on issues other than the death penalty, but special interest groups are free to pose questions regarding the death penalty to judges. Regardless of the contents of the questionnaires, the answering of these and other controversial questions<sup>167</sup> gives the appearance that the judge is committing to a point of view or a specific party before being privy to the facts and legal arguments in an actual case. Similarly, obtaining public endorsements from law enforcement organizations and victim rights groups,<sup>168</sup> as discussed in Recommendation #1, also creates the perception that judicial candidates will be partial to these groups in actual cases.

Based on this information, it is unclear whether the State of Florida is taking sufficient steps to preclude judges who make promises regarding their prospective decisions about capital cases that amount to prejudgment from presiding over capital cases or from reviewing any death penalty decision in the jurisdiction. We are, therefore, unable to assess whether the State of Florida is in compliance with Recommendation #2.

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<sup>165</sup> *Id.*; see also Fla. Sup. Ct., Jud. Ethics Advisory Comm., Advisory Op. 2004-09 (Feb. 25, 2004), available at <http://www.jud6.org/LegalPractice/opinions/judicialethicsadvisoryopinions/2004/2004-09.html> (last visited on Aug. 3, 2006).

<sup>166</sup> Op. Jud. Ethics Advisory Comm. of Fla. Sup. Ct. 2006-18 (Aug. 7, 2006), available at <http://www.jud6.org/LegalPractice/opinions/judicialethicsadvisoryopinions/2006/2006-18.html> (last visited on Aug. 29, 2006); see also Op. Jud. Ethics Advisory Comm. of Fla. Sup. Ct. 2006-20 (Aug. 8, 2006), available at <http://www.jud6.org/LegalPractice/opinions/judicialethicsadvisoryopinions/2006/2006-20.html> (last visited on Aug. 29, 2006) (stating that a judge standing for re-election may not incorporate favorable remarks from juror questionnaires in campaign literature unless it is clear that the questionnaires are public information acquired in a judicial capacity).

<sup>167</sup> Kay, *supra* note 161.

<sup>168</sup> *Editorial*, SARASOTA HERALD-TRIBUNE, Oct. 22, 2004 (“We still think Moreland’s a good candidate, but we’re increasingly uncomfortable with aspects of her campaign. We have been troubled by some of her advertising, including televised endorsements by Joe Brucia and Manatee Sheriff Charlie Wells. Brucia is the father of a slain Sarasota girl—a murder that stirred national outrage. Joseph Smith, the man charged in the killing, is expected to be tried in the 12th Circuit. It’s a death-penalty case, and as with everything else that comes before the court, impartiality—real and perceived—is paramount. Ads like this do not help that cause.”).

C. Recommendation # 3

**Bar associations and community leaders should speak out in defense of sitting judges who are criticized for decisions in capital cases, particularly when the judges are unable, pursuant to standards of judicial conduct, to speak out themselves.**

**a. Bar associations should educate the public concerning the roles and responsibilities of judges and lawyers in capital cases, particularly concerning the importance of understanding that violations of substantive constitutional rights are not “technicalities” and that judges and lawyers are bound to protect those rights for all defendants.**

Political attacks on judges like those discussed in Recommendation #1 not only affect the way judges approach their decision-making processes in death penalty cases,<sup>169</sup> they also affect the public’s perception of the proper role of the judiciary. The negative perception created by attacks on the judiciary is exacerbated by the inability of the judiciary to speak out in its own defense. To combat the negative impact of such attacks on the public perception of the judiciary, The Florida Bar has taken a lead roll in protecting the independence of the judiciary from attacks on how judges decide cases regarding a number of issues. Throughout the years, a number of Bar Presidents have spoken out on behalf of an independent judiciary and instituted special commissions to help protect that independence.

Former President of The Florida Bar, Herman J. Russomanno, stated that the “Florida Bar is there to vigorously protect the independence of the judiciary.”<sup>170</sup> With this in mind, in 2000, he established a Judicial Independence Commission within the Bar to “help educate political leaders, the public and the media to understand that ‘unwarranted attacks on the judiciary interfere with this delicate balance’”<sup>171</sup> and to facilitate an “open dialogue among judges, scholars, attorneys and legislators.”<sup>172</sup> In 2005, in the wake of attacks on Judge Greer in the case of Terri Schiavo, then-President of The Florida Bar, Kelly Overstreet Johnson, reinstated the Judicial Independence Commission to educate the public and defend the judiciary.<sup>173</sup>

Additionally, in 1998, then-President of The Florida Bar, Howard Coker, stated that some “self-serving political factions and misinformed citizens seem ready to destroy [the

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<sup>169</sup> See *supra* notes 147-148 and accompanying text.

<sup>170</sup> Jan Pudlow, *Herman J. Russomanno—President of The Florida Bar*, FLORIDA B.J., July 2000.

<sup>171</sup> *Id.*

<sup>172</sup> American Bar Association, Office of Justice Initiatives, Judicial Independence, Selection, Compensation, and Tenure, at <http://www.abanet.org/justice/01summary/traditionalact/judind.html> (last visited Apr. 20, 2006).

<sup>173</sup> Gary Blankenship, *Court System Survives Both Political and Natural Storms: Chief Warns the Courts Still Face Many Challenges, Including Political Attacks on Judicial Independence*, FLA. B. NEWS, July 15, 2005. Florida Supreme Court Chief Justice Pariente commended the Bar for honoring judges who respected their oath by not wilting to political attacks and for instituting the Judicial Independence Commission. *Id.* For additional responses from The Florida Bar to attacks on the judiciary, including those against Judge Greer who presided in the Terri Schiavo case, see Press Release, Statement of Kelly Overstreet Johnson, President of The Florida Bar (Mar. 24, 2005), available at <http://www.freerepublic.com/focus/f-news/1390454/posts> (last visited on Apr. 21, 2006).

independent judiciary,] [s]imply because of some highly publicized rulings with which some political factions disagree.”<sup>174</sup> He continued by noting that it benefits the public good when judges can freely act as a “buffer[] against society’s excesses.”<sup>175</sup> Furthermore, current Florida Bar President Alan Bookman has emphasized the “need to continue to vigilantly protect the independence of the judiciary so that our court system is impartial and fair to everyone and [to] protect our profession from unwarranted attacks.”<sup>176</sup> Recently, The Florida Bar’s Young Lawyer’s Division also sponsored an educational symposium on the co-equal roles of the three branches of Florida’s government.<sup>177</sup>

In addition to efforts by The Florida Bar to protect the independence of the judiciary, other groups also have taken the initiative to combat attacks against the independence of the judiciary. In 2005, the Florida Board of Trial Advocates followed the American Board of Trial Advocates Protocol for Responding to Unfair Criticisms of Judges by responding to attacks on the judiciary and calling for public respect of the rule of law and separation of powers.<sup>178</sup>

Additionally, the Jacksonville Bar Association and similar groups in Palm Beach and Dade Counties, each assembled a group of local attorneys to form a Judicial Campaign Practices Commission.<sup>179</sup> The goal of these commissions is to investigate campaign complaints filed by citizens and candidates against judicial candidates stemming from nasty judicial elections, because “[n]egativity has no place in judicial campaigning . . . and [judicial candidates] should be a step above politics as usual.”<sup>180</sup> The Jacksonville Commission ensures its own neutrality by prohibiting its members from endorsing judicial candidates or contributing to judicial campaigns.<sup>181</sup> The efforts of the Dade County Commission, which has been in place since 1986, has resulted in judges being “a lot more careful about what they say.”<sup>182</sup> Because these commissions have no power to regulate activities of judicial candidates, their success in maintaining clean and ethical judicial campaigns depends largely on their ability to investigate complaints and use the media to publicize any questionable ethical behavior of judicial candidates.<sup>183</sup>

Although The Florida Bar and other organizations have gone to great lengths to protect the independence of the judiciary and explain to the public the need for an independent

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<sup>174</sup> Farewell Speech of the Honorable John L. Nickels, Justice, Illinois Supreme Court, *The Need for an Independent Judiciary* (Dec. 11, 1998), at <http://www.dcba.org/brief/judpractice/1298.htm> (last visited on Apr. 21, 2006).

<sup>175</sup> *Id.*

<sup>176</sup> Brochure for Alan B. Bookman, President, The Florida Bar (2005-06) (on file with author).

<sup>177</sup> The Florida Bar, News and Events, News Releases, at <http://www.floridabar.org/TFB/TFBPublic.nsf/WNewsReleases/10D2BBE2F5A173B5852571390062E63B?OpenDocument> (last visited on Apr. 21, 2006).

<sup>178</sup> Mindy Boggs, Executive Director, Florida Board of Trial Advocates, 2005 a Busy Year for FLABOTA, at <http://www.abota.org/chapters/default.asp?statechapter=2> (last visited on Apr. 21, 2006).

<sup>179</sup> Paul Pinkham, *Panel to Watch Judicial Races*, FLA. TIMES-UNION, Mar. 31, 2004.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

judiciary, we were unable to determine whether these efforts include educating the public concerning the roles and responsibilities of judges and lawyers in capital cases, particularly concerning the importance of understanding that violations of substantive constitutional rights are not “technicalities” and that judges and lawyers are bound to protect those rights for all defendants. However, the willingness of the Bar to defend the judiciary against political attacks generally is an important step in educating the public about the importance of a judiciary independent of the political will.

- b. Bar associations and community leaders publicly should oppose any questioning of candidates for judicial appointment or re-appointment concerning the percentages of capital cases in which they have upheld the death penalty.**
- c. Purported views on the death penalty or on habeas corpus should not be litmus tests or important factors in the selection of judges.**

As stated above, special interest groups in Florida are using judicial questionnaires to gauge the views of judicial candidates on a variety of controversial issues.<sup>184</sup> However, we were unable to identify any instances where bar associations or community leaders in Florida publicly opposed questionnaires or any other questioning of candidates for judicial appointment concerning the percentage of capital cases in which they have imposed the death penalty. In fact, in August 2006, the Florida Supreme Court Judicial Ethics Advisory Committee issued an opinion authorizing judicial candidates to complete questionnaires as long as: (1) the candidate clearly indicates that the answers do not constitute a promise that the candidate will rule a certain way in a case; (2) the candidate clearly acknowledges the obligation to follow binding legal precedent anywhere it exists; (3) the candidate does not appear to endorse any other individual who is likely to stand for election or retention in any public office or any platform of a political party; and (4) any commentary on past judicial decisions is analytical, informed, respectful, and dignified.<sup>185</sup> Answering these questions, regardless of the issue,<sup>186</sup> allows any special interest group to base its public support or opposition to a judge’s candidacy on the answers to these questions. This process not only influences the selection of judges, but also puts the judge’s impartiality in question by giving the appearance that the judge has a predisposed view on an issue that may come before him/her. In fact, some judges who responded to all or portions of the questionnaires had reservations about doing so afterwards because of how it may affect the public’s view of their impartiality.<sup>187</sup>

Despite the latitude given to judges to state their views on disputed issues, certain limitations on a candidate’s ability to state his/her personal views on disputed issues still exist to protect against the appearance of impartiality. Specifically, the Florida Supreme

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<sup>184</sup> Kay, *supra* note 161.

<sup>185</sup> Fla. Sup. Ct., Jud. Ethics Advisory Comm., Advisory Op. 2006-18 (Aug. 7, 2006), *available at* <http://www.jud6.org/LegalPractice/opinions/judicialethicsadvisoryopinions/2006/2006-18.html> (last visited on Aug. 29, 2006).

<sup>186</sup> We located special interest group questionnaires regarding reproductive rights and equality for gay, lesbian, bisexual and transgender individuals, including gay marriage, civil unions and gay adoptions. Kay, *supra* note 161.

<sup>187</sup> *Id.*

Court upheld as constitutional<sup>188</sup> the Canon 7 prohibitions against (1) “making pledges [or] promises” that are “inconsistent with the faithful and impartial performance of the adjudicative duties of the office” (pledges and promises clause),<sup>189</sup> and (2) making statements that commit or appear to commit the candidate with “respect to cases, controversies or issues that are likely to come before the court (commit clause).”<sup>190</sup> In applying the strict scrutiny test to the “pledges and promises” and “commit” clauses of Canon 7(A)(3)(d), the Florida Supreme Court held that these clauses serve a compelling state interest in “preserving the integrity of our judiciary and maintaining the public’s confidence in an impartial judiciary,” and are narrowly tailored to meet that interest.<sup>191</sup> The Florida Supreme Court further stated that “a candidate may state his[/]her personal views, even on disputed issues,” but also noted that “where the law differs from his[/]her personal belief, the commentary [to the Canon] encourages candidates to stress that as judges, they will uphold the law.”<sup>192</sup>

Given that The Florida Bar and other organizations regularly speak out against attacks on the judiciary that undermine its independence, but have not publicly opposed the questioning of judicial candidates, including incumbent judges, on their views regarding the imposition of the death penalty, the State of Florida only partially meets Recommendation #3.

#### *D. Recommendation # 4*

**A judge who observes ineffective lawyering by defense counsel should inquire into counsel's performance and, where appropriate, take effective actions to ensure that the defendant receives a proper defense.**

#### *Recommendation # 5*

**A judge who determines that prosecutorial misconduct or other activity unfair to the defendant has occurred during a capital case should take immediate action authorized in the jurisdiction to address the situation and to ensure that the capital proceeding is fair.**

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<sup>188</sup> *In re Kinsey*, 842 So. 2d 77 (Fla. 2003).

<sup>189</sup> FLA. CODE OF JUD. CONDUCT CANON 7(A)(3)(d)(i).

<sup>190</sup> *Id.*

<sup>191</sup> *In re Kinsey*, 842 So. 2d 77 (Fla. 2003). The United States Supreme Court’s ruling in *Republican Party v. White*, 536 U.S. 765 (2002), has not changed Canon 7(A)(3)(d) of the Judicial Code of Conduct. One year after *White*, the Florida Supreme Court relied on Canon 7(A)(3)(d)(i), (ii) in *In re Kinsey* to discipline a judicial candidate for campaign literature and conduct that “stressed her allegiance to police officers . . . [made] implicit pledges that if elected to office, [she] would help law enforcement. . . . [and] fostered the distinct impression that she harbored a prosecutor’s bias and [that] police officers could expect more favorable treatment from her[, and] made pledges to victims of crime.” *Id.* at 88. The Court held that this behavior gave “the appearance that [the candidate] was already committed to according [these parties] more favorable treatment than other parties appearing before her.” *Id.* at 88-89. To the First Amendment argument, the Court responded that Florida’s version of Canon 7(A)(3)(d) does not include the “announce” clause that exists in the Minnesota rule judicial conduct which was held unconstitutional in *White*. *Id.* The Florida Supreme Court publicly reprimanded Kinsey and required her to pay a \$50,000 fine. *Id.* at 87.

<sup>192</sup> *Id.*

The Florida Code of Judicial Conduct does not explicitly mention the appropriate course of action that judges should take when confronted with “ineffective lawyering” by defense counsel or “prosecutorial misconduct.” The Florida Code of Judicial Conduct, however, does require judges to “take appropriate action” when they receive information indicating a “substantial likelihood” that an attorney has committed a violation of the Florida Rules of Professional Conduct.<sup>193</sup> Appropriate action includes: “direct communication with the . . . [attorney] who has committed the violation, [or] other direct action if available, [and] reporting the violation to the appropriate authority or other agency.”<sup>194</sup> If the misconduct is minor, the judge may “address the problem solely by direct communication” with the offending attorney.<sup>195</sup> However, if an attorney’s violation of the Florida Rules of Professional Conduct raises a “substantial question as to the [attorney’s] honesty, trustworthiness, or fitness as a[n] [attorney],” the judge must report the violation to The Florida Bar.<sup>196</sup> The Florida Supreme Court echoed these reporting rules, holding that “[w]hen there is overzealous[ness] or misconduct on the part of either the prosecutor or defense lawyer it is proper for either trial or appellate courts to exercise their supervisory powers by registering their disapproval, or, in appropriate cases, referring the matter to The Florida Bar for disciplinary investigation.”<sup>197</sup>

The Florida Standards for Imposing Lawyer Sanction also emphasize that judges have an “obligation to report unethical conduct to the disciplinary agencies.”<sup>198</sup> These standards also refer to the judge’s authority to use contempt citations and “other mechanisms” to discipline attorneys.<sup>199</sup> In fact, there are a number of appellate decisions that reference the reporting of an attorney to the Bar for improper behavior in the trial courts in both capital and non-capital cases.<sup>200</sup> However, in at least two cases, the Florida Supreme Court has found that the prosecutor’s actions would ordinarily violate the Code of Professional Responsibility, but it did not refer the prosecutor to the Bar, at least in the reported opinion.<sup>201</sup> Furthermore, at least one appellate court has questioned the efficacy of The Florida Bar’s disciplinary efforts when a lawyer is referred to the Bar.<sup>202</sup>

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<sup>193</sup> FLA. CODE OF JUD. CONDUCT CANON 3(D)(2). For examples of how defense counsel and prosecutors can violate the Rules Regulating The Florida Bar, see FLA. R. PROF’L CONDUCT R. 4-1.1 (requiring lawyers to provide competent representation to their clients), and FLA. R. PROF’L CONDUCT R. 4-3.8 (highlighting the special responsibilities of a prosecutor, including the disclosure of evidence to defense counsel).

<sup>194</sup> FLA. CODE OF JUD. CONDUCT CANON 3(D)(2) cmt.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *State v. Murray*, 443 So. 2d 955, 956 (Fla. 1984) (citing *Arango v. State*, 437 So. 2d 1099 (Fla. 1983); *Jackson v. State*, 421 So. 2d 15 (Fla. 3d DCA 1982); *Spengelink v. Wainwright*, 372 So. 2d 927 (Fla. 1979) (Alderman, J., concurring).

<sup>198</sup> FLORIDA BAR, STANDARDS FOR IMPOSING LAWYER SANCTION, at 2, available at [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/18F71B077A612FB785256DFE00664509/\\$FILE/lawyersanctions03.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/18F71B077A612FB785256DFE00664509/$FILE/lawyersanctions03.pdf?OpenElement) (last visited on May 9, 2006).

<sup>199</sup> *Id.* at 2-3.

<sup>200</sup> See, e.g., *Ruiz v. State*, 743 So. 2d 1, 10 (Fla. 1999) (referring the prosecutor to the Bar for misconduct in a capital case); *Johnnides v. Amoco Oil Co., Inc.*, 778 So. 2d 443, 445 n.2 (Fla. 3d DCA 2001) (containing a list of cases, seven of them criminal but none capital, involving Bar complaints initiated by the courts).

<sup>201</sup> *Suarez v. State*, 481 So. 2d 1201 (Fla. 1985) (finding prosecutorial interview of unrepresented defendant to be a violation of the Code of Professional Responsibility, but that suppression of the interview was not required); *Darden v. State*, 329 So. 2d 287 (Fla. 1976) (finding that “[a] careful examination of the

Additionally, as noted in Chapter Six, inadequate performance by capital collateral counsel appointed from the attorney registry has also prompted two Florida Supreme Court Justices to take their criticisms to the press. Justice Cantero has said that the representation provided by some registry attorneys is “[s]ome of the worst lawyering” he has ever seen.<sup>203</sup> Specifically, “some of the registry counsel have little or no experience in death penalty cases. They have not raised the right issues . . . [and] [s]ometimes they raise too many issues and still haven’t raised the right ones.”<sup>204</sup> Chief Justice Barbara Pariente reiterated the concerns of Justice Cantero by stating that “[a]s for registry counsel, we have observed deficiencies and we would definitely endorse the need for increased standards for registry counsel, as well as a continuing system of screening and monitoring to ensure minimum levels of competence.”<sup>205</sup>

Similarly, on a number of occasions, the Florida Supreme Court has expressed its concern over the prevalence of prosecutorial misconduct. In *Gore v. State*, the Court reiterated an admonishment from an earlier case stating:

[W]e are deeply disturbed as a Court by continuing violations of prosecutorial duty, propriety and restraint. We have recently addressed incidents of prosecutorial misconduct in several death penalty cases . . . It ill becomes those who represent the state in the application of its

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record leads this Court to conclude that, although the prosecutor’s remarks under ordinary circumstances would constitute a violation of the Code of Professional Responsibility, in this particular case they amount to harmless error when the totality of the record is considered in these uniquely vicious crimes.”)

<sup>202</sup> In *Johnnides*, the court stated:

[W]e have no illusions that [referring lawyers to The Florida Bar] will have any practical effect. Our skepticism is caused by the fact that, of the many occasions in which members of this court—reluctantly and usually only after agonizing over what we thought was the seriousness of doing so—have found it appropriate to make such a referral about a lawyer’s conduct in litigation, none has resulted in the public imposition of any discipline—not even a reprimand—what[so]ever. In fact, the reported decisions do not reflect that the Bar has responded concretely at all to the tide of uncivil and unprofessional conduct which has been the subject of so much article-writing, sermon-giving, seminar-holding and general hand-wringing for at least the past twenty years. Perhaps the ultimate example of the Bar’s attitude toward the problem is the case of Harvey Hyman, who was the subject of three separate complaints by this court to the Bar, but who avoided any sanction by entering a diversion program which consisted entirely of the arduous requirement of attending a day-long seminar on trial ethics.

*Johnnides*, 778 So. 2d at 445 n.2.

<sup>203</sup> Jackie Hallifax, *Lawmaker Asks Court for Names of Bad Lawyers*, MIAMI HERALD, March 23, 2005, available at [http://www.acluf.org/news\\_events/alert\\_archive/index.cfm?action=viewRelease&emailAlertID=919](http://www.acluf.org/news_events/alert_archive/index.cfm?action=viewRelease&emailAlertID=919) (last visited on Aug. 3, 2006); Marc Caputo, *Justice Blasts Lawyers Over Death Row Appeals*, MIAMI HERALD, Jan. 28, 2005. Legislators have criticized these comments because Justice Cantero did not include names of inadequate registry counsel.

<sup>204</sup> Caputo, *supra* note 203.

<sup>205</sup> Gary Blankenship, *Registry Lawyers Defended at Committee Meeting*, FLA. B. NEWS, April 1, 2005.

lawful penalties to themselves ignore the precepts of their profession and their office.<sup>206</sup>

While it is clear that ineffective defense lawyering and prosecutorial misconduct exist within Florida's death penalty system, we were unable to assess whether judges are doing all within their power to remedy the harm caused by these acts and prevent the harm from occurring in the future. We are, therefore, unable to assess whether the State of Florida is in compliance with Recommendations #4 and #5.

*E. Recommendation # 6*

**Judges should do all within their power to ensure that defendants are provided with full discovery in all capital cases.**

Neither the Florida Statutes, Florida Rules of Criminal Procedure, nor the Florida Code of Judicial Conduct explicitly require judges to ensure that defendants are provided with full discovery in all capital cases. Canon 3 of the Judicial Code of Conduct, however, requires judges to be "faithful to the law" and perform their judicial duties fairly and impartially,<sup>207</sup> which presumably includes enforcing existing discovery rules and ensuring that defendants are provided with full discovery in capital cases.

Additionally, in certain instances, the Florida Rules of Criminal Procedure explicitly require judges to enforce the requirements of "reciprocal discovery." In all criminal cases, including capital cases, defendants may elect to participate in "reciprocal discovery," which allows the defendant to "inspect, copy, test and photograph,"<sup>208</sup> witness lists; witness statements; grand jury testimony of the defendant; tangible papers or objects that were obtained from or belonged to the defendant; tangible papers or objects that the prosecuting attorney intends to use in the hearing or trial that were not obtained from or that did not belong to the defendant; and expert reports or statements.<sup>209</sup> If the defendant elects to participate, but s/he or the state fails to comply with the requirements of "reciprocal discovery,"<sup>210</sup> the judge has the discretion to order the non-complying party to allow the discovery or inspection of discoverable materials;<sup>211</sup> prohibit the introduction of the undisclosed evidence; or prohibit any undisclosed witnesses from testifying.<sup>212</sup> Upon a showing of a "willful violation by counsel," the judge must subject the violating counsel to "appropriate sanctions," which may include,

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<sup>206</sup> *Gore v. State*, 719 So. 2d 1197, 1202 (Fla. 1998) (citing *Bertolotti v. State*, 476 So. 2d 130 (Fla. 1985)).

<sup>207</sup> FLA. CODE OF JUD. CONDUCT CANON 3(B)(2).

<sup>208</sup> FLA. R. CRIM. P. 3.220(b)(1).

<sup>209</sup> FLA. R. CRIM. P. 3.220(b)(1)(A)-(K). This rule also requires the prosecution to inform the defense if they are in possession of statements by confidential informants, whether there has been any electronic surveillance of the defendant, and whether there have been any search and seizures. FLA. R. CRIM. P. 3.220(b)(1)(G)-(I).

<sup>210</sup> The requirements for participating in "reciprocal discovery" are listed in Rule 3.220 of the Florida Rules of Criminal Procedure. *See* FLA. R. CRIM. P. 3.220.

<sup>211</sup> FLA. R. CRIM. P. 3.220(n)(1).

<sup>212</sup> FLA. R. CRIM. P. 3.220(b)(3).

but are not limited to, contempt proceedings against the counsel, as well as levying of costs incurred by the opposing party.<sup>213</sup>

On the issue of judicial discretion to remedy a party's noncompliance with the statute, Florida courts require the trial court to hold a *Richardson*<sup>214</sup> hearing to determine whether the discovery violation "(1) was willful or inadvertent, (2) was substantial or trivial, and (3) had a prejudicial effect on the aggrieved party's trial preparation."<sup>215</sup> Once the court determines that a violation exists, it has the discretion to choose the appropriate remedy or sanction.<sup>216</sup> However, the extreme sanction of excluding evidence "should be used only as a last resort" when no other remedy will suffice.<sup>217</sup>

Because we were unable to assess whether judges are doing all within their power to enforce the requirements of reciprocal discovery to ensure full discovery in capital cases, we are unable to determine whether the State of Florida meets the requirements of this Recommendation.

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<sup>213</sup> FLA. R. CRIM. P. 3.220(n)(2).

<sup>214</sup> See *Richardson v. State*, 246 So. 2d 771, 775 (Fla. 1971).

<sup>215</sup> *State v. Evans*, 770 So. 2d 1174, 1183 (Fla. 2000); *State v. Eaton*, 868 So. 2d 650, 653 (Fla. 2d DCA 2004).

<sup>216</sup> *Eaton*, 868 So. 2d 653 (citing *Hayden v. State*, 760 So. 2d 1031, 1033 (Fla. 2d DCA 2000)).

<sup>217</sup> See *id.* (citing *Livigni v. State*, 725 So. 2d 1150, 1151 (Fla. 2d DCA 1998)).



## CHAPTER TWELVE

### RACIAL AND ETHNIC MINORITIES

#### INTRODUCTION TO THE ISSUE

In the past twenty-five years, numerous studies evaluating decisions to seek and to impose the death penalty have found that race is all too often a major explanatory factor. Most of the studies have found that, holding other factors constant, the death penalty is sought and imposed significantly more often when the murder victim is white than when the victim is African-American. Studies also have found that in some jurisdictions, the death penalty has been sought and imposed more frequently in cases involving African-American defendants than in cases involving white defendants. The death penalty appears to be most likely in cases in which the victim is white and the perpetrator is black.

In 1987, the United States Supreme Court held in *McCleskey v. Kemp*<sup>1</sup> that even if statistical evidence revealed systemic racial disparity in capital cases, this would not amount to a federal constitutional violation in and of itself. At the same time, the Court invited legislative bodies to adopt legislation to deal with situations in which there were systematic racial disparity in death penalty implementation.

The pattern of racial discrimination reflected in *McCleskey* persists today in many jurisdictions, in part, because courts often tolerate actions by prosecutors, defense lawyers, trial judges, and juries that can improperly inject race into capital trials. These include intentional or unintentional prosecutorial bias when selecting cases in which to seek the death penalty; ineffective defense counsel who fail to object to systemic discrimination or to pursue discrimination claims; and discriminatory use of peremptory challenges to obtain all-white or largely all-white juries.

There is little dispute about the need to eliminate race as a factor in the administration of the death penalty. To accomplish that, however, requires that states identify the various ways in which race infects the administration of the death penalty and that they devise solutions to eliminate discriminatory practices.

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<sup>1</sup> 481 U.S. 279 (1987).

## I. FACTUAL DISCUSSION

The issue of racial and ethnic discrimination in the administration of the death penalty was brought to the forefront of the death penalty debate by the United States Supreme Court's decision in *McCleskey v. Kemp*.<sup>2</sup> Relying on a study conducted by David Baldus, Charles Pulaski, and George Woodworth (Baldus study), McCleskey challenged the constitutionality of Georgia's capital sentencing process by arguing that it was applied in a racially discriminatory manner because blacks convicted of killing whites were found to have the greatest likelihood of receiving the death penalty, while whites convicted of killing blacks were rarely sentenced to death.<sup>3</sup> The Court rejected McCleskey's claims, finding that the figures evidencing racial discrepancies in the administration of the death penalty did not prove the existence of intentional racial discrimination in his particular case.<sup>4</sup>

Following the Court's decision in *McCleskey*, the State of Florida explored the impact of race on Florida's criminal justice system through three different avenues: (1) the Florida Supreme Court's Racial and Ethnic Bias Study Commission, (2) the Florida Supreme Court's Ten Year Retrospective, and (3) the Governor's Task Force on Capital Cases.

### A. Florida Supreme Court's Racial and Ethnic Bias Study Commission

Nearly two years after the Court's decision in *McCleskey*, the Chief Justice of the Florida Supreme Court issued an administrative order creating the Racial and Ethnic Bias Study Commission (Commission) to (1) determine whether "race or ethnicity affects the dispensation of justice, either through explicit bias or unfairness implicit in the way the civil and criminal justice systems operate;" and (2) develop "long term strategies" for eradicating any bias uncovered by the Commission.<sup>5</sup>

To perform these tasks, the Commission "listen[ed] to extensive public testimony and conduct[ed] numerous empirical studies."<sup>6</sup> On December 11, 1990, the Commission released its initial report, which contained findings and recommendations on three aspects of the justice system: (1) the dearth of minorities in Florida's courthouses; (2) the treatment accorded minorities by law enforcement organizations; and (3) the processing of delinquency cases of minority juvenile offenders.<sup>7</sup> On the issue of the "dearth of minorities in Florida's courthouses," the Commission's report stated:

- (1) Minorities are significantly underrepresented as judges in Florida in

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 291-92.

<sup>4</sup> *Id.* at 297.

<sup>5</sup> EXECUTIVE SUMMARY: REPORTS & RECOMMENDATIONS OF THE FLORIDA SUPREME COURT RACIAL & ETHNIC BIAS COMMISSION, WHERE THE INJURED FLY FOR JUSTICE: REFORMING PRACTICES WHICH IMPEDE THE DISPENSATION OF JUSTICE TO MINORITIES IN FLORIDA, THE FLORIDA SUPREME COURT 11 (1990-91) [hereinafter EXECUTIVE SUMMARY], available at [http://www.flcourts.org/gen\\_public/pubs/bin/racial.pdf](http://www.flcourts.org/gen_public/pubs/bin/racial.pdf) (last visited on Aug. 5, 2006).

<sup>6</sup> *Id.* at 11.

<sup>7</sup> *Id.* at 4, 6, 8.

- proportion to their numbers in the general population, comprising only 5.5 percent of the 723 judges in the state;
- (2) The judicial appointive system has failed to achieve racial and ethnic diversity, in large measure because minorities are not included in the selection process and are underrepresented in the pool from which judges are drawn. Only 5.6 percent and 3.6 percent of the membership of the judicial nominating commissions are, respectively, African-American and Hispanic. Almost half of the commissions have no minority members at all;
  - (3) The election process (for trial court judges) has not yielded significant representation of minorities in the judiciary in Florida;
  - (4) No African-American attorneys are employed in attorney positions by either the Florida Supreme Court or any district court of appeal; and
  - (5) African-Americans, Hispanics, and Native Americans continue to be poorly represented generally in the work force of the circuit and county courts, as officials and administrators in the clerk of the circuit courts' offices, some state attorneys' offices, and certain court-related executive agencies.<sup>8</sup>

In light of these findings, the Commission made a number of recommendations, including, but not limited to:

- (1) The Florida Legislature should mandate representative minority attorney and citizen membership on each judicial nominating commission in Florida;
- (2) Each judicial nominating commission should, by rule, establish a model plan for recruiting qualified minority candidates for judicial appointment, updating the plan as appropriate to account for experience gained in the recruitment process; and
- (3) The Governor should establish, as a top priority, the increase of minorities among his/her appointments to Florida's bench.<sup>9</sup>

In addition to the Commission's findings on the underrepresentation of minorities in the judicial system, the Commission also found that "extensive evidence suggests that minorities are too often subjected to the threat of abuse and brutality by law enforcement organizations. Survey responses suggest that African-Americans and Hispanic individuals are stopped and detained more frequently than a non-minority would be under similar circumstances and are treated with less respect and more unnecessary force than are their white counterparts."<sup>10</sup> As a result of this finding, the Commission made a number of recommendations, including, but not limited to:

- (1) The Legislature should create and fund a new division within the Attorney General's Office to be called the "Civil Rights Division." This Division

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<sup>8</sup> *Id.* at 4-5.

<sup>9</sup> *Id.* at 5.

<sup>10</sup> *Id.* at 6.

- would be charged with the authority and responsibility to bring injunctive and compensatory suits against individuals and agencies, including law enforcement agencies, which engage in harassment or other inappropriate conduct on the basis of race or ethnicity;
- (2) The Legislature should mandate that each law enforcement agency adopt a policy which regulates the use of force and domination on stops, recognizes that excessive force is an impediment to stable and effective law enforcement, and provides disciplinary action for violations of the policy; and
  - (3) The Legislature should amend Chapter 943 of the Florida Statutes, to mandate the following improvements to law enforcement training in Florida:
    - (a) cultural representation among police instructors;
    - (b) development of a “train the trainer” curriculum for Florida’s law enforcement instructors and certification of all instructors by attending “train the trainer” classes, especially on racial and ethnic bias related-topics;
    - (c) specialized training for internal affairs officers in the area of ensuring equality and fairness in the investigation of internal affairs complaints;
    - (d) an increase in the number of hours designated for training on ethnic and cultural groups;
    - (e) integration of concepts relating to racial and ethnic bias into other courses in the Criminal Justice Standards and Training curriculum;
    - (f) reclassification of racial and ethnic relations topics as “proficiency” areas, subject to serious standardized testing;
    - (g) instruction in cross-cultural awareness and communications for Field Training Officers;
    - (h) the development of standardized, uniform, specific, and culturally sensitive lesson plans and instructors’ guides in high risk/critical task areas identified as important because of their effect upon the minority community, as well as the monitoring and inspection of the classes covering these areas;
    - (i) the updating of videotapes and other materials used in race and ethnicity-related training;
    - (j) the initiation of community interaction sessions at each training center through interaction components in the training classes; and
    - (k) for chief executives, including sheriffs and police chiefs, training in areas relating to racial, ethnic and cultural awareness.<sup>11</sup>

Following these findings, the Commission released its second report in 1991, addressing the “disproportionate number of minorities in the criminal justice system and the lack of minority presence within the legal profession.”<sup>12</sup> The Commission’s report again included a number of findings and recommendations. For example, the Commission

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<sup>11</sup> *Id.* at 7-8.

<sup>12</sup> *Id.* at 11.

found that “the present system of selecting jurors through the list of registered voters does not result in juries which are racial and ethnic composites of the community.”<sup>13</sup> As a result, the Commission recommended that “[t]he Florida Legislature [] further resolve to ensure that jury composition accurately reflects the diversity of the population, allowing the community conscience to be voiced through the judicial process.”<sup>14</sup>

Unlike its initial report, the Commission’s second report specifically addressed the impact of racial bias on the administration of the death penalty. The Commission’s findings on this issue were based at least in part on a study partially funded by the Commission, but conducted by Michael L. Radelet and Glenn L. Pierce.<sup>15</sup> The Commission’s findings included:

- (1) The application of the death penalty in Florida is not colorblind, inasmuch as a criminal defendant in a capital case is, other things being equal, 3.4 times more likely to receive the death penalty if the victim is White than if the victim is an African-American;
- (2) Since 1972, 18 percent of all capital cases have involved a judicial override of a jury recommendation of life imprisonment. The discretionary authority of the judge to override a jury’s recommendation of life opens up an additional window of opportunity for bias to enter into the capital sentencing decision. This discretion is too often influenced by public pressure for punishment and retribution; and
- (3) Society must intensify its efforts to address the underlying economic and social issues and conditions which contribute to the tragically high rate of incarceration of minorities on death row.<sup>16</sup>

Based on these findings, the Commission recommended that “the Florida Legislature [] amend [section] 921.141(3) [of the] Florida Statutes, to prohibit judges from imposing the death penalty in cases where the jury has recommended a sentence of life imprisonment.”<sup>17</sup>

### *B. Florida Supreme Court’s Ten-Year Retrospective*

In early 2000, an Advisory Committee, created as part of Chief Justice Charles Wells’ Ten-Year Retrospective, preliminary explored the extent to which the State of Florida had implemented the Commission’s 1990 and 1991 recommendations.<sup>18</sup> The purpose of

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<sup>13</sup> *Id.* at 13.

<sup>14</sup> *Id.* at 13.

<sup>15</sup> Michael L. Radelet & Glen L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 FLA. L. REV. 1 (1991). Of course, the data reported in this study could be explained by nonracial factors, but it should also be noted that the study used regression analysis to take into account factors such as the number of victims, the number of offenders, the weapon used, and the victim-offender relationship. *Id.*

<sup>16</sup> EXECUTIVE SUMMARY, *supra* note 5, at 15.

<sup>17</sup> *Id.*

<sup>18</sup> “WHERE THE INJURED FLY FOR JUSTICE”: A TEN-YEAR RETROSPECT ON THE REPORT AND RECOMMENDATIONS OF THE FLORIDA SUPREME COURT RACIAL AND ETHNIC BIAS STUDY COMMISSION, at ii

the Ten-Year Retrospective was to “ensur[e] continuing progress in the equitable treatment of and full participation by racial and ethnic minorities in the Florida State Courts System.”<sup>19</sup> In December 2000, the Advisory Committee released a report identifying the implementation status of the Commission’s 1990 and 1991 recommendations.<sup>20</sup>

The Advisory Committee was not able to confirm the implementation status of all of the Commission’s recommendations, but of those that it was able to confirm, it appears that only some of those recommendations have been implemented either in full or in part by the State of Florida.<sup>21</sup> On the issue of law enforcement interaction with minorities, for example, the Advisory Committee found that a number of the Commission’s recommendations had been effectively implemented, leading to improvements in law enforcement training (including cultural awareness).<sup>22</sup> In contrast, on the issue of the death penalty, the Advisory Committee found that although two bills were introduced during the 1992 Legislative Session to abolish judicial override in capital cases, both bills died in committee.<sup>23</sup>

The Advisory Committee also found that due to Governor Childers’ and Bush’s implementation of policies encouraging diversity of Florida’s judges, “minority judges at the trial court level ha[d] increased from 5.8% in 1990 to 11.4% in 2000; minority judges at the district court of appeal level ha[d] increased from only 3.5% in 1990 to 14.7% in 2000; and minority judges at the supreme court level ha[d] increased from 14.2% in 1990 to 28.5% in 2000.”<sup>24</sup> However, the Advisory Committee found that “[d]espite these advances, the judiciary as a whole still [did] not accurately reflect the rich cultural diversity of our state.”<sup>25</sup>

In the end, the Advisory Committee found that “[w]hile much progress has been made in the last ten years, much remains to be done.”<sup>26</sup> In order to further address these issues, the Advisory Committee stated that the Florida Supreme Court needed to secure adequate resources, including staff and funding, to “fully assess the implementation status [of all of the recommendations] and develop a comprehensive action plan for moving forward.”<sup>27</sup> The Advisory Committee recommended that particular attention be paid to the implementation of recommendations pertaining to “improving the judicial nominating/appointment process[,] as it impacts on the diversity of the bench,” and

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(2000) [hereinafter TEN-YEAR RETROSPECT], available at [http://www.flcourts.org/gen\\_public/family/diversity/bin/bias\\_study2.pdf](http://www.flcourts.org/gen_public/family/diversity/bin/bias_study2.pdf) (last visited on Aug. 5, 2006).

<sup>19</sup> *Id.*

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

<sup>21</sup> *Id.* at 13.

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

<sup>23</sup> *Id.* at 29.

<sup>24</sup> *Id.* at 3.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at ii.

<sup>27</sup> *Id.*

“reducing the disparate impact of sentencing policies and practices on racial and ethnic minorities.”<sup>28</sup>

### C. Governor’s Task Force on Capital Cases

On January 7, 2000, Governor Jeb Bush established, by Executive Order 2000-1, a fifteen member task force—the Task Force on Capital Cases—to “study evidence of discrimination, if any, in the sentencing of defendants in capital cases, including consideration of race, ethnicity, gender, and the possible mental retardation of the defendant.”<sup>29</sup> The Task Force on Capital Cases (Task Force) was composed of, but not limited to: four prosecutors or ex-prosecutors; two police officers; four victims or relatives of murder and rape victims; and two defenders.<sup>30</sup> The Executive Order required the Task Force to submit a report of its findings to the Governor, Florida Supreme Court, the President of the Senate, and the Speaker of the House of Representatives by no later than March 1, 2000.<sup>31</sup>

On March 31, 2000, the Task Force held a public meeting to discuss and present its findings.<sup>32</sup> The Task Force concluded that previous studies showing that racial bias exists in the capital punishment process in Florida are outdated and may have relied on flawed methodology.<sup>33</sup> The Task Force, therefore, recommended that a study on this issue be funded by the Florida Legislature and designed and conducted by a committee of experts in death penalty litigation appointed by the Governor, the Legislature, and the Florida Supreme Court.<sup>34</sup> The Task Force also recommended that the Legislature establish an information clearinghouse on race and the death penalty at Florida A & M University.<sup>35</sup>

In addition to these recommendations, the Task Force made the following recommendations:

- (1) Defense lawyers should be able to question jurors privately about racial bias;
- (2) Judges should advise jurors that race, gender and ethnicity may not influence their deliberations;
- (3) State attorneys should do their best to recruit minority attorneys to handle capital cases; and

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<sup>28</sup> *Id.* at ii-iii.

<sup>29</sup> Fla. Exec. Order No. 2000-1 (2000), available at [http://sun6.dms.state.fl.us/eog\\_new/eog/orders/2000/january/eo2000-1.html](http://sun6.dms.state.fl.us/eog_new/eog/orders/2000/january/eo2000-1.html) (last visited on Aug. 5, 2006); see also Sydney P. Freedberg & William Yardley, *Lethal Injection Approved*, ST. PETERSBURG TIMES, Jan. 7, 2000.

<sup>30</sup> Martin Dyckman, *The Consequences of Consequences*, ST. PETERSBURG TIMES, Jan. 20, 2000.

<sup>31</sup> Fla. Exec. Order No. 2000-1, *supra* note 29.

<sup>32</sup> Executive Office of Governor, Section VI Notices of Meetings, Workshops, and Public Hearings, 26 Fla. Admin. Weekly 1568 No. 13 (2000), available at <http://faw.dos.state.fl.us/fawframes.html> (last visited on Aug. 5, 2006).

<sup>33</sup> Jo Becker, *Task Force: Death Penalty Bias Unclear*, ST. PETERSBURG TIMES, April 8, 2000.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

(4) Judicial nominating committees should nominate more minorities.<sup>36</sup>

To date, however, the majority of these recommendations have not been implemented.

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<sup>36</sup> *Id.*

## II. ANALYSIS

### A. Recommendation #1

**Jurisdictions should fully investigate and evaluate the impact of racial discrimination in their criminal justice systems and develop strategies that strive to eliminate it.**

The State of Florida has undertaken three initiatives that explored the impact of racial discrimination in its criminal justice system: (1) the Florida Supreme Court's Racial and Ethnic Bias Study Commission, (2) the Florida Supreme Court's Ten-Year Retrospective, and (3) the Governor's Task Force on Capital Cases.

Between 1990 and 1991, the Florida Supreme Court's Racial and Ethnic Bias Study Commission investigated five issues involving Florida's criminal justice system: (1) the dearth of minorities in Florida's courthouses; (2) the treatment accorded minorities by law enforcement organizations; (3) the processing of delinquency cases of minority juvenile offenders;<sup>37</sup> (4) the disproportionate number of minorities in the criminal justice system; and (5) the lack of minority presence within the legal profession.<sup>38</sup> The Commission's investigation included listening to "extensive public testimony" and conducting "numerous empirical studies," and resulted in the release of two reports containing startling findings on these five issues.<sup>39</sup>

Not only were minorities found to be significantly underrepresented as judges (i.e., minorities comprised only 5.5 percent of the 723 judges in the state),<sup>40</sup> but they also were found to be treated by law enforcement organizations differently from non-minorities under similar circumstances.<sup>41</sup> The Commission similarly found that criminal defendants are sentenced differently depending upon the race of their victims.<sup>42</sup> Specifically, the Commission found that a criminal defendant is 3.4 times more likely to receive the death penalty if the victim is white than if the victim is an African-American.<sup>43</sup>

In an attempt to address these issues and others like them, the Commission made over eighty recommendations for reform. For example, to address the under-representation of minorities as judges, the Commission recommended, among other things, that the Governor establish, as a top priority, increasing the number of minorities among his appointments to Florida's bench.<sup>44</sup> The effect that these recommendations had on Florida's criminal justice was not explored until 2000, when then-Chief Justice Charles Wells of the Florida Supreme Court tasked an Advisory Committee to review the

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<sup>37</sup> EXECUTIVE SUMMARY, *supra* note 5, at 4.

<sup>38</sup> *Id.* at 11.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 4.

<sup>41</sup> *Id.* at 6.

<sup>42</sup> *Id.* at 15.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 5.

implementation status of the Commission’s recommendations, as part of the Florida Supreme Court’s Ten-Year Retrospective.<sup>45</sup>

The Advisory Committee did not independently investigate and evaluate the impact of racial discrimination in Florida’s criminal justice system. Rather, it assessed the implementation status of the Commission’s 1990 and 1991 recommendations.<sup>46</sup> Although the Advisory Committee found that some of the recommendations had been implemented either in whole or in part, it also found that additional progress was needed in a number of areas, including “improving the judicial nominating/appointment process as it impacts on the diversity on the bench” and “reducing the disparate impact of sentencing policies and practices on racial and ethnic minorities.”<sup>47</sup> In fact, the Advisory Committee commented that “racial disparity in capital cases continues to be a controversial topic. During the 2000 special legislative session, this issue was hotly debated in the Florida Legislature.”<sup>48</sup>

At least in part because of these debates, the Governor established, in January 2000, a Task Force on Capital Cases to “study evidence of discrimination, if any, in the sentencing of defendants in capital cases, including consideration of race, ethnicity, gender, and the possible mental retardation of the defendant.”<sup>49</sup> The method used by the Task Force to study these issues is unclear, but it appears that the Task Force may have reviewed at least some of the then-existing research on racial discrimination and capital sentencing in Florida.

In March 2000, the Task Force held a public meeting to discuss and present its findings,<sup>50</sup> and the Task Force concluded that the research indicating that racial bias exists in the capital punishment process was outdated and/or flawed.<sup>51</sup> The Task Force then made a number of recommendations, including but not limited to, that a “committee of experts” be appointed to undertake a state-funded review of the capital punishment process in Florida.<sup>52</sup> To date, however, the State of Florida has not established this committee.

Although the State of Florida has previously examined the impact of racial discrimination in its criminal justice system and made recommendations that strive to eliminate the impact of racial discrimination, the majority of these recommendations have not been implemented. As a result, the State of Florida needs to (1) reexamine the impact of racial discrimination in its criminal justice system, (2) thoroughly investigate the impact of racial discrimination in capital sentencing, and (3) develop new strategies to eliminate

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<sup>45</sup> TEN-YEAR RETROSPECT, *supra* note 18, at ii.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 30.

<sup>49</sup> Fla. Exec. Order No. 2000-1, *supra* note 29.

<sup>50</sup> Executive Office of Governor, Section VI Notices of Meetings, Workshops, and Public Hearings, *supra* note 32.

<sup>51</sup> Becker, *supra* note 33.

<sup>52</sup> *Id.*

racial discrimination. Based on this information, the State of Florida is only in partial compliance with Recommendation #1.

*B. Recommendation #2*

**Jurisdictions should collect and maintain data on the race of defendants and victims, on the circumstances of the crime, on all aggravating and mitigating circumstances, and on the nature and strength of the evidence for all potential capital cases (regardless of whether the case is charged, prosecuted, or disposed of as a capital case). This data should be collected and maintained with respect to every stage of the criminal justice process, from reporting of the crime through execution of the sentence.**

Recognizing the need for the collection of this type of data, the Governor's Task Force on Capital Cases recommended in 2000, that the Florida Legislature establish an information clearinghouse on race and the death penalty at Florida A & M University.<sup>53</sup> To date, however, it does not appear that the Florida Legislature has established such clearinghouse, nor is any state entity currently collecting or maintaining through any other means data on the race of defendants and victims, on the circumstances of the crime, on all aggravating and mitigating circumstances, and on the nature and strength of the evidence for all potential capital cases at all stages of the proceedings. Based on this information, the State of Florida is not in compliance with Recommendation #2.

*C. Recommendation #3*

**Jurisdictions should collect and review all valid studies already undertaken to determine the impact of racial discrimination on the administration of the death penalty and should identify and carry out any additional studies that would help determine discriminatory impacts on capital cases. In conducting new studies, states should collect data by race for any aspect of the death penalty in which race could be a factor.**

To the best of our knowledge, the State of Florida is not currently collecting and reviewing all valid studies already undertaken to determine the impact of racial discrimination on the death penalty, nor is it identifying and carrying out any additional studies that would help determine discriminatory impacts on capital cases.

Between 1990 and 1991, however, the Florida Supreme Court's Racial and Ethnic Bias Study Commission partially funded a study by Michael L. Radelet and Glen L. Pierce that not only reviewed then-existing empirical research on Florida's death penalty, but also analyzed all death sentences between 1976 and 1987.<sup>54</sup> In reviewing then-existing research, Radelet and Pierce stated that "[t]aken as a whole, the [] eleven studies [reviewed] give strong evidence of racial disparities in capital sentencing in Florida. That those who kill whites are more likely to be sentenced to death appears to be an

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

<sup>54</sup> Radelet & Pierce, *supra* note 15, at 2 (noting that "the Commission gave the researchers complete autonomy in conducting this research").

undeniable fact.”<sup>55</sup> Radelet’s and Pierce’s study of Florida’s death sentences between 1976 and 1987 confirmed this statement and found that “the odds of a death sentence are 3.42 times higher for defendants who are suspected of killing whites than for defendants suspected of killing blacks.”<sup>56</sup>

Approximately ten years after the Radelet and Pierce study, Governor Jeb Bush established the Task Force on Capital Cases (Task Force) to “study evidence of discrimination, if any, in the sentencing of defendants in capital cases, including [but not limited to] consideration of race [and] ethnicity.”<sup>57</sup> The method used by the Task Force to conduct the study is unclear, but it appears that the Task Force may have reviewed at least some of the then-existing research on the impact of race on the administration of the death penalty in Florida. The Task Force, which did not include any social scientists,<sup>58</sup> concluded that studies showing that racial bias exists in the capital punishment process in Florida are outdated and may have relied on flawed methodology.<sup>59</sup> Despite this conclusion, the Task Force recommended that further study be conducted on this issue by a committee of experts in death penalty litigation.<sup>60</sup> However, to date, it does not appear that “a committee of experts” has been appointed to undertake a state-funded review of the capital punishment process in Florida. It is noteworthy that since the Task Force met, several analyses of the impact of race in capital cases—all of which strongly suggest that racial bias exists in Florida—have been released and have yet to be officially addressed by the State of Florida.<sup>61</sup>

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<sup>55</sup> *Id.* at 16. The study reviewed a number of studies including, but not limited to: (1) William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 26 CRIME & DELINQ. 563, 599 (1980) (finding white victim bias); (2) Han Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456 (1981) (finding that “[t]he prosecutor has overpowering control over the flow of offenders to death row” and suggesting that prosecutors were often racially biased); (3) Michael L. Radelet, *Racial Characteristics and the Imposition of the Death Penalty*, 46 AM. SOC. REV. 918 (1981) (finding, among 637 homicide indictments in twenty Florida counties during 1976 and 1977, that those who killed whites were substantially more likely to receive a death sentence after controlling for several nonracial factors that might be thought to explain the racial differences); (4) Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 L. & SOC’Y REV. 587, 612 (1984) (finding that among Florida homicide cases from a random sample of twenty-one counties, prosecutors were most likely to pursue the death penalty in cases in which the victim was white); and (5) Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 108 (1984) (finding “a remarkably stable and consistent” pattern of racial discrimination in the imposition of the death penalty in Arkansas, Florida, Georgia, Illinois, Mississippi, North Carolina, Oklahoma, and Virginia, largely based on race of victim). *Id.* at 7-17.

<sup>56</sup> *Id.* at 28.

<sup>57</sup> Fla. Exec. Order No. 2000-1, *supra* note 29; *see also* Dyckman, *supra* note 30 (stating that the purpose of the Task Force was characterized by some as being to “trash all of the racial research that’s been done in Florida”).

<sup>58</sup> Dyckman, *supra* note 30. The make-up of the Task Force was criticized by some as being “unbalanced.” *Id.*

<sup>59</sup> Becker, *supra* note 33.

<sup>60</sup> *Id.*

<sup>61</sup> David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DePaul L. Rev. 1411, 1419 (2004) (summarizing research on Florida cases that substantiates race-of-victim bias but does not substantiate race-of-defendant effect; also stating that “[i]n states with strong evidence of race-of-victim discrimination, such

Based on this information, the State of Florida is not in compliance with Recommendation #3. Accordingly, the Florida Death Penalty Assessment Team makes the following recommendation: The State of Florida should sponsor a study to determine the existence or non-existence of unacceptable disparities, whether they be racial, socio-economic, geographic, or otherwise in its death penalty system, or, at least, implement the recommendations of its 2000 Governor’s Task Force on Capital Cases.

*D. Recommendation #4*

**Where patterns of racial discrimination are found in any phase of the death penalty administration, jurisdictions should develop, in consultation with legal scholars, practitioners, and other appropriate experts, effective remedial and prevention strategies to address the discrimination.**

In 1991, the Florida Supreme Court’s Racial and Ethnic Bias Study Commission found that “the application of the death penalty in Florida is not colorblind.”<sup>62</sup> In support of this finding, the Commission referenced a statistic from the Radelet and Pierce study: “the odds of a death sentence are 3.42 times higher for defendants who are suspected of killing whites than for defendants suspected of killing blacks.”<sup>63</sup> On this issue, the Commission also found:

- (1) Since 1972, 18 percent of all capital cases have involved a judicial override of a jury recommendation of life imprisonment. The discretionary authority of the judge to override a jury’s recommendation of life opens up an additional window of opportunity for bias to enter into the capital sentencing decision. This discretion is too often influenced by public pressure for punishment and retribution; and
- (2) Society must intensify its efforts to address the underlying economic and social issues and conditions which contribute to the tragically high rate of incarceration of minorities on death row.<sup>64</sup>

In response to these findings, the Commission recommended that “the Florida Legislature [] amend [section] 921.141(3) [of the] Florida Statutes, to prohibit judges from imposing

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as Florida, . . . we estimate that one quarter to one third of death-sentenced defendants with white victims would have avoided the death penalty if their victims had been black”); William Bowers et al., *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing When the Defendant Is Black and the Victim Is White*, 53 DePaul L. Rev. 1497, 1528-32 (2004) (including a description of a Florida case in which the jury divided along racial lines); and William S. Lofquist, *Putting Them There, Keeping Them There, and Killing Them: An Analysis of State Level Variations in Death Penalty Intensity*, 87 Iowa L. Rev. 1505, 1535-36, 1542 (2002) (finding that Florida exhibits a fairly high degree of “death penalty intensity” as measured by its number of death sentences, executions, etc., and then concluding that “[v]ariables directly or indirectly measuring issues of race were particularly strongly related to death penalty intensity”; further, the “contemporary practice of the death penalty in [states like Florida] is linked to the system of race-based social control that developed through slavery and was extended through the convict lease system, lynching, Jim Crow, and the pre-Furman use of the death penalty.”).

<sup>62</sup> EXECUTIVE SUMMARY, *supra* note 5, at 15.

<sup>63</sup> Radelet & Pierce, *supra* note 15.

<sup>64</sup> EXECUTIVE SUMMARY, *supra* note 5, at 15.

the death penalty in cases where the jury has recommended a sentence of life imprisonment.”<sup>65</sup> Although attempts have been made to implement this recommendation, it has yet to be adopted by the Florida Legislature.<sup>66</sup>

Data compiled since the release of the Commission’s report in 1991 collaborate the racial disparities identified by the Commission. The Orlando Sentinel released a study in 1992, finding that “[j]ustice [] is not colorblind in Central Florida when it comes to the prosecution of first-degree murder cases.”<sup>67</sup> The Sentinel study focused on “how often prosecutors seek the death penalty and why” by analyzing all 283 first-degree murder cases prosecuted from January 1, 1986 through September 30, 1991, in Orange, Osceola, Seminole, Brevard, Lake and Volusia counties.<sup>68</sup> Based on these cases, the Sentinel found that “[p]rosecutors more often sought death for killers of whites.”<sup>69</sup> For example:

- (1) In spousal killings, [prosecutors] sought the death penalty 3 1/2 times more often in cases with white victims than those involving black or Hispanic victims.
- (2) In cases in which victims and accused killers were friends or relatives, prosecutors in Orange and Seminole counties asked for the death penalty four times more often when the victim was white. When victims and killers were strangers, prosecutors asked for the death penalty in white-victim cases 50 percent more often.
- (3) In cases in which the accused killer was charged with committing another felony along with the killing, prosecutors in Orange and Seminole counties sought death 3 1/2 times more often when the victim was white. When no other felony was involved, the figure was 50 percent more often in white-victim cases.<sup>70</sup>

Similarly, “statistics compiled by Radelet showed that of the 368 inmates on death row as of December 10, [1999,] only five [were] whites condemned for killing blacks. Six other whites were condemned for the serial killings of whites and blacks. And three other whites were sentenced to death for killing Hispanics.”<sup>71</sup> In 2000, the Governor’s Task Force on Capital Cases, which was not composed of a single social scientist, dismissed then-existing data showing that racial bias exists in the capital punishment process in Florida as outdated and potentially flawed and made a number of recommendations

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<sup>65</sup> *Id.*

<sup>66</sup> TEN-YEAR RETROSPECT, *supra* note 18, at 29-30.

<sup>67</sup> Bob Levenson & Debbie Salamone, *Prosecutors See Death Penalty in Black and White*, ORLANDO SENTINEL, May 24, 1992.

<sup>68</sup> *Id.* We note that it appears that this study only includes cases in which death was sought and does not include cases in which it was not sought. Therefore, it did not compare either the quality or quantity of aggravating circumstances present in those cases where the death penalty was sought as opposed to those cases where it was not.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Freedberg & Yardley, *supra* note 29.

pertaining to race and the death penalty,<sup>72</sup> implying that at least some problems exist within the system.

Although the Florida Supreme Court's Racial and Ethnic Bias Study Commission and the Governor's Task Force on Capital Cases made recommendations to address potential discrimination, few of those recommendations have been implemented. Additionally, the State of Florida is not currently developing new remedial and preventative strategies to address the apparent racial disparities in the administration of the death penalty. Therefore, the State of Florida is only in partial compliance with Recommendation #4.

*E. Recommendation #5*

**Jurisdictions should adopt legislation explicitly stating that no person shall be put to death in accordance with a sentence sought or imposed as a result of the race of the defendant or the race of the victim. To enforce such a law, jurisdictions should permit defendants and inmates to establish *prima facie* cases of discrimination based upon proof that their cases are part of established racially discriminatory patterns. If such a *prima facie* case is established, the State should have the burden of rebutting it by substantial evidence.**

The State of Florida has not adopted legislation explicitly stating that no person shall be put to death in accordance with a sentence sought or imposed as a result of the race of the defendant or the race of the victim. Therefore, the State of Florida is not in compliance with Recommendation #5. It should be noted, however, that during the 2000 legislative session, two bills were introduced prohibiting the imposition of the death penalty based on race, but both bills died in committee.<sup>73</sup>

*F. Recommendation #6*

**Jurisdictions should develop and implement educational programs applicable to all parts of the criminal justice system to stress that race should not be a factor in any aspect of death penalty administration. To ensure that such programs are effective, jurisdictions also should impose meaningful sanctions against any State actor found to have acted on the basis of race in a capital case.**

In 1990, the Florida Supreme Court's Racial and Ethnic Bias Study Commission found significant evidence suggesting that minorities are too often subjected to the threat of abuse and brutality by law enforcement officers; as a result, it recommended, among

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<sup>72</sup> Becker, *supra* note 33.

<sup>73</sup> S.B. 1662, Florida Racial Justice Act (Fla. 2000), available at [http://www.flsenate.gov/Session/index.cfm?Mode=Bills&Submenu=1&BI\\_Mode=ViewBillInfo&Billnum=1662&Year=2000](http://www.flsenate.gov/Session/index.cfm?Mode=Bills&Submenu=1&BI_Mode=ViewBillInfo&Billnum=1662&Year=2000) (last visited on Aug. 5, 2006); S.B. 2600 Relating to Capital Punishment (Fla. 2000), available at [http://www.flsenate.gov/Session/index.cfm?Mode=Bills&Submenu=1&BI\\_Mode=ViewBillInfo&Billnum=2600&Year=2000](http://www.flsenate.gov/Session/index.cfm?Mode=Bills&Submenu=1&BI_Mode=ViewBillInfo&Billnum=2600&Year=2000) (last visited on Aug. 5, 2006).

other things, the development of extensive racial sensitivity policies and training to improve the treatment of minorities.<sup>74</sup>

At least in part because of these recommendations, Florida law currently requires the Criminal Justice Standards and Training Commission (CJSTC),<sup>75</sup> which is the regulatory body that oversees the training of law enforcement candidates,<sup>76</sup> to “establish and maintain standards for instruction of officers in the subject of interpersonal skills relating to diverse populations, with an emphasis on the awareness of cultural differences.”<sup>77</sup> Individual law enforcement officers are specifically required to complete a basic training course<sup>78</sup> at a training academy authorized by the CJSTC, which consists of at least eight hours of training in interpersonal skills with diverse populations.<sup>79</sup>

The Coordinator’s Guide for the Florida Department of Law Enforcement’s Basic Recruit Training does not have a unit on race, but practically every unit of the Guide mentions race in one way or another. For instance, in the introductory unit, the Guide states: “There is no place for bias or remarks as they relate to racial, gender, religious, and political views.”<sup>80</sup> It also states that “[s]topping or searching individuals on the basis of age, ethnicity, gender or race is not effective law enforcement policy, is inconsistent with our democratic ideals, and strictly prohibited . . . . Us[e] of age, ethnicity, gender or race as a proxy for criminality is wrong, it offends the very meaning and purpose of the Constitution, an entire body of civil rights laws, and the . . . ethical standards for police conduct policy.”<sup>81</sup>

Following basic recruit training, “each officer [must] receive, as part of the 40 hours of required instruction for continued employment . . . instruction in the subject of interpersonal skills relating to diverse populations, with an emphasis on the awareness of cultural differences.”<sup>82</sup> The curriculum for instruction on continued employment should include: “standardized proficiency instruction relating to high-risk and critical tasks which include, but are not limited to, stops, use of force and domination, and other areas of interaction between officers and members of diverse populations.”<sup>83</sup>

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<sup>74</sup> EXECUTIVE SUMMARY, *supra* note 5, at 6-8.

<sup>75</sup> For a description of the membership and responsibilities of the Criminal Justice Standards and Training Commission, see FLA. STAT. §§ 943.11, 943.12 (2006).

<sup>76</sup> FLA. STAT. §§ 943.11, 943.12 (2006)

<sup>77</sup> FLA. STAT. § 943.1715.

<sup>78</sup> The law enforcement candidate must successfully complete a commission-approved basic recruit training program for the applicable criminal justice discipline, unless exempted. FLA. STAT. § 943.13(9) (2006); FLA. ADMIN. CODE R. 11B-35.002 (2006) (providing for the basic training course at a training academy authorized by the Criminal Justice Standards and Training Commission).

<sup>79</sup> FLA. STAT. § 943.1715 (2006).

<sup>80</sup> CRIMINAL JUSTICE STANDARDS AND TRAINING COMMISSION, LAW ENFORCEMENT BASIC RECRUIT CURRICULUM, module 1, unit 1, p.29 (2005) [hereinafter BASIC RECRUIT CURRICULUM] (on file with author).

<sup>81</sup> *Id.* at 212.

<sup>82</sup> FLA. STAT. § 943.1716 (2006).

<sup>83</sup> FLA. STAT. § 943.1758 (2006).

Along with the statutory requirements for individual officers, a number of law enforcement certification bodies recommend or require that law enforcement agencies adopt policies on racial sensitivity. For example, the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA)<sup>84</sup> and the Commission for Florida Law Enforcement Accreditation (CFLEA)<sup>85</sup> require certified police departments, sheriff's departments, state law enforcement agencies, state highway patrols, transportation police departments, training academies, and university police departments to establish a written directive that, at a minimum, prohibits bias-based profiling and requires training on how to avoid biased-based profiling.<sup>86</sup> The CALEA and CFLEA standards requirements, however, only pertain to certified police departments, sheriff's departments, state law enforcement agencies, state highway patrols, transportation police departments, training

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<sup>84</sup> Fifty-eight police departments, sheriff's departments, state law enforcement agencies, state highway patrols, transportation police departments, training academies, and university police departments in Florida have been accredited or are in the process of obtaining accreditation by the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA). See CALEA Online, Agency Search, at <http://www.calea.org/agcysearch/agencysearch.cfm> (last visited on Aug. 5, 2006) (use second search function, designating "U.S." and "Florida" as search criteria); see also CALEA Online, About CALEA, at <http://www.calea.org/newweb/AboutUs/Aboutus.htm> (last visited on Aug. 5, 2006) (noting that CALEA is an independent accrediting authority established by the four major law enforcement membership associations in the United States: International Association of Chiefs of Police (IACP); National Organization of Black Law Enforcement Executives (NOBLE); National Sheriffs' Association (NSA); and Police Executive Research Forum (PERF)). To obtain accreditation, a law enforcement agency must complete a comprehensive process consisting of (1) purchasing an application; (2) executing an Accreditation Agreement and submitting a completed application; (3) completing an Agency Profile Questionnaire; (4) completing a thorough self-assessment to determine whether the law enforcement agency complies with the accreditation standards and developing a plan to come into compliance; (5) undergoing an on-site assessment by a team selected by CALEA to determine compliance who, in turn, will submit a compliance report to CALEA; and (6) participating in a hearing where a final decision on accreditation is rendered. See CALEA Online, The Accreditation Process, at <http://www.calea.org/newweb/accreditation%20Info/process1.htm> (last visited on Aug. 5, 2006).

<sup>85</sup> One hundred twenty-nine police departments, sheriff's departments, state law enforcement agencies, state highway patrols, transportation police departments, training academies, and university police departments in Florida have obtained accreditation under the CFLEA standards. COMMISSION FOR FLA. LAW ENFORCEMENT ACCREDITATION: STANDARDS MANUAL (4<sup>th</sup> ed. 2004) [hereinafter CFLEA STANDARDS], available at <http://www.flaccreditation.org/standards.htm> (last visited on Aug. 5, 2006) (click on "4th Edition Standards Manual").

<sup>86</sup> CFLEA STANDARDS, *supra* note 85, at 2:5 (Standard 2.08 M). Standard 2.08 M specifically states:

The agency has a directive governing bias-based profiling in accordance with Florida Statutes and, at a minimum, includes the following provisions:

- A. A prohibition against bias based profiling in traffic contacts, field contacts, and in asset seizure and forfeiture efforts;
- B. Training agency enforcement personnel in bias based profiling issues including legal aspects; in accordance with CJSTC guidelines;
- C. Corrective measures if bias based profiling occurs;
- D. Definitions to include bias based profiling and reasonable suspicion;
- E. Traffic stop procedures;
- F. Community education and awareness efforts; and
- G. An annual administrative review of agency practices including citizen complaints and documented concerns.

*Id.*

academies, and university police departments, and not to those that have yet to obtain certification.

Similar to the training requirements for law enforcement officers, judges handling capital cases are required to have a minimum of six months experience working in the felony criminal division and have successfully completed the “Handling Capital Cases” course offered by the Florida College of Advanced Judicial Studies.<sup>87</sup> Although the course does not contain a specific section devoted to racial sensitivity, it does cover expressions of racial prejudice during *voir dire* and closing arguments.<sup>88</sup> This training correlates with Canon 3 of the Code of Judicial Conduct, which states that judges must require that attorneys in proceedings before the judge do not manifest “by words, gestures, or other conduct, any bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, against parties, witnesses, counsel, or others.”<sup>89</sup>

Despite Canon 3 and the mandatory training, neither prosecutors nor defense attorneys always withhold from making racially bias or prejudicial remarks in the courtroom. For example, in the case of *State v. Davis*,<sup>90</sup> the defense attorney discussed at length during *voir dire* and during trial his propensity for becoming angry at black people “just because they’re black,” and that he hoped the potential jurors did not let the same type of feeling affect their deliberations.<sup>91</sup>

Further, although there are training programs on racial issues for law enforcement officers and judges, it does not appear that similar educational programs are required for prosecutors and defense attorneys or other actors involved in the administration of the death penalty. According to the four prosecutor offices that we contacted, training about racial issues focuses on *Batson* challenges.<sup>92</sup>

Based on this information, the State of Florida is only in partial compliance with Recommendation #6.

### G. Recommendation #7

**Defense counsel should be trained to identify and develop racial discrimination claims in capital cases. Jurisdictions also should ensure that defense counsel are trained to identify biased jurors during *voir dire*.**

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<sup>87</sup> FLA. R. OF JUD. ADMIN. R. 2.050(b)(10). Once a judge completes the required course, the judge must attend a refresher course during each subsequent continuing legal education three-year reporting period. *Id.*

<sup>88</sup> O.H. EATON, JR., FLORIDA COLLEGE OF ADVANCED JUDICIAL STUDIES, CONDUCTING THE PENALTY PHASE OF A CAPITAL CASE 42 (2006), available at <http://www.flcourts18.org/PDF/Pen%20Phase%20Materials%202006.pdf> (last visited on Aug. 5, 2006).

<sup>89</sup> FLA. CODE OF JUD. CONDUCT CANON 3(B)(6).

<sup>90</sup> 872 So. 2d 250 (2004).

<sup>91</sup> *Id.* at 252.

<sup>92</sup> To collect research for this section, we sent out questionnaires to all twenty state attorneys’ offices. We received replies from three offices: Second Circuit; Fourth Circuit; and Eighth Circuit. We also conducted a phone interview with a prosecutor from the Eleventh Circuit. Each office indicated that it provided training on *Batson* issues.

In 2000, the Governor’s Task Force on Capital Cases recognized the importance of identifying racially biased jurors by recommending that defense attorneys be able to question jurors privately about racial bias.<sup>93</sup> Despite this recommendation, however, the State of Florida neither requires defense attorneys to participate in training to identify and develop racial discrimination claims in capital cases or identify biased jurors during *voir dire* nor does it give defense attorneys the opportunity to meet with the jurors privately to identify biased jurors.

Two major organizations in Florida, however, sponsor capital defender training programs, which could address racial discrimination claims and/or the identification of racially biased jurors. The Florida Public Defenders Association, Inc. (FPDA) sponsors a training program called “Life Over Death,” which is a three-day program pertaining to the defense of capital cases.<sup>94</sup> The seminar is by invitation only but interested attorneys may request an invitation by e-mailing a member of the FPDA’s Death Penalty Steering Committee.<sup>95</sup> Additionally, the Commission on Capital Cases annually offers both in-person and on-line continuing legal education courses for attorneys litigating capital cases.<sup>96</sup>

Although training on the issue of race in capital litigation might be available, the State of Florida does not require defense counsel to participate in training to specifically identify and develop racial discrimination claims in capital cases and to identify biased jurors during *voir dire*. The State of Florida is, therefore, not in compliance with Recommendation #7.

#### H. Recommendation #8

**Jurisdictions should require jury instructions that it is improper to consider any racial factors in their decision making and that they should report any evidence of racial discrimination in jury deliberations.**

In 2000, the Governor’s Task Force on Capital Cases recommended that judges advise jurors that race, gender and ethnicity may not influence their deliberations.<sup>97</sup> However, neither Florida law nor the *Florida Standard Jury Instructions in Criminal Cases* requires jury instructions informing jurors that it is improper to consider any racial factors in their decision making and that they should report any evidence of racial discrimination in jury deliberations. The State of Florida, therefore, is not in compliance with Recommendation #8.

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<sup>93</sup> Becker, *supra* note 33.

<sup>94</sup> Florida Public Defenders Association, Inc., Life Over Death, at [http://www.flpda.org/pages/life\\_over\\_death.htm](http://www.flpda.org/pages/life_over_death.htm) (last visited on Aug. 5, 2006).

<sup>95</sup> *Id.*

<sup>96</sup> Commission on Capital Cases, Current On-Line Courses, at <http://www.floridacapitalcases.state.fl.us/c-cle.cfm> (last visited on Aug. 5, 2006).

<sup>97</sup> Becker, *supra* note 33.

We note that the Florida Supreme Court Criminal Court Steering Committee, chaired by Circuit Judge O.H. Eaton, Jr., has proposed a set of model jury instructions for the penalty phase of a capital trial, that includes an instruction telling the jury that its sentencing “recommendation should not be influenced by feelings of prejudice or bias” and should be based solely “on the evidence, and on the law contained in the[] instructions.”<sup>98</sup> These model instructions, however, have yet to be adopted by the Florida Supreme Court.

The alleged conduct of jurors in the 1986 case of *Marshall v. State*,<sup>99</sup> suggests the need for state action on this Recommendation. In *Marshall*, the Florida Supreme Court remanded the case for an evidentiary hearing on a juror misconduct claim in a capital case, based on an affidavit alleging that “some jurors told racial jokes about Marshall and that some jurors announced during the guilt phase that they were going to vote for a guilty verdict and life sentence because they wanted Marshall to return to prison to kill more black inmates.”<sup>100</sup>

### I. Recommendation #9

**Jurisdictions should ensure that judges recuse themselves from capital cases when any party in a given case establishes a reasonable basis for concluding that the judge’s decision making could be affected by racially discriminatory factors.**

Canon 3 of the Florida Code of Judicial Conduct requires judges to “perform judicial duties without bias or prejudice.”<sup>101</sup> The Code requires a judge to recuse him/herself from presiding over a proceeding in instances where s/he is unable to be impartial or where his/her impartiality may be reasonably questioned, including, but not limited to, when “the judge has a personal bias or prejudice concerning a party or a party’s lawyer.”<sup>102</sup> The number of judges who have properly disqualified themselves due to racial bias or prejudice in Florida is unknown and we have identified only one case in which a judge disqualified himself due to his racial bias or prejudice. In this case, *Peek v. State*,<sup>103</sup> however, the judge did not disqualify himself until after stating in open court something along the lines of “[s]ince the nigger mom and dad are here anyway, why don’t we go ahead and do the penalty phase today instead of having to subpoena them back at cost to the state.”<sup>104</sup> The judge was not removed from the bench or sanctioned;<sup>105</sup> rather,

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<sup>98</sup> See Proposed Revisions to *Florida Standard Jury Instructions in Criminal Cases*, Proposed Standard Jury Instruction 7.11 Penalty Proceedings—Capital Cases, SC05-1890, App. 1-Proposal One (last amended on Sept. 7, 2006) (on file with author); see also FLORIDA COLLEGE OF ADVANCED JUDICIAL STUDIES, MODEL PENALTY PHASE JURY INSTRUCTIONS (2006), available at <http://www.flcourts18.org/PDF/Model%20Penal%20Phase%20Instr%2006.pdf> (last visited on Aug. 14, 2006).

<sup>99</sup> 854 So. 2d 1235 (Fla. 2003).

<sup>100</sup> *Marshall v. State*, 854 So. 2d 1235 (Fla. 2003).

<sup>101</sup> FLA. CODE OF JUD. CONDUCT CANON 3(B)(5).

<sup>102</sup> FLA. CODE OF JUD. CONDUCT CANON 3(E)(1)(a).

<sup>103</sup> 488 So. 2d 52 (Fla. 1986).

<sup>104</sup> *Peek v. State*, 488 So. 2d 52, 56 (Fla. 1986).

the Florida Supreme Court only recommended that judges in general avoid the appearance of impropriety in the future.<sup>106</sup>

Despite the existence of Canon 3, we do not have sufficient information to properly assess whether the State of Florida ensures that judges rightfully disqualify themselves. We are, therefore, unable to assess whether the State of Florida is in compliance with Recommendation #9.

*J. Recommendation #10*

**States should permit defendants or inmates to raise directly claims of racial discrimination in the imposition of death sentences at any stage of judicial proceedings, notwithstanding any procedural rule that otherwise might bar such claims, unless the State proves in a given case that a defendant or inmate has knowingly and intelligently waived the claim.**

The State of Florida does not make any exceptions to the general procedural rules for claims of racial discrimination in the imposition of the death penalty. The Florida Supreme Court has found that claims arguing that the death penalty is imposed in an arbitrary and capricious manner based on racial discrimination should be raised in a motion for post-conviction relief.<sup>107</sup> The Court has further found that a movant who fails to raise such a claim in his/her initial motion for post-conviction relief is procedurally barred from raising it anytime thereafter.<sup>108</sup> Similarly, claims challenging the racial composition of a grand jury, venire, and/or the convicting and sentencing jury,<sup>109</sup> or racial statements made by a prosecutor,<sup>110</sup> are deemed procedurally barred unless properly preserved at trial and raised on direct appeal. In order to overcome these

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<sup>105</sup> Arthur L. Rizer III, *The Race Effect on Wrongful Convictions*, 29 WM. MITCHELL L. REV. 845, 864 n.130 (2003) (stating that this judge was re-elected, and is currently sitting on the bench).

<sup>106</sup> *Peek*, 488 So. 2d at 56.

<sup>107</sup> *Stewart v. Wainwright*, 494 So. 2d 489, 490 (1986); *see also* *Henry v. State*, 377 So. 2d 692, 692-93 (Fla. 1979); *Smith v. State*, 457 So. 2d 1380, 1381 (Fla. 1984) (stating that “[t]he claim that the death sentence was the product of racially discriminatory sentencing practices is in theory one that can be raised by motion under Rule 3.850”); *Griffin v. Wainwright*, 760 F.2d 1505 (11th Cir. 1985) (finding that “Griffin’s claim of unconstitutional application of the death penalty was properly placed before the state courts in Griffin’s petition for post-conviction relief”). *But see* *Ruthann Robson & Michael Mello, Ariadne’s Provisions: A ‘Clue of Thread’ to the Intricacies of Procedural Default, Adequate and Independent State Grounds, and Florida’s Death Penalty*, 76 CAL. L. REV. 87, 139 (1988) (citing *Stone v. State*, 481 So. 2d 478 (Fla. 1985) and *Booker v. State*, 441 So. 2d 148 (Fla. 1983), and stating that the Florida Supreme Court has found similar claims to be procedurally barred for not being raised on direct appeal).

<sup>108</sup> *Stewart*, 494 So. 2d at 490; *Aldridge v. State*, 503 So. 2d 1257, 1259 (Fla. 1987) (stating that “Aldridge claims that Florida’s death penalty is imposed in a discriminatory manner based on arbitrary factors. We rejected this claim in Aldridge’s prior 3.850 motion and he is procedurally barred from raising it now [in his third post-conviction proceeding]”); *Darden v. State*, 496 So. 2d 136, 136-137 (Fla. 1986) (finding that Darden’s claim that the death penalty is imposed in a racial discriminatory manner is procedurally barred given that it could have been raised in his previous post-conviction motions).

<sup>109</sup> *Robinson v. State*, 707 So. 2d 688, 698 (Fla. 1998); *Spengelink v. State*, 350 So. 2d 85 (Fla. 1977).

<sup>110</sup> *Darden*, 521 So. 2d at 1105 (Fla. 1988).

procedural bars, the movant must present “newly discovered” evidence,<sup>111</sup> or allege that the error constituted a “fundamental error.”<sup>112</sup>

Based on this information, the State of Florida is not in compliance with Recommendation #10.

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<sup>111</sup> *Miller v. State*, 926 So. 2d 1243, 1258 (Fla. 2006) (quoting *Scott v. Dugger*, 604 So. 2d 465, 468 (Fla. 1992), and defining “newly discovered” evidence); *Stewart v. State*, 495 So. 2d 164, 165 (Fla. 1986) (quoting *Christopher v. State* 489 So. 2d 22, 24 (Fla.1986), which stated that a claim of racial discrimination is barred “unless the movant alleges that the asserted grounds were not known and could not have been known to the movant at the time the initial motion was filed”).

<sup>112</sup> *Miller*, 926 So. 2d at 1261.



## CHAPTER THIRTEEN

### MENTAL RETARDATION AND MENTAL ILLNESS

#### INTRODUCTION TO THE ISSUE

##### Mental Retardation

The ABA unconditionally opposes the imposition of the death penalty on offenders with mental retardation. In *Atkins v. Virginia*,<sup>1</sup> the United States Supreme Court held it unconstitutional to execute offenders with mental retardation.

This holding does not, however, guarantee that no one with mental retardation will be executed. The American Association on Mental Retardation defines a person as mentally retarded if the person's IQ (general intellectual functioning) is in the lowest 2.5 percent of the population; if the individual is significantly limited in his/her conceptual, social, and practical adaptive skills; and if these two limitations were present before the person reached the age of 18. Unfortunately, some states do not define mental retardation in accordance with this commonly accepted definition. Moreover, some states impose upper limits on IQ that are lower than the range that is commonly accepted in the field (approximately 70-75 or below). In addition, lack of sufficient knowledge and resources often precludes defense counsel from properly raising and litigating claims of mental retardation. And in some jurisdictions, the burden of proving mental retardation is not only placed on the defendant, but also requires proof greater than a preponderance of the evidence.

Accordingly, a great deal of additional work is required to make the holding of *Atkins*, i.e., that people with mental retardation can not be executed, a reality.

##### Mental Illness

Although mental illness should be a mitigating factor in capital cases, juries often mistakenly treat it as an aggravating factor. States, in turn, often have failed to monitor or correct such unintended and unfair results.

State death penalty statutes based upon the Model Penal Code list three mitigating factors that implicate mental illness: (1) whether the defendant was under “extreme mental or emotional disturbance” at the time of the offense; (2) whether “the capacity of the defendant to appreciate the criminality (wrongfulness) of his[/her] conduct or to conform his[/her] conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication;” and (3) whether “the murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation of his[/her] conduct.”

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<sup>1</sup> 536 U.S. 304 (2002).

Often, however, these factors are read to jurors without further explanation or without any discussion of their relationship to mental illness. Without proper instructions, most jurors are likely to view mental illness incorrectly as an aggravating factor; indeed, research indicates that jurors routinely consider the three statutory factors listed above as *aggravating*, rather than *mitigating* factors in cases involving mental illness. One study found specifically that jurors' consideration of the factor, "extreme mental or emotional disturbance" in capital cases correlated positively with decisions to impose death sentences.

Mental illness particularly weighs against a criminal defendant when it is considered in the context of determining "future dangerousness," often a criterion for imposing the death penalty. One study showed that a judge's instructions on future dangerousness led mock jurors to believe that the death penalty was *mandatory* for mentally ill defendants. In fact, only a small percentage of mentally ill individuals are dangerous, and most of them respond successfully to treatment. But the contrary perception unquestionably affects decisions in capital cases.

In addition, the medication of some mentally ill defendants in connection with their trials often leads them to appear to be lacking in emotion, including remorse. This, too, can lead jurors to impose a sentence of death.

Mental illness can affect every stage of a capital trial. It is relevant to the defendant's competence to stand trial; it may provide a defense to the murder charge; and it can be the centerpiece of the mitigation case. Conversely, when the judge, prosecutor, and jurors are misinformed about the nature of mental illness and its relevance to the defendant's culpability and life experience, tragic consequences often follow for the defendant.

Given these concerns, in August 2006, the ABA House of Delegates<sup>2</sup> adopted a resolution expanding the conditions that, if present at the time of the offense, exempt the offender from the death penalty. The resolution also provides special procedures for those who are not exempt from the death penalty on eligibility grounds, but become incompetent to participate in post-conviction proceedings, or are incompetent to be executed. The text of the resolution has been broken down into various ABA Mental Illness Recommendations. A discussion of these recommendations and Florida's compliance with them is found in the Mental Illness Section.

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<sup>2</sup> American Bar Association, Recommendation #122A with Report, adopted Aug. 2006, *available at* <http://www.abanet.org/leadership/2006/annual/dailyjournal/hundredtwentytwoa.doc> (last visited Aug. 30, 2006).

## I. FACTUAL DISCUSSION

### A. Mental Retardation

In 2001, the Florida Legislature adopted section 921.137 of the Florida Statutes, prohibiting the imposition of the death penalty upon mentally retarded defendants who are sentenced to death after the statute's effective date of June 12, 2001, and providing procedures to determine whether a defendant is mentally retarded.<sup>3</sup> One year later, the United States Supreme Court in *Atkins v. Virginia*<sup>4</sup> found the imposition of the death penalty upon mentally retarded offenders to be an unconstitutionally excessive punishment.<sup>5</sup> In an effort to integrate *Atkins* into Florida law, the Florida Supreme Court in 2004 promulgated a new rule of criminal procedure, rule 3.203, which (1) prohibits the execution of all mentally retarded defendants, including those convicted of a capital offense prior to the effective date of section 921.137; and (2) provides new procedures for determining mental retardation.<sup>6</sup>

#### 1. Definition of Mental Retardation

Section 921.137(1) of the Florida Statutes and rule 3.203(b) of the Florida Rules of Criminal Procedure define the term "mental retardation" as: (1) "significantly subaverage general intellectual functioning," (2) "existing concurrently with deficits in adaptive behavior," and (3) which has "manifested during the period from conception to age 18."<sup>7</sup> "Significantly subaverage general intellectual functioning" is defined as "performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Department of Children and Family Services."<sup>8</sup> The rules of the Department of Children and Family Services describe the recognized intelligence tests to be individually administered by a qualified professional, but do not specify the mean score needed to be classified as having significantly subaverage general intellectual functioning.<sup>9</sup>

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<sup>3</sup> FLA. STAT. § 921.137 (2006).

<sup>4</sup> 536 U.S. 304 (2002).

<sup>5</sup> *Id.* at 321.

<sup>6</sup> FLA. R. CRIM. P. 3.203; *In re* Amendments to Fla. Rules of Criminal Procedure and Fla. Rules of Appellate Procedure, 875 So. 2d 563, 565 (Fla. 2004).

<sup>7</sup> FLA. STAT. § 921.137(1) (2006); FLA. R. CRIM. P. 3.203(b).

<sup>8</sup> FLA. R. CRIM. P. 3.203(b) (noting that the intelligence tests authorized by the Department of Children and Family Services are found in Fla. Admin. Code R. 65B-4.032 (2005)); Agency for Persons with Disabilities, About Us, *available at* <http://apd.myflorida.com/about/> (last visited on July 31, 2006) (explaining the developmental disabilities recognized by the State of Florida, describing mental retardation as "significant limitations in functioning related to subaverage intelligence," and stating that "[p]eople who have mental retardation learn more slowly than other people and might need assistance in areas like communication, self-care, self-direction, health and safety, leisure, work and functional academics"). *But see* Fla. Stat. § 921.137(1) (2006) (specifying the test administered must be found in the rules of the Agency for Persons with Disabilities).

<sup>9</sup> FLA. ADMIN. CODE R. 65B-4.032(1) (2006) (requiring the Stanford-Binet Intelligence Scale and the Wechsler Intelligence Scale tests to be administered to defendants convicted of a capital felony who are suspected of being mentally retarded); *see also* Philip Fougousse, *The Demise of the Death Penalty for the Mentally Retarded*, 77 FLA. B.J. 63, 66 (Dec. 2003) (explaining that the Florida rules do not have a required mean score to determine mental retardation but that the two standard deviations rule may protect

Florida law defines the term “adaptive behavior” as “the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.”<sup>10</sup> The Florida Supreme Court has held that a low IQ is not, by itself, sufficient to establish mental retardation; there must also be deficits in the defendant’s adaptive functioning.<sup>11</sup>

## 2. Procedures for Raising and Considering Mental Retardation Claims

After the United States Supreme Court’s decision in *Atkins* prohibiting the execution of the mentally retarded, the Florida Supreme Court promulgated rule 3.203 of the Florida Rules of Criminal Procedure to fill in the gaps left by section 921.137<sup>12</sup> of the Florida Statutes. Rule 3.203 provides a mechanism for all defendants, including those who were sentenced to death prior to the enactment of section 921.137, and therefore not covered by section 921.137, to seek a determination of mental retardation.<sup>13</sup> Rule 3.203 also establishes specific pleading and time requirements for filing a rule 3.203 motion for a determination of mental retardation as a bar to execution.<sup>14</sup>

### a. Contents of a Rule 3.203 Motion

A defendant who intends to raise mental retardation as a bar to execution must file a written motion that includes (1) a statement that the defendant is mentally retarded and,

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defendants with an IQ as high as 75, whereas many experts believe that mental retardation is an IQ of 70 and below).

<sup>10</sup> FLA. STAT. § 921.137(1) (2006).

<sup>11</sup> See *Rodriguez v. State*, 919 So. 2d 1252, 1265-67 (Fla. 2005) (noting that the defendant was able to run a drug trafficking operation, balance a bank account, and understand how to finance a new car, which indicated to the court-appointed expert a level of adaptive functioning sufficient to counter his IQ of 64).

<sup>12</sup> The process for obtaining a determination of mental retardation as a bar to execution contained in section 921.137 of the Florida Statutes, although still on the books, has been abrogated by the process in rule 3.203. *In re Amendments to Fla. Rules of Criminal Procedure and Fla. Rules of Appellate Procedure*, 875 So. 2d at 569 n.5 (Cantero, J., concurring) (citing FLA. CONST. art. V, § 2, which states that the Florida Supreme Court “shall adopt rules for the practice and procedure in all [Florida] courts”). Before the enactment of rule 3.203, a capital defendant seeking a determination of mental retardation was required to first give notice to the state and the court of his/her intent to raise mental retardation as a bar to a potential death sentence. FLA. STAT. § 921.137(3) (2006). Once this notice was filed and after the defendant: (1) was convicted of a capital felony and the advisory jury has recommended a death sentence; (2) pled to or was convicted of a capital felony and waived his/her right to a recommended sentence; or (3) was convicted of a capital felony and the advisory jury recommended a life sentence, but the state requested that the judge impose a death sentence, the defendant could file a motion to determine his/her mental retardation. FLA. STAT. § 921.137(4)-(6) (2006). Upon receipt of the motion, the court would then appoint two mental retardation experts to evaluate the defendant, and the judge would hold a hearing, without a jury, to consider the findings of the experts and other evidence in making a determination of mental retardation. FLA. STAT. § 921.137(4) (2006). This process, however, was only available to defendants who were sentenced to death on or after the effective date of section 921.137—June 12, 2001—and, therefore, section 921.137 did not provide an adequate outlet for seeking a determination of mental retardation for those sentenced to death before the effective date of the statute. FLA. STAT. § 921.137(8) (2006).

<sup>13</sup> FLA. R. CRIM. P. 3.203(a), (c), (d)(1)-(4); *In re Amendments to Fla. Rules of Criminal Procedure and Fla. Rules of Appellate Procedure*, 875 So. 2d at 565-66.

<sup>14</sup> FLA. R. CRIM. P. 3.203(c), (d).

(2) if the defendant has been previously tested, evaluated, or examined by one or more experts, the names and addresses of those experts, as well as copies of any expert reports.<sup>15</sup> If the defendant has not been previously tested, evaluated, or examined by an expert, s/he must include a statement to that effect.<sup>16</sup>

b. Time Requirements for Filing a Rule 3.203 Motion

The text of rule 3.203 and the Florida Supreme Court opinion promulgating the rule provide for the filing of a motion and a determination of mental retardation as a bar to execution *before* trial.<sup>17</sup> However, section 921.137 of the Florida Statutes, which was also in place when rule 3.203 was enacted, requires courts to hold a hearing on mental retardation *after* the conclusion of the guilt/innocence phase and jury recommendation of sentence.<sup>18</sup> The Florida Supreme Court reconciled this apparent conflict by noting that the Florida Constitution grants the Florida Supreme Court the ultimate responsibility for enacting rules of procedure for the courts.<sup>19</sup>

In its opinion promulgating rule 3.203, the Florida Supreme Court also noted that rule 3.203 divides into three categories the type of cases in which a defendant/inmate may avail him/herself of a determination of mental retardation as a bar to execution:

- (1) mental retardation claims that “arose in all trials that began after the effective date of the rule,” October 1, 2004—future cases;
- (2) mental retardation claims that arose in “trials that began on or before the effective date of [rule 3.203] but where a sentence had not been imposed and affirmed on direct appeal on or before the effective date”—non-final cases; and
- (3) mental retardation claims that arose in cases where the conviction for first-

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<sup>15</sup> FLA. R. CRIM. P. 3.203(c)(1), (2).

<sup>16</sup> FLA. R. CRIM. P. 3.203(c)(3).

<sup>17</sup> See FLA. R. CRIM. P. 3.203(d)(1); *In re* Amendments to Fla. Rules of Criminal Procedure and Fla. Rules of Appellate Procedure, 875 So. 2d 563, 567-68 (Fla. 2004) (Cantero, J., concurring) (discussing numerous efficiency reasons for requiring the hearing to be prior to trial rather than after the verdict).

<sup>18</sup> FLA. STAT. § 921.137(3)-(6) (2006) (providing that, after filing a pre-trial notice of intent to seek a determination of mental retardation as a bar to execution and after a defendant has been convicted and the jury has recommended a death sentence (or, if the jury sentencing proceeding is waived, after conviction), the defendant may file a motion to initiate the process for determining mental retardation). *But see In re Amendments to Fla. Rules of Criminal Procedure and Fla. Rules of Appellate Procedure*, 875 So. 2d at 569 n.5 (Cantero, J., concurring) (stating that the provision for a pretrial hearing in the court’s rules trumps the post-verdict hearing provision in the statute, because the timing of hearing is a procedural, not substantive, issue).

<sup>19</sup> For example, once the legislature creates a right, such as a defendant’s ability to obtain a determination of mental retardation, the decision on when that right may be invoked, such as the time requirements in rule 3.203 for filing a motion seeking such a determination, is “quintessentially a matter of *procedure*,” over which the Florida Supreme Court has ultimate authority. *In re Amendments to Fla. Rules of Criminal Procedure and Fla. Rules of Appellate Procedure*, 875 So. 2d at 569 n.5 (Cantero, J., concurring) (citing FLA. CONST. art. V, § 2, which states that the Florida Supreme Court “shall adopt rules for the practice and procedure in all [Florida] courts”).

degree murder and sentence of death had been “affirmed on direct appeal on or before the effective date of the rule”—final cases.<sup>20</sup>

In any of these three categories, a claim seeking a determination of mental retardation is waived if not filed in accordance with the time requirements specified in rule 3.203(d), unless good cause is shown for failure to comply with these requirements.<sup>21</sup> The filing of a rule 3.203 motion will not stay further proceedings without a separate order staying the execution.<sup>22</sup>

The time for filing a motion for a determination of mental retardation as a bar to execution has passed in all final cases and in most, if not all, non-final cases. Still, to recognize the steps taken by the Florida Supreme Court to provide mentally retarded individuals at any stage of a capital case a chance to file a rule 3.203 motion, we have included the procedures for filing a rule 3.203 motion in final and non-final cases even though these time restrictions are no longer applicable to most, and perhaps all, current or future cases.

i. Future Cases

In all cases commenced after October 1, 2004, a motion for a determination of mental retardation as a bar to execution must be filed no later than ninety days prior to trial.<sup>23</sup> If, however, the trial is set earlier than ninety days from October 1, 2004, the motion must be filed at a specific time ordered by the court.<sup>24</sup>

ii. Non-Final Cases

In all cases in which the trial commenced on or before October 1, 2004, and a sentence was not imposed and affirmed on direct appeal before the effective date of the rule, a rule 3.203 motion has to be filed and determined before a sentence is imposed.<sup>25</sup>

If an appeal of a judgment of conviction and sentence of death was pending on October 1, 2004, a defendant could have filed a motion to relinquish jurisdiction for a mental retardation determination within sixty days of October 1, 2004.<sup>26</sup> The motion to relinquish jurisdiction had to contain a copy of the motion to establish mental retardation

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<sup>20</sup> *In re Amendments to Fla. Rules of Criminal Procedure and Fla. Rules of Appellate Procedure*, 875 So. 2d at 565-66.

<sup>21</sup> FLA. R. CRIM. P. 3.203(f).

<sup>22</sup> FLA. R. CRIM. P. 3.203(i).

<sup>23</sup> FLA. R. CRIM. P. 3.203(d)(1).

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

<sup>25</sup> FLA. R. CRIM. P. 3.203(d)(2). Rule 3.203(d)(2) states that “[i]n all cases in which trial has commenced on October 1, 2004, the motion shall be filed and determined before a sentence is imposed.” *Id.* (emphasis added). The plain language of this provision appears to limit its reach to only those cases which began on the effective date of the statute. However, the Florida Supreme Court noted that this provision applies to allow claims of mental retardation that arose in “trials that began *on or before* the effective date of the rule but where a sentence had not been imposed.” *In re Amendments to Fla. Rules of Criminal Procedure and Fla. Rules of Appellate Procedure*, 875 So. 2d at 565-66.

<sup>26</sup> FLA. R. CRIM. P. 3.203(d)(3).

as a bar to execution and a certificate by appellate counsel that the motion was based on a good faith, reasonable belief that the defendant is mentally retarded.<sup>27</sup>

### iii. Final Cases

If a death-sentenced prisoner had not filed a motion for post-conviction relief on or before October 1, 2004, the prisoner had to raise a claim under rule 3.203 in his/her initial rule 3.851 motion for post-conviction relief.<sup>28</sup> If a death-sentenced prisoner had filed a motion for post-conviction relief and that motion had not been ruled on by the circuit court on or before October 1, 2004, the prisoner could amend the motion to include a claim under rule 3.203 within sixty days after October 1, 2004.<sup>29</sup> This motion or amended motion for post-conviction relief seeking a determination of mental retardation had to contain a certification by counsel that the motion was “made in good faith and on reasonable grounds to believe that the [prisoner] is mentally retarded.”<sup>30</sup>

“If a death-sentenced prisoner ha[d] filed a motion for post-conviction relief and that motion ha[d] been ruled on by the circuit court but the prisoner ha[d] not filed an appeal on or before October 1, 2004, the prisoner [had to] file a supplemental motion in the circuit court raising the mental retardation claim.<sup>31</sup> The prisoner’s time for filing an appeal of the ruled-upon post-conviction motion [was then] stayed until the circuit court rule[d] upon the mental retardation claim.”<sup>32</sup>

If a death-sentenced prisoner had filed a motion for post-conviction relief and that motion had been ruled on by the circuit court and an appeal was pending on or before October 1, 2004, the prisoner could file a motion in the Florida Supreme Court within sixty days after October 1, 2004 “to relinquish jurisdiction to the circuit court for a determination of mental retardation.”<sup>33</sup> The motion to relinquish jurisdiction had to contain a copy of the motion to establish mental retardation as a bar to execution (which itself had to be raised as a successive rule 3.851 motion) and a certificate by appellate counsel that the motion was “made in good faith and on reasonable grounds to believe that the defendant is mentally retarded.”<sup>34</sup>

If a death-sentenced prisoner had filed a motion for post-conviction relief, the motion had been ruled on by the circuit court, and that ruling was final on or before October 1, 2004, the prisoner could raise a claim under rule 3.203 in a successive rule 3.851 motion for post-conviction relief filed no later than sixty days after October 1, 2004.<sup>35</sup> The circuit

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<sup>27</sup> *Id.*

<sup>28</sup> FLA. R. CRIM. P. 3.203(d)(4)(B); *see* FLA. R. CRIM. P. 3.851 (governing collateral attack on a judgment of conviction and sentence of death). For an in-depth discussion regarding the capital post-conviction process in Florida see *supra* Chapter Eight: State Post-Conviction Relief, at 213.

<sup>29</sup> FLA. R. CRIM. P. 3.203(d)(4)(C).

<sup>30</sup> FLA. R. CRIM. P. 3.203(d)(4)(A).

<sup>31</sup> FLA. R. CRIM. P. 3.203(d)(4)(D).

<sup>32</sup> *Id.*

<sup>33</sup> FLA. R. CRIM. P. 3.203(d)(4)(E).

<sup>34</sup> *Id.*

<sup>35</sup> FLA. R. CRIM. P. 3.203(d)(4)(F).

court could reduce this time period and expedite the proceedings if it deemed such action necessary.<sup>36</sup>

### c. Evaluation of the Defendant by Court-Appointed Experts

After the defendant has filed a motion for a determination of mental retardation as a bar to execution, the court must appoint two experts who must “promptly test, evaluate, or examine” the defendant and “submit a written report of any findings to the parties and to the court.”<sup>37</sup> If the defendant has been previously tested, examined, or evaluated by experts, the court must appoint an expert chosen by the prosecution, if one is requested, who will “promptly test, evaluate, or examine” the defendant and submit a written report of his/her findings to the parties and the court.<sup>38</sup> “Attorneys for the state and defendant may be present at the examinations conducted by court-appointed experts.”<sup>39</sup>

### d. Determination of Mental Retardation as a Bar to Execution

The court must conduct an evidentiary hearing on the motion for a determination of mental retardation, at which time it must consider the findings of experts and any other evidence regarding the defendant’s mental retardation.<sup>40</sup> If the court determines, that the defendant has established by “clear and convincing evidence,”<sup>41</sup> that s/he is mentally

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<sup>36</sup> *Id.*

<sup>37</sup> FLA. R. CRIM. P. 3.203(c)(3); *see also* FLA. STAT. § 921.137(4) (2006). Similarly, if the defendant is suspected of being mentally retarded or autistic, the court must appoint: (1) at least one expert, or if requested by either party, two experts, from a list of qualified professionals to evaluate whether the defendant meets the definition of retardation or autism and, if so, whether the defendant is competent to proceed; and (2) a psychologist to evaluate the defendant for the same purposes. FLA. STAT. § 916.301(1), (2)(a), (b) (2006).

<sup>38</sup> FLA. R. CRIM. P. 3.203(c)(2). Defendants may also serve a notice of discovery on the prosecution after the filing of the charging document and before trial, which will trigger the prosecutor’s discovery obligation to disclose “reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons.” FLA. R. CRIM. P. 3.220(a), (b)(1)(J).

<sup>39</sup> FLA. R. CRIM. P. 3.203(c)(4). “If the defendant refuses to be examined or fully cooperate with the court-appointed experts or the state’s expert, the court may, in the court’s discretion:” (1) order the defense to provide the court-appointed experts access to mental health reports, tests, and evaluations by the defendant’s expert; (2) prohibit the defense experts from testifying about such reports, tests, or evaluations regarding the defendant’s mental retardation; or (3) order any other appropriate relief. FLA. R. CRIM. P. 3.203(c)(5)(A)-(C).

<sup>40</sup> FLA. R. CRIM. P. 3.203(e); FLA. STAT. § 921.137(4) (2006). The Florida Supreme Court has rejected the claim that, under *Ring v. Arizona*, 536 U.S. 584 (2002), section 921.137 is unconstitutional because it permits a judge to make the determination of the defendant’s mental retardation. *See Rodriguez v. State*, 919 So. 2d 1252, 1267 (Fla. 2005) (citing *Arbalaez v. State*, 898 So. 2d 25, 43, 54 (Fla. 2005), and holding that the defendant “has no right under *Ring* and *Atkins* to a jury determination of whether he is mentally retarded”).

<sup>41</sup> FLA. STAT. § 921.137(4) (2006). “Because of concerns about whether the burden of proof is a substantive or procedural requirement” and further concerns about the constitutionality of the “clear and convincing evidence” standard used in section 921.137 for a mental retardation determination, the Florida Supreme Court left rule 3.203 silent as to the burden of proof. *See In re Amendments to Fla. Rules of Criminal Procedure and Fla. Rules of Appellate Procedure*, 875 So. 2d 563, 566-67 (Fla. 2004) (Pariente, J., concurring) (noting that the combination of *Atkins* and *Cooper v. Oklahoma*, 517 U.S. 348 (1996), which “held that a state law requiring a defendant to establish incompetence to stand trial by clear and convincing

retarded, it must enter a written order (1) prohibiting the imposition of the death penalty,<sup>42</sup> (2) announcing the court's specific findings in support of that determination,<sup>43</sup> and (3) ordering the case to proceed without the death penalty as an issue.<sup>44</sup> The state may seek an interlocutory appeal of an order finding that the defendant is mentally retarded, which, if taken, "will stay further proceedings in the trial court until a decision on appeal is rendered."<sup>45</sup>

Conversely, if the court finds that the defendant has not established mental retardation, it must enter a written order providing its specific findings in support of that determination.<sup>46</sup> The defendant may seek review of an adverse determination during his/her direct appeal.

## *B. Mental Disorders Other Than Mental Retardation*

### 1. Insanity

#### a. Definitions of Insanity

The State of Florida recognizes two types of insanity: (1) the "right from wrong" test; and (2) insanity by hallucination.

Under the "right from wrong" test, the defendant can be found not guilty by reason of insanity if the jury finds that, at the time of the commission of the offense, the defendant had a "mental infirmity, disease, or defect," and because of this condition:

- (1) s/he did not know what s/he was doing or its consequences; or
- (2) although s/he knew what s/he was doing and its consequences, s/he did not know that what s/he was doing was wrong.<sup>47</sup>

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evidence was unconstitutional," raises the issue of whether use of the same clear and convincing evidence standard in a mental retardation determination is constitutional). Justice Pariente notes that the omission of the standard of proof in rule 3.203 obligates trial courts to either (1) "apply the clear and convincing evidence standard" that is required by section 921.137(4); or (2) "find that standard unconstitutional in a particular case," which would give the Florida Supreme Court a case or controversy to decide the constitutionality of the standard rather than doing so in a non-adversarial rules proceeding. *Id.* at 567. Justice Pariente also suggested that the legislature should consider amending section 921.137(4) while noting that the "preponderance of the evidence" standard is already used by a majority of states with statutes concerning mental retardation as a bar to execution. *Id.* (citing *Ex parte Briseno*, 135 S.W.3d 1, 12 (Tex. Crim. App. 2004), and noting that twelve of nineteen states with statutes on the subject use a preponderance of the evidence standard).

<sup>42</sup> FLA. R. CRIM. P. 3.203(e).

<sup>43</sup> *Id.*

<sup>44</sup> FLA. R. CRIM. P. 3.203(g).

<sup>45</sup> FLA. R. CRIM. P. 3.203(h). The court must also stay proceedings for thirty days after rendition of the order prohibiting the death penalty or, "if a motion for rehearing is filed, for [thirty] days following the rendition of the order denying rehearing, to allow the state the opportunity to appeal the order." FLA. R. CRIM. P. 3.203(e).

<sup>46</sup> FLA. R. CRIM. P. 3.203(e).

<sup>47</sup> FLA. STAT. § 775.027(1) (2006); FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 3.6(a) (5th ed. 2005).

Alternatively, a jury may find a defendant not guilty by reason of insanity by hallucination if at the time of the offense, the defendant had a “mental infirmity, disease, or defect” and because of this condition:

- (1) s/he had hallucinations or delusions which caused him/her to honestly believe to be facts things which are not true or real; and
- (2) the act of the defendant would have been lawful had the hallucinations or delusions been the actual facts.<sup>48</sup>

Insanity at the time of a crime may not be the result of substance abuse unless the substance is involuntarily ingested or was prescribed.<sup>49</sup>

#### b. Appointment of a Defense Expert

Where an indigent defendant’s counsel informs the court of his/her reasonable belief that the defendant may have been insane at the time of the commission of the offense and requests expert assistance, the court must appoint one expert to examine the defendant to assist counsel in the preparation of the defense.<sup>50</sup>

#### c. Intent to Pursue an Insanity Defense and Pre-Trial Proceedings

If the defendant intends to raise as a defense his/her insanity at the time of the offense and wishes to introduce evidence to establish this defense, s/he must file a notice of intent to rely on an insanity defense.<sup>51</sup> This notice must be filed no later than fifteen days after the arraignment or the filing of a written plea of not guilty where the defense is to be relied on at trial.<sup>52</sup> If defense counsel reasonably believes that the defendant is also incompetent to proceed, the notice must be given at the same time as the filing of the motion to examine the defendant’s competence to proceed.<sup>53</sup> The notice must contain a statement showing “the nature of the insanity the defendant expects to prove and the names and addresses of the witnesses” the defendant will call to support the defense.<sup>54</sup> If the defendant fails to timely file the required notice of intent, the court may grant the defendant an additional ten days to file the notice of intent to raise the defense of insanity if s/he can demonstrate good cause for his/her failure to file the notice.<sup>55</sup>

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<sup>48</sup> FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 3.6(b) (5th ed. 2005). “The guilt or innocence of a person suffering from such hallucinations or delusions is to be determined just as though the hallucinations or delusions were actual facts.” *Id.*

<sup>49</sup> FLA. STAT. § 775.051 (2006).

<sup>50</sup> FLA. R. CRIM. P. 3.216(a). Once defense counsel demonstrate that the defendant is indigent and asserts the reasonable belief that the defendant was insane at the time of the commission of the offense, the appointment of an expert to assist in preparation of the defense is mandatory. *Id.*; *see also* Price v. State, 816 So. 2d 738, 740 (Fla. 3d DCA 2002).

<sup>51</sup> FLA. R. CRIM. P. 3.216(b).

<sup>52</sup> FLA. R. CRIM. P. 3.216(c).

<sup>53</sup> *Id.* For detailed information about motions, hearings, and decisions about a defendant’s competency to proceed, see Fla. R. Crim. P. 3.210-3.212.

<sup>54</sup> FLA. R. CRIM. P. 3.216(c).

<sup>55</sup> FLA. R. CRIM. P. 3.216(h). If the trial has already begun, on a motion by the defendant, the court may grant a mistrial in order to allow the defendant to assert the defense of insanity. *Id.* However, this motion

When the notice is filed, the court may, on its own motion, and must, on a motion filed by either party, order that the defendant be examined by two or three disinterested, qualified experts<sup>56</sup> in regards to the defendant's insanity at the time of the offense.<sup>57</sup> If the issue of competence to proceed is also raised by the defendant, the examination into the defendant's insanity should take place at the same time as the competency examination.<sup>58</sup>

After examining the defendant, the experts must file a report of their findings with the court and provide copies of the report to the parties.<sup>59</sup> The report must contain:

- (1) a description of the evaluative techniques that were used during the examination;
- (2) a description of the mental and emotional condition and mental processes of the defendant at the time of the commission of the offense, including the nature of any mental impairment and its relationship to the actions and state of mind of the defendant at the time of the offense;
- (3) a statement of all relevant factual information regarding the defendant's behavior on which the conclusions or opinions regarding the defendant's mental condition were based; and
- (4) an explanation of how the conditions and opinions regarding the defendant's mental condition at the time of the commission of the offense were reached.<sup>60</sup>

d. Introduction of Evidence Concerning Insanity and Judgment of Not Guilty by Reason of Insanity.

The law presumes that every person is sane.<sup>61</sup> Therefore, the burden lies with the defendant to overcome this presumption and establish the defense of insanity by showing, by clear and convincing evidence,<sup>62</sup> that s/he was legally insane at the time of the offense in question.<sup>63</sup>

Either party may call the appointed experts to testify at trial, call additional experts, or introduce any other evidence regarding the defendant's insanity at the time of the commission of the offense.<sup>64</sup> In its instructions to the jury, the trial judge must "include an instruction on the consequences of a verdict of not guilty by reason of insanity."<sup>65</sup>

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for mistrial will constitute a waiver of any subsequent double jeopardy claims based on the uncompleted trial. *Id.*

<sup>56</sup> For the qualification requirements of these experts, see Fla. Stat. § 916.115(1)(a) (2006).

<sup>57</sup> FLA. R. CRIM. P. 3.216(d). Attorneys for the both parties may be present at the examination. *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> FLA. R. CRIM. P. 3.216(g).

<sup>60</sup> FLA. R. CRIM. P. 3.216(g)(1)-(4).

<sup>61</sup> FLA. STAT. § 775.027(1) (2006).

<sup>62</sup> FLA. STAT. § 775.027(2) (2006).

<sup>63</sup> *Yohn v. State*, 476 So. 2d 123, 126 (Fla. 1985); *Rossi v. State*, 416 So. 2d 1166, 1167 (Fla. 4th DCA 1982); *see also* FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 3.6(a) (5th ed. 2005).

<sup>64</sup> FLA. R. CRIM. P. 3.216(j).

<sup>65</sup> *Id.*

Specifically, among other instructions, the court should, if applicable, instruct the jury that if its “verdict is that the defendant is not guilty because [s/he is] insane, that does not necessarily mean [s/he] will be released from custody. [The court] must conduct further proceedings to determine if the defendant should be committed to a mental hospital, or given other outpatient treatment or released.”<sup>66</sup>

If the defendant is found “guilty” rather than “not guilty by reason of insanity,” s/he may present evidence of his/her mental condition as mitigation during the penalty phase of the capital trial. If the jury, however, finds the defendant not guilty of the offense by reason of insanity, it must state that the not guilty verdict was given because of the defendant’s insanity at the time of the offense.<sup>67</sup>

e. Post-Verdict Actions Regarding a Person Found Not Guilty by Reason of Insanity

Upon a verdict of not guilty by reason of insanity, the court may commit the individual if it determines that s/he (1) is mentally ill, and (2) because of this illness, is “manifestly dangerous” to him/herself or others.<sup>68</sup>

If the acquitted person does not meet these criteria, the court must either discharge him/her, or order him/her to outpatient treatment at a specific appropriate facility.<sup>69</sup> If the acquitted person, however, satisfies these criteria, s/he must be committed to a facility within the Department of Children and Family Services,<sup>70</sup> and treated at the facility.<sup>71</sup> No later than six months from the date of admission, the facility’s administrator must file with the court a report, addressing whether the individual should remain at the facility.<sup>72</sup> Within thirty days of the report’s receipt, the court must hold a hearing at which the individual may be present<sup>73</sup> and be appointed counsel if s/he is indigent.<sup>74</sup> The judge will receive evidence<sup>75</sup> to determine whether the committed person no longer meets the criteria for commitment.<sup>76</sup> “If the court determines that the person meets the criteria for

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<sup>66</sup> FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 3.6(a), (b) (5th ed. 2005) (stating the instruction should only be given if applicable).

<sup>67</sup> FLA. R. CRIM. P. 3.217(a).

<sup>68</sup> See FLA. STAT. § 916.15(2) (2006); see also FLA. R. CRIM. P. 3.217(b), 3.218(a). Florida law defines mental illness as “an impairment of emotional processes that exercise conscious control of one’s actions, or of the ability to perceive or understand reality, which impairment substantially interferes with a defendant’s ability to meet the ordinary demands of living.” FLA. STAT. § 916.106(11) (2006). The term “mentally ill” does not apply to defendants who are solely retarded or autistic, “and does not include intoxication or conditions manifested only by antisocial behavior or substance abuse impairment.” *Id.*

<sup>69</sup> *Tavares v. State*, 871 So. 2d 974, 976 (Fla. 5th DCA 2004).

<sup>70</sup> *Id.*

<sup>71</sup> See FLA. STAT. § 916.15(2), (3) (2006); FLA. R. CRIM. P. 3.218(a).

<sup>72</sup> FLA. R. CRIM. P. 3.218(a). A copy of the report also must be provided to the parties. *Id.*

<sup>73</sup> FLA. R. CRIM. P. 3.218(b).

<sup>74</sup> FLA. STAT. § 916.15(4) (2006).

<sup>75</sup> The court may appoint two or three experts to examine the committed person regarding whether the person meets the criteria for continued commitment and order a report to the court on their conclusions. FLA. R. CRIM. P. 3.218(c). The parties may also have access to the committed person’s records from the treatment facility. FLA. STAT. § 916.15(4) (2006).

<sup>76</sup> See FLA. STAT. § 916.15(3), (4) (2006); FLA. R. CRIM. P. 3.218(a), (b).

continued commitment or treatment,” the court must order further commitment or treatment for a period not exceeding one year.<sup>77</sup> The same procedure providing for a hearing and a determination on continued commitment must take place “before the expiration of each additional [one]-year period in which the [person] is retained by the facility.”<sup>78</sup>

C. “Next Friend”<sup>79</sup> *Petitions On Behalf of the Incompetent*

A person may have standing as a “next friend” where the “real party in interest is unable to litigate his/her own cause due to mental incapacity, lack of access to the court, or other similar disability.”<sup>80</sup> Specifically in the context of a capital post-conviction proceeding, a “next friend” has standing to file a petition on behalf of a death-row inmate who wishes to waive his/her right to pursue post-conviction proceedings if the “next friend” can establish that s/he is truly “dedicated to the interests” of the inmate,<sup>81</sup> and there is an adequate explanation—i.e., mental incompetence—why the inmate cannot appear on his/her own behalf.<sup>82</sup>

According to the United States Supreme Court, an individual is incompetent for the purposes of next friend standing if s/he lacks the “capacity to appreciate his[/her] position and make a rational choice with respect to continuing or abandoning further litigation,” or suffers “from a mental disease, disorder, or defect which may substantially affect his[/her] capacity.”<sup>83</sup> This involves a determination of three issues: (1) “whether that [individual] suffers from a mental disease, disorder, or defect;” (2) “whether a mental disease, disorder, or defect prevents that [individual] from understanding his/her legal position and the options available to him[/her];” and (3) “whether a mental disease, disorder, or defect prevents that [individual] from making a rational choice among his[/her] options.”<sup>84</sup>

D. *Insanity to be Executed*<sup>85</sup>

In order for an inmate to be executed, s/he must be sane, meaning s/he possesses the “mental capacity to understand the fact of the impending execution and the reason for

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<sup>77</sup> FLA. R. CRIM. P. 3.218(b).

<sup>78</sup> *Id.*

<sup>79</sup> A “next friend” is an individual acting for benefit of a person *sui juris*, without being regularly appointed guardian. A “next friend” is not a party to an action, but is an officer of the court, especially appearing to look after the interests of the person for whose benefit s/he appears. Where permitted, in a capital case, this includes acting to assert claims for a defendant who seeks to waive such claims.

<sup>80</sup> *Whitmore v. Arkansas*, 495 U.S. 149, 165 (1990).

<sup>81</sup> *Lonchar v. Zant*, 978 F.2d 637, 641 (11th Cir. 1993) (citing *Whitmore v. Arkansas*, 495 U.S. 149, 163-64 (1990)).

<sup>82</sup> *See Durocher v. Singletary*, 623 So. 2d 482, 485 (Fla. 1993) (citing *Whitmore*, 495 U.S. at 163).

<sup>83</sup> *See Rees v. Peyton*, 384 U.S. 312, 314 (1966).

<sup>84</sup> *Hauser ex rel. Crawford v. Moore*, 223 F.3d 1316, 1322 (11th Cir. 2000) (citing *Lonchar*, 978 F.2d at 641-42).

<sup>85</sup> Although the commonly used term is “incompetency to be executed,” Florida Rules of Criminal Procedure 3.811 and 3.812 refer to “insanity to be executed.” *See* FLA. R. CRIM. P. 3.811(a), (b), 3.812.

it.”<sup>86</sup> If the Governor is informed that the inmate is insane, the Governor must stay the execution and appoint a commission of three psychiatrists to examine the inmate’s mental capacity.<sup>87</sup> The psychiatrists must simultaneously examine the inmate to determine “whether [s/he] understands the nature and effect of the death penalty and why it is to be imposed upon [him/her].”<sup>88</sup> Counsel for both the inmate and the state may be present during the examination.<sup>89</sup> If the inmate is not represented, the court that imposed the inmate’s conviction and sentence must appoint counsel to represent him/her.<sup>90</sup>

Following the examination, the commission of psychiatrists should provide the Governor with a report of their findings on the inmate’s insanity.<sup>91</sup> If the Governor finds that the inmate is insane—s/he does not possess the mental capacity to be executed because s/he does not understand the nature of the death penalty and why it is to be imposed on him/her—the Governor must have the inmate committed to a Department of Corrections (DOC) mental health treatment facility.<sup>92</sup> The inmate must remain in the DOC mental health treatment facility until the facility administrator determines that the inmate “has been restored to sanity.”<sup>93</sup> If the facility administrator determines that the inmate’s sanity has been restored, s/he must inform the Governor of the inmate’s status, at which time the Governor must appoint another commission of three psychiatrists to evaluate the inmate’s mental capacity.<sup>94</sup>

In contrast, if the Governor finds that the inmate understands the nature and effect of the death penalty and why it is to be imposed on him/her, then the Governor must lift the stay of execution, notify the Attorney General of the lifting of the stay, and, within ten days of that notification, set a new date for the inmate’s execution.<sup>95</sup>

Following the lifting of the inmate’s Governor-imposed stay of execution upon a finding by the Governor that the inmate is sane to be executed, the inmate’s counsel may move for a stay of execution based on insanity to be executed and request that a hearing be held on this issue.<sup>96</sup> The inmate’s motion must be in writing and contain a “certificate of counsel” that the motion is made “in good faith and on reasonable grounds to believe that the [inmate] is insane to be executed.”<sup>97</sup> In addition to the motion, the inmate must include any expert reports that were submitted to the Governor pursuant to the initial statutory determination of the inmate’s sanity to be executed.<sup>98</sup> The inmate may also file

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<sup>86</sup> FLA. R. CRIM. P. 3.811(b); *see also* FLA. STAT. § 922.07(2) (2006).

<sup>87</sup> FLA. STAT. § 922.07(1) (2006).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *See* FLA. STAT. § 922.07(2) (2006).

<sup>92</sup> FLA. STAT. § 922.07(3) (2006).

<sup>93</sup> FLA. STAT. § 922.07(4) (2006).

<sup>94</sup> *Id.*

<sup>95</sup> FLA. STAT. § 922.07(2) (2006).

<sup>96</sup> FLA. R. CRIM. P. 3.811(c), (d).

<sup>97</sup> FLA. R. CRIM. P. 3.811(d)(2).

<sup>98</sup> FLA. R. CRIM. P. 3.811(d)(3). If these reports are unavailable to the inmate’s counsel, s/he must attach an affidavit to the motion stating this fact, with an explanation as to why the evidence is unavailable. *Id.*

any other expert reports or relevant evidence.<sup>99</sup> The motion must be filed in the circuit court where the execution is scheduled to take place.<sup>100</sup>

If the circuit court judge “has reasonable grounds to believe that the [inmate] is insane to be executed,”<sup>101</sup> s/he must grant a stay of execution and may order a hearing de novo<sup>102</sup> on the issue of the inmate’s insanity to be executed—whether the inmate “lacks the mental capacity to understand the fact of the pending execution and the reason for it.”<sup>103</sup> In order to adequately resolve the issue of inmate’s insanity to be executed, the judge may do one of the following:

- (1) require the presence of the prisoner at the hearing;
- (2) appoint no more than three disinterested mental health experts to examine the prisoner with respect to the criteria for insanity to be executed and to report their findings and conclusions to the court; or
- (3) enter such other orders as may be appropriate to effectuate a speedy and just resolution.<sup>104</sup>

At the hearing, both the state and inmate’s counsel may present evidence relevant to the inmate’s insanity to be executed, including, but not limited to, the reports of expert witnesses.<sup>105</sup>

If the judge finds by clear and convincing evidence that the inmate is insane to be executed, s/he must enter an order continuing the stay of execution.<sup>106</sup> If the judge makes the contrary finding, s/he must deny the inmate’s motion and enter an order dissolving the stay of execution.<sup>107</sup>

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<sup>99</sup> FLA. R. CRIM. P. 3.811(d)(4).

<sup>100</sup> FLA. R. CRIM. P. 3.811(d)(1).

<sup>101</sup> FLA. R. CRIM. P. 3.811(e).

<sup>102</sup> The judge may not review the Governor’s determination on the inmate’s insanity to be executed. FLA. R. CRIM. P. 3.812(a).

<sup>103</sup> FLA. R. CRIM. P. 3.812(a), (b); *see also* FLA. R. CRIM. P. 3.811(e).

<sup>104</sup> FLA. R. CRIM. P. 3.812(c)(1)-(3).

<sup>105</sup> FLA. R. CRIM. P. 3.812(d).

<sup>106</sup> FLA. R. CRIM. P. 3.812(e).

<sup>107</sup> *Id.*

## II. ANALYSIS - MENTAL RETARDATION

### A. Recommendation #1

**Jurisdictions should bar the execution of individuals who have mental retardation, as that term is defined by the American Association on Mental Retardation. Whether the definition is satisfied in a particular case should be based upon a clinical judgment, not solely upon a legislatively prescribed IQ measure, and judges and counsel should be trained to apply the law fully and fairly. No IQ maximum lower than 75 should be imposed in this regard. Testing used in arriving at this judgment need not have been performed prior to the crime.**

The American Association on Mental Retardation (AAMR) defines mental retardation as “a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18.”<sup>108</sup>

Since 2001, the State of Florida has prohibited the execution of offenders with mental retardation,<sup>109</sup> defined as: (1) “significantly subaverage general intellectual functioning,” (2) “existing concurrently with deficits in adaptive behavior,” and (3) which has “manifested during the period from conception to age 18.”<sup>110</sup> Although the State of Florida’s definition of mental retardation is similar to the AAMR definition, it is potentially more restrictive in one aspect. Under the AAMR definition of mental retardation, limited intellectual functioning requires that an individual have an impairment in general intellectual functioning that places him/her in the lowest category of the general population. Experts generally agree that mental retardation includes everyone with an IQ score of 70 or below, but the definition also includes some individuals with IQ scores in the low to mid-70s.<sup>111</sup>

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<sup>108</sup> American Association on Mental Retardation, Definition of Mental Retardation, at [http://www.aamr.org/Policies/faq\\_mental\\_retardation.shtml](http://www.aamr.org/Policies/faq_mental_retardation.shtml) (last visited on July 31, 2006).

<sup>109</sup> See *supra* notes 3-6 and accompanying text.

<sup>110</sup> FLA. STAT. § 921.137(1) (2006); FLA. R. CRIM. P. 3.203(b).

<sup>111</sup> See James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, at 7 (2002) (unpublished manuscript), available at [www.deathpenaltyinfo.org/MREllisLeg.pdf](http://www.deathpenaltyinfo.org/MREllisLeg.pdf) (last visited on July 31, 2006). Ellis notes that “relevant professional organizations have long recognized the importance of clinical judgment in assessing general intellectual functioning, and the inappropriateness and imprecision of arbitrarily assigning a single IQ score as the boundary of mental retardation.” *Id.* at 7 n.18; see also American Association of Mental Retardation, Definition of Mental Retardation, at [http://www.aamr.org/Policies/faq\\_mental\\_retardation.shtml](http://www.aamr.org/Policies/faq_mental_retardation.shtml) (last visited on July 26, 2006) (noting that “[a]n obtained IQ score must always be considered in light of its standard error of measurement,” thus potentially making the IQ ceiling for mental retardation rise to 75. However, “an IQ score is only one aspect in determining if a person has mental retardation.”); AMERICAN ASSOCIATION OF MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT 5 (Ruth Luckasson ed., 9th ed. 1992) (“Mental retardation is characterized by significantly subaverage intellectual capabilities or ‘low intelligence.’ If the IQ score is valid, this will generally result in a score of approximately 70 to 75 or below. This upper boundary of IQs for use in classification of mental retardation is flexible to reflect the statistical variance inherent in all intelligence tests and the need for clinical judgment by a qualified psychological examiner.”); AMERICAN ASSOCIATION ON MENTAL DEFICIENCY, CLASSIFICATION IN MENTAL RETARDATION 11 (Herbert J. Grossman ed., 8th ed. 1983) (“This upper limit is

Florida's definition of mental retardation, however, appears to potentially impose a maximum IQ score lower than 75. Florida law defines "significantly subaverage general intellectual functioning" as "performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Department of Children and Family Services."<sup>112</sup> While the AAMR states that an IQ score of 75 is "approximately 2 standard deviations below the mean, considering the standard error of measurement,"<sup>113</sup> at least two Florida sources indicate that two standard deviations below the mean score is an IQ score of 69 or 70.<sup>114</sup> It should also be noted that neither the rule nor the statute setting out the definition of mental retardation in Florida makes any reference to the standard error of measurement.

Because we were unable to ascertain whether Florida's definition of mental retardation, and, in turn, its maximum IQ score for mental retardation, implicitly include the standard error of measurement, and because we were unable to pinpoint a commonly accepted standard error of measurement, we are unable to conclude whether the State of Florida requires that no maximum IQ score under 75 be imposed.

In addition to having an IQ score that is "two or more standard deviations from the mean score on a standardized intelligence test," the State of Florida requires the defendant to have "deficits in adaptive behavior" that exist concurrently with the requisite IQ score.<sup>115</sup> The AAMR definition of mental retardation includes adaptive behavior limitations, which produce real-world disabling effects on a person's life, designed to ensure that an individual is truly disabled and not simply a poor test-taker.<sup>116</sup> Under this definition,

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intended as a guideline; it could be extended upward through an IQ of 75 or more, depending on the reliability of the intelligence test used. This particularly applies in schools and similar settings if behavior is impaired and clinically determined to be due to deficits in reasoning and judgment."); AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4<sup>th</sup> ed. 2000) ("Thus it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior.").

<sup>112</sup> FLA. R. CRIM. P. 3.203(b) (noting that the intelligence tests authorized by the Department of Children and Family Services are found in FLA. ADMIN. CODE R. 65B-4.032 (2005)); Agency for Persons with Disabilities, About Us, *available at* <http://apd.myflorida.com/about/> (last visited on July 31, 2006) (explaining the developmental disabilities recognized by the State of Florida, describing mental retardation as "significant limitations in functioning related to subaverage intelligence," and stating "[p]eople who have mental retardation learn more slowly than other people and might need assistance in areas like communication, self-care, self-direction, health and safety, leisure, work and functional academics"). *But see* FLA. STAT. § 921.137(1) (2006) (specifying the test administered must be found in the rules of the Agency for Persons with Disabilities).

<sup>113</sup> American Association on Mental Retardation, AAMR Definition of Mental Retardation, *at* [http://www.aamr.org/Policies/faq\\_mental\\_retardation.shtml](http://www.aamr.org/Policies/faq_mental_retardation.shtml) (last visited on July 31, 2006).

<sup>114</sup> *See* CRIMINAL JUSTICE STANDARDS AND TRAINING COMMISSION, LAW ENFORCEMENT BASIC RECRUIT CURRICULUM, module 1, units 7, lesson 1, p. 4 (2005) [hereinafter BASIC RECRUIT CURRICULUM] (on file with author) (stating that two standard deviations below the mean score is an IQ score of 69); Philip Fougousse, *The Demise of the Death Penalty for the Mentally Retarded*, 77 FLA. B.J. 63, 66 (Dec. 2003) (explaining that the Florida rules do not have a required mean score to determine mental retardation but that the two standard deviations rule may protect defendants with an IQ as high as 75, whereas many experts believe that mental retardation is an IQ of 70 and below).

<sup>115</sup> FLA. STAT. § 921.137(1) (2006); FLA. R. CRIM. P. 3.203(b).

<sup>116</sup> Ellis, *supra* note 111, at 8.

adaptive behavior is “expressed in conceptual, social, and practical adaptive skills” and focuses on broad categories of adaptive impairment, not service-related skill areas.<sup>117</sup>

Similar to the AAMR definition, Florida law defines the term “adaptive behavior” as “the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.”<sup>118</sup> Additionally, the Florida Supreme Court, like the AAMR, has stated that the “deficit in adaptive behavior” component is equally important as a low IQ score.<sup>119</sup> The Florida Supreme Court also has held that a low IQ is not, by itself, sufficient to establish mental retardation; there must also be deficits in the defendant’s adaptive functioning.<sup>120</sup>

The AAMR also requires that mental retardation be manifested during the developmental period, which is generally defined as up until the age of 18. This does not mean that a person must have been IQ tested with scores in the mentally retarded range during the developmental period, but instead, there must have been manifestations of mental disability, which at an early age generally take the form of problems in the area of adaptive functioning.<sup>121</sup> The age of onset requirement is used to distinguish mental retardation from those forms of mental disability that can occur later in life, such as traumatic brain injury or dementia.<sup>122</sup>

The State of Florida similarly requires the subaverage intellectual functioning and concurrent deficits in adaptive behavior to “manifest[] during the period from conception to age 18.”<sup>123</sup>

Based on this information, the State of Florida appears to be in partial compliance with Recommendation #1.

#### *B. Recommendation #2*

**All actors in the criminal justice system, including police, court officers, prosecutors, defense attorneys, prosecutors, judges, and prison authorities, should be trained to recognize mental retardation in capital defendants and death-row inmates.**

Apart from law enforcement officials, the State of Florida does not explicitly require any other actors in the criminal justice system to participate in training to recognize mental retardation in capital defendants and death-row inmates. All Florida law enforcement

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<sup>117</sup> *Id.*

<sup>118</sup> FLA. STAT. § 921.137(1) (2006).

<sup>119</sup> *See Rodriguez v. State*, 919 So. 2d 1252, 1265-67 (Fla. 2005).

<sup>120</sup> *Id.* (noting that the defendant was able to run a drug trafficking operation, balance a bank account, and understand how to finance a new car, which indicated to the court-appointed expert a level of adaptive functioning sufficient to counter his IQ of 64).

<sup>121</sup> Ellis, *supra* note 111, at 9 n.27.

<sup>122</sup> *Id.* at 9.

<sup>123</sup> FLA. STAT. § 921.137(1) (2006); FLA. R. CRIM. P. 3.203(b).

officers are statutorily required to meet certain criteria,<sup>124</sup> pass an examination,<sup>125</sup> and complete a basic training course<sup>126</sup> at a training academy authorized by the Criminal Justice Standards and Training Commission (CJSTC), which is the regulatory body that oversees the training of law enforcement candidates.<sup>127</sup> The course consists of 756 hours of training,<sup>128</sup> including four hours of instruction on mental retardation.<sup>129</sup> This includes, but is not limited to, instruction on: (1) the proper definition of mental retardation and the IQ metric for determining the level of mental retardation; (2) the characteristic signals of mentally retarded persons; and (3) proper methods of communicating with persons suspected of being mentally retarded, including explaining *Miranda* warnings in terms that a mentally retarded individual can best understand.<sup>130</sup>

Florida law also requires certain capital attorneys to participate in continuing legal education. The Florida Rules of Criminal Procedure require all trial and appellate counsel handling death penalty cases to have attended, within the two years previous to the representation, “a continuing legal education program of at least twelve hours’ duration devoted specifically to the defense of capital cases.”<sup>131</sup> Similarly, attorneys on the capital post-conviction appointment registry must have attended, within the year preceding the representation, at least ten hours of continuing legal education programs devoted specifically to the defense of capital cases.<sup>132</sup> Post-conviction attorneys working at the Florida Capital Collateral Regional Counsel Offices, however, are not required to attend any mandatory training in capital defense and are often merely recent law school graduates.<sup>133</sup> On June 16, 2006, the Florida Commission on Capital Cases offered a non-

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<sup>124</sup> FLA. STAT. § 943.13(1)-(8), (11) (2006). One must (1) be at least 19 years of age; (2) be a citizen of the United States notwithstanding any contrary state law; (3) have obtained a high school diploma or the recognized equivalent; (4) not have been convicted of a felony or misdemeanor involving perjury or false statements nor have been dishonorably discharged from the United States Armed Forces; (5) be fingerprinted for a background check; (6) have passed a physical examination; (7) possess good moral character; (8) submit an affidavit stating compliance with requirements (1)-(7); and (9) comply with continuing the training or education requirements of section 943.135. *Id.*

<sup>125</sup> The law enforcement candidate must obtain an acceptable score on the officer certification examination for the applicable criminal justice discipline. FLA. STAT. § 943.13(10) (2006).

<sup>126</sup> The law enforcement candidate must complete a commission-approved basic recruit training program for the applicable criminal justice discipline, unless exempted. FLA. STAT. § 943.13(9) (2006); FLA. ADMIN. CODE R. 11B-35.002 (2006) (administrative rule providing for the basic training course at a training academy authorized by the Criminal Justice Standards and Training Commission).

<sup>127</sup> FLA. STAT. §§ 943.11, 943.12 (2006).

<sup>128</sup> Telephone Interview with Dwight Floyd, Training Manager, Florida Department of Law Enforcement (Oct. 21, 2005).

<sup>129</sup> BASIC RECRUIT CURRICULUM, *supra* note 114, at module 1, unit 7, p. iv. Law enforcement officers must also complete forty hours of re-training every four years of service. FLA. STAT. § 943.135(1) (2006); *see also* Florida Department of Law Enforcement, Mandatory Retraining Requirement, at <http://www.fdle.state.fl.us/cjst/officerrequirements/mandatory.html> (last visited on Aug. 1, 2006).

<sup>130</sup> BASIC RECRUIT CURRICULUM, *supra* note 114, at module 1, unit 7, lesson 2, p. 5-6.

<sup>131</sup> FLA. R. CRIM. P. 3.112(f)(7), (g)(2)(E), (h)(6).

<sup>132</sup> FLA. STAT. § 27.710(1) (2006).

<sup>133</sup> Interview with Paul Norton, Administrative Service Director, CCRC-South (2005). Attorneys representing capital defendants are entitled to a maximum of \$500 per fiscal year for tuition and expenses for continuing legal education that pertain to the representation of capital defendants. FLA. STAT. § 27.711(7) (2006).

mandatory continuing legal education course on mental retardation,<sup>134</sup> but it is unclear whether such specialized training is regularly available to capital attorneys in Florida.

Based on this information, it appears that law enforcement officials are receiving mandatory training on how to recognize mental retardation and interact with mentally retarded suspects and witnesses, but not all actors within the criminal justice system are required to receive this training. Therefore, the State of Florida is only in partial compliance with Recommendation #2.

### *C. Recommendation #3*

**The jurisdiction should have in place policies that ensure that persons who may have mental retardation are represented by attorneys who fully appreciate the significance of their client's mental limitations. These attorneys should have training sufficient to assist them in recognizing mental retardation in their clients and understanding its possible impact on their clients' ability to assist with their defense, on the validity of their "confessions" (where applicable) and on their eligibility for capital punishment. These attorneys should also have sufficient funds and resources (including access to appropriate experts, social workers and investigators) to determine accurately and prove the mental capacities and adaptive skills deficiencies of a defendant who counsel believes may have mental retardation.**

As discussed under Recommendation #2, the State of Florida does not require attorneys representing capital defendants with mental retardation to participate in any special training on recognizing mental retardation and understanding the impact of mental retardation.

Defendants raising a claim of mental retardation as a bar to execution<sup>135</sup> and who wish to raise statutory or non-statutory mental mitigating circumstances during the capital penalty phase<sup>136</sup> are appointed a mental health expert. However, the court, not the defendant,<sup>137</sup> chooses this expert, who, in turn, must report the outcome of their evaluations to the court. Because this expert is not provided directly to defense counsel, s/he is not the type of resource contemplated by this Recommendation.

Capital defendants, however, do appear to receive some resources to assist in their defense that could be used to accurately determine and prove the mental capacities and adaptive skills deficiencies of a defendant who counsel believes may have mental

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<sup>134</sup> Florida Legislature, Commission on Capital Cases, at <http://www.floridacapitalcases.state.fl.us/> (last visited on July 31, 2006) (on file with author).

<sup>135</sup> FLA. R. CRIM. P. 3.203(c).

<sup>136</sup> FLA. R. CRIM. P. 3.202(b), (d).

<sup>137</sup> After the defendant files his/her notice of intent to present expert testimony of mental mitigation during the capital penalty phase, the state indicates its desire to seek the death penalty, and the defendant has been convicted of a capital felony; the court must appoint a mental health expert of the *state's* choosing to evaluate the defendant. FLA. R. CRIM. P. 3.202(d) (emphasis added).

retardation. During the capital trial and appeal, both appointed public defenders<sup>138</sup> and private attorneys<sup>139</sup> representing capital defendants are entitled to compensation for reasonable and necessary expenses. These include state-funded expert witnesses appearing on the indigent defendant's behalf for an investigation, preliminary hearing, or trial.<sup>140</sup> Although the appointed attorney for an indigent defendant could obtain a reimbursement for reasonable and necessary expenses associated with the retention of mental health experts during the pre-trial stage for the purposes of evaluating the defendant for mental retardation, we were unable to determine whether the extent of the resources provided or the funding for these resources is sufficient to determine accurately and prove the mental capacities and adaptive skills deficiencies of a defendant who counsel believes may have mental retardation.

Additionally, during post-conviction, an attorney who represents a capital defendant may use the services of one or more investigators to assist in representing a capital defendant, at a rate of \$40 per hour, up to a maximum of \$15,000 upon approval by the court.<sup>141</sup> A capital post-conviction attorney may also seek a maximum of \$15,000 for miscellaneous expenses, including compensating expert witnesses, upon approval by the court.<sup>142</sup> This statutory cap may be exceeded, however, if the court finds that "extraordinary circumstances" exist.<sup>143</sup>

Based on this information, it is unclear whether the State of Florida is in compliance with Recommendation #3.

#### *D. Recommendation #4*

**For cases commencing after the United States Supreme Court's decision in *Atkins v. Virginia*<sup>144</sup> or the state's ban on the execution of the mentally retarded (the earlier of the two), the determination of whether a defendant has mental retardation should occur as early as possible in criminal proceedings, preferably prior to the guilt/innocence phase of a trial and certainly before the penalty stage of a trial.**

The State of Florida first prohibited the execution of the mentally retarded in 2001 with the passage of section 921.137 of the Florida Statutes.<sup>145</sup> However, section 921.137 only applied to mentally retarded defendants who were sentenced on or after the statute's effective date of June 12, 2001,<sup>146</sup> and required that the determination of mental

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<sup>138</sup> FLA. STAT. §§ 29.006, 394.473(1) (2006).

<sup>139</sup> FLA. STAT. §§ 27.5304, 29.007 (2006).

<sup>140</sup> FLA. STAT. §§ 29.006(3), 29.007(4) (2006).

<sup>141</sup> FLA. STAT. § 27.711(5) (2006).

<sup>142</sup> FLA. STAT. § 27.711(6) (2006).

<sup>143</sup> *Id.*

<sup>144</sup> 536 U.S. 304 (2002).

<sup>145</sup> FLA. STAT. § 921.137 (2006).

<sup>146</sup> *Id.*

retardation be made after the jury makes its sentencing recommendation, but before the judge actually imposes the sentence.<sup>147</sup>

After the United States Supreme Court's 2002 decision in *Atkins v. Virginia* prohibiting the execution of the mentally retarded, the Florida Supreme Court promulgated rule 3.203 of the Florida Rules of Criminal Procedure to provide for the filing of a motion and a determination of mental retardation as a bar to execution before trial and allow capital defendants/inmates not covered by section 921.137 of the Florida Statutes an opportunity to present a claim of mental retardation as a bar to execution.<sup>148</sup> Rule 3.203 specifically provides that in all cases commenced after October 1, 2004, a motion for a determination of mental retardation as a bar to execution must be filed no later than ninety days prior to trial.<sup>149</sup> In promulgating the rule, the Florida Supreme Court expressed a clear preference for filing a rule 3.203 motion and resolving the issue of mental retardation as a bar to execution before trial, which "promotes the most efficient use of increasingly scarce judicial and legal resources."<sup>150</sup> In cases that were either non-final (in trial or direct appeal) or final (at some point after the direct appeal has concluded) and the inmate already filed his/her post-conviction motion at the time of the promulgation of rule 3.203 on October 1, 2004, the defendants/inmates were given sixty days from October 1, 2004 to file a motion claiming mental retardation as a bar to execution and to obtain a determination of mental retardation upon such filing, or amend their already-filed post-conviction motion to include such a claim.<sup>151</sup> Additionally, if the inmate's direct appeal was final, but s/he had not yet filed a post-conviction motion on October 1, 2004, then the inmate had to include the claim of mental retardation as a bar to execution in his/her post-conviction motion, which had to be filed within one year of his/her conviction and sentence becoming final.<sup>152</sup>

Because Florida law allows for a determination of mental retardation as a bar to execution at the earliest possible moment, the State of Florida is in compliance with Recommendation #4. We note, however, that individuals, mentally retarded or otherwise, who fail to raise a claim of mental retardation as a bar to execution within the time periods provided by rule 3.203 waive such a claim, unless they show good cause for the failure to comply with the time requirements.<sup>153</sup>

#### *E. Recommendation #5*

**The burden of disproving mental retardation should be placed on the prosecution, where the defense has presented a substantial showing that the defendant may have mental retardation. If, instead, the burden of proof is**

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<sup>147</sup> FLA. STAT. § 921.137(3)-(6) (2006).

<sup>148</sup> See FLA. R. CRIM. P. 3.203.

<sup>149</sup> FLA. R. CRIM. P. 3.203(d)(1).

<sup>150</sup> See FLA. R. CRIM. P. 3.203(d); *In re* Amendments to Fla. Rules of Criminal Procedure and Fla. Rules of Appellate Procedure, 875 So. 2d 563, 567-68 (Fla. 2004) (Cantero, J., concurring) (discussing numerous efficiency reasons for requiring the hearing to be prior to trial rather than after the verdict).

<sup>151</sup> FLA. R. CRIM. P. 3.203(d)(2)-(4); see also FLA. R. CRIM. P. 3.851.

<sup>152</sup> *Id.*

<sup>153</sup> FLA. R. CRIM. P. 3.203(f).

**placed on the defense, its burden should be limited to proof by a preponderance of the evidence.**

The State of Florida does not require the prosecution to disprove mental retardation after the defendant has presented a substantial showing that s/he may have mental retardation. Rather, Florida places the burden of proving mental retardation on the defendant by “clear and convincing evidence.”<sup>154</sup> In concurring with the opinion promulgating rule 3.203, Justice Pariente questioned the constitutionality of requiring the defendant to prove mental retardation by a standard of proof greater than preponderance of the evidence, but left the resolution of that question for a later time.<sup>155</sup>

The State of Florida, therefore, is not in compliance with Recommendation #5.

*F. Recommendation #6*

**During police investigations and interrogations, special steps should be taken to ensure that the *Miranda* rights of a mentally retarded person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.**

Police departments, sheriff’s departments, state law enforcement agencies, state highway patrols, transportation police departments, training academies, and university police departments in Florida certified by the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA)<sup>156</sup> and/or the Commission for Florida Law Enforcement Accreditation (CFLEA)<sup>157</sup> are required to adopt written directives establishing procedures to be used in criminal investigations, including procedures on

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<sup>154</sup> FLA. STAT. § 921.137(4) (2006). Of the twenty-six states that have adopted statutes or rules prohibiting the execution of the mentally retarded, sixteen states require the defendant to prove mental retardation by a preponderance of the evidence and Florida is one of six states using a clear and convincing evidence standard. John H. Blume, *Summaries of Relevant Cases and Legislation Resulting From Atkins v. Virginia*, 536 U.S. 304 (2002), Dec. 2, 2005 (unpublished manuscript, on file with author).

<sup>155</sup> See *supra* note 41 and accompanying text.

<sup>156</sup> Fifty-eight police departments, sheriff’s departments, state law enforcement agencies, state highway patrols, transportation police departments, training academies, and university police departments in Florida have been accredited or are in the process of obtaining accreditation by the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA). See CALEA Online, at <http://www.calea.org/agcysearch/agencysearch.cfm> (last visited on Aug. 1, 2006) (use second search function, designating “U.S.” and “Florida” as search criteria); see also CALEA Online, About CALEA, at <http://www.calea.org/newweb/AboutUs/Aboutus.htm> (last visited on Sept. 23, 2005) (noting that CALEA is an independent accrediting authority established by the four major law enforcement membership associations in the United States: International Association of Chiefs of Police (IACP); National Organization of Black Law Enforcement Executives (NOBLE); National Sheriffs’ Association (NSA); and Police Executive Research Forum (PERF)).

<sup>157</sup> One hundred twenty-nine police departments, sheriff’s departments, state law enforcement agencies, state highway patrols, transportation police departments, training academies, and/or university police departments in Florida have obtained accreditation under the CFLEA standards. Commission for Florida Law Enforcement Accreditation, CFA Credited Agencies, at <http://www.flaccreditation.org/CFA%20Accredited%20Agencies.htm> (last visited Aug. 1, 2006); see also COMMISSION FOR FLA. LAW ENFORCEMENT ACCREDITATION: STANDARDS MANUAL (4th ed. 2004) (rev’d June 2006)[hereinafter CFLEA STANDARDS].

interviews and interrogations.<sup>158</sup> CALEA further requires a written directive for assuring compliance with all applicable constitutional requirements pertaining to interviews, interrogations and access to counsel.<sup>159</sup> Although written directives produced in an effort to comply with the CALEA and CFLEA standards may include procedures designed to ensure that the *Miranda* rights of mentally retarded individuals are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used, the CALEA and CFLEA standards do not specifically require special procedures for interrogating or taking the confession of a mentally retarded person.

However, Florida law enforcement officers are statutorily required to complete a basic training course<sup>160</sup> at a training academy authorized by the Criminal Justice Standards and Training Commission (CJSTC), which is the regulatory body that oversees the training of law enforcement candidates.<sup>161</sup> The course has four hours of instruction on mental retardation, which includes, but is not limited to, instruction for law enforcement candidates on proper methods of communicating with persons whom they suspect are mentally retarded and explaining *Miranda*<sup>162</sup> warnings in terms that a mentally retarded individual can best understand in order to avoid confusion about the warning and a faulty waiver.<sup>163</sup> The course specifically instructs participants that a “mentally retarded person probably will not understand the *Miranda* rights as they are usually explained . . . . [and that] the person might find some of the words and concepts of the [warning] unfamiliar.”<sup>164</sup> To help prevent confusion regarding the meaning of the warning and the voluntariness of any subsequent confession, the course recommends that law enforcement officials:

- (1) ask questions about criminal activity only if the person’s guardian or attorney is present;
- (2) ask the person to repeat each phrase in his/her own words, and make sure the person understands the warning in order to assure that the individual is not simply replying “yes” to questions in order to please the officer or falsely demonstrate comprehension to hide his/her disability;
- (3) videotape the interview whenever possible;
- (4) ask questions in a straightforward, nonaggressive manner; and

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<sup>158</sup> COMMISSION ON ACCREDITATION OF LAW ENFORCEMENT AGENCIES, STANDARDS FOR LAW ENFORCEMENT AGENCIES, THE STANDARDS MANUAL OF THE LAW ENFORCEMENT AGENCY ACCREDITATION PROGRAM 42-2 (4th ed. 2001) [hereinafter CALEA STANDARDS] (Standard 42.2.1); CFLEA STANDARDS, *supra* note 157, at 18:5 (Standard 18.05).

<sup>159</sup> CALEA STANDARDS, *supra* note 158, at 1-3 (Standard 1.2.3).

<sup>160</sup> The law enforcement candidate must complete a commission-approved basic recruit training program for the applicable criminal justice discipline, unless exempted. FLA. STAT. § 943.13(9) (2006); FLA. ADMIN. CODE R. 11B-35.002 (2006) (administrative rule providing for the basic training course at a training academy authorized by the Criminal Justice Standards and Training Commission).

<sup>161</sup> See FLA. STAT. §§ 943.11, 943.12 (2006).

<sup>162</sup> *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (holding that “the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination”).

<sup>163</sup> BASIC RECRUIT CURRICULUM, *supra* note 114, at module 1, unit 7, p. iv, 5-6.

<sup>164</sup> *Id.* at module 1, unit 7, lesson 2, p. 6 (emphasis added).

- (5) if possible, make sure someone who knows the mentally retarded individual is present.<sup>165</sup>

Although it is unclear whether the written directives adopted by Florida law enforcement agencies in an effort to comply with the CALEA and CFLEA standards include procedures designed to ensure that the *Miranda* rights of mentally retarded individuals are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used, we do know that the State of Florida provides training on these issues. The State of Florida, therefore, is in partial compliance with Recommendation #6.

*G. Recommendation # 7*

**The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of mentally retarded persons are protected against "waivers" that are the product of their mental disability.**

Courts can protect against inappropriate “waivers” of rights, such as the right to counsel, by holding a hearing (either *sua sponte* or upon the request of one of the parties) to determine whether the defendant’s mental disability affects his/her ability to make a knowing and voluntary waiver and by rejecting any waivers that are the product of the defendant’s mental disability.

In order for a capital defendant to waive his/her rights, Florida courts must, at a minimum, conduct some level of inquiry to determine whether the defendant is making a knowing and voluntary waiver, as required by *Faretta v. California*.<sup>166</sup> If the defendant wishes to waive his/her right to counsel, the court is required to perform a “thorough inquiry . . . into both the accused’s comprehension of that offer [of appointed counsel] and the accused’s capacity to make a knowing and intelligent waiver,” before the court may accept waiver of counsel.<sup>167</sup> When a defendant expresses a desire to dismiss his/her collateral counsel and post-conviction petition after it has been instituted,<sup>168</sup> but the *Faretta*-type evaluation raises a doubt in the judge’s mind as to the defendant’s competency to offer a knowing and voluntary waiver, the judge may order a mental health evaluation to assist in making a competency determination. If the *Faretta*-type evaluation raises no doubt as to the defendant’s competency to waive collateral counsel and dismiss the post-conviction proceeding, no mental health evaluation is necessary for the competency determination.<sup>169</sup>

Similarly, where a capital defendant wishes to waive the right to present mitigation evidence in the penalty phase of the trial, the court is “obligated to ensure that the defendant’s waiver is knowing, uncoerced, and not due to defense counsel’s failure to

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<sup>165</sup> *Id.*

<sup>166</sup> 422 U.S. 806, 835 (1975) (holding that in order to represent himself, the accused must knowingly and intelligently forgo those relinquished benefits).

<sup>167</sup> FLA. R. CRIM. P. 3.111(d)(2).

<sup>168</sup> *Sanchez-Velasco v. State*, 702 So. 2d 224, 228 (Fla. 1997) (citing *Durocher v. Singletary*, 623 So. 2d 482, 485 (Fla. 1993)).

<sup>169</sup> *Id.*

fully investigate penalty phase matters.”<sup>170</sup> Specifically, (1) “counsel must inform the court on the record of the defendant’s decision;” (2) “[counsel must indicate whether, based on his[/her] investigation, [s/]he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be;” and (3) “[t]he court should then require the defendant to confirm on the record that his[/her] counsel has discussed these matters with him[/her], and despite counsel’s recommendation, [s/]he wishes to waive presentation of penalty phase evidence.”<sup>171</sup> Courts have confirmed the defendant’s knowing and voluntary waiver by directly inquiring whether the defendant (1) wished to move forward with the waiver, (2) was acting contrary to counsel’s advice, (3) understood the consequences of waiving the presentation of mitigation evidence, and (4) still wished to go forward with the waiver.<sup>172</sup>

Additionally, regardless of whether a capital defendant can make a knowing and voluntary waiver, Florida law prohibits him/her from waiving a direct appeal and any clemency proceedings. Specifically, direct appeal is mandatory and occurs even over the defendant’s objection.<sup>173</sup> Furthermore, because the Governor’s authority to grant clemency is absolute, as long as s/he has the approval of two other Board members, clemency may be granted over the inmate’s objection.<sup>174</sup>

Based on this information, it appears that the State of Florida is in compliance with Recommendation #7.

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<sup>170</sup> *Spann v. State*, 857 So. 2d 845, 853 (Fla. 2003).

<sup>171</sup> *See Koon v. Dugger*, 619 So. 2d 246, 250 (Fla. 1993).

<sup>172</sup> *See Spann*, 857 So. 2d at 853-54; *see also Durocher v. State*, 604 So. 2d 810, 812 (Fla. 1992) (noting that the judge questioned the defendant closely over a two-day period “on his understanding of what he was giving up and what he was risking by pleading guilty and waiving the presentation of mitigating evidence”).

<sup>173</sup> *See Hamblen v. State*, 527 So. 2d 800, 802 (Fla. 1988); *see also Tillman v. State*, 591 So. 2d 167, 169 (Fla. 1991); *Klokoc v. State*, 589 So. 2d 219, 221-22 (Fla. 1991) (refusing to allow the defendant to waive appeal, finding that the mitigating circumstances of mental illness outweighed the aggravating circumstances, and invalidating the death sentence).

<sup>174</sup> *See* FLA. CONST. art. IV, § 8(a).

### III. ANALYSIS - MENTAL ILLNESS

#### A. Recommendation #1

**All actors in the criminal justice system, including police officers, court officers, prosecutors, defense attorneys, judges, and prison authorities, should be trained to recognize mental illness in capital defendants and death-row inmates.**

As in the case with mental retardation,<sup>175</sup> the State of Florida does not explicitly require any actors in the criminal justice system—apart from law enforcement officers—to participate in training to recognize mental illness in capital defendants and death-row inmates. Each law enforcement officer is required to complete a basic training course, consisting of 756 hours of training,<sup>176</sup> and of those 756 hours, twelve hours include instruction on mental illness.<sup>177</sup> This includes, but is not limited to, instruction on: (1) “common mental illnesses” and their predominate symptoms and behaviors; (2) factors to consider when evaluating an individual’s mental condition, including differentiating between symptoms of mental illness and other behaviors; (3) medications to treat common mental illnesses and their side effects; and (4) the proper methods for responding to a mentally ill person in crisis.<sup>178</sup>

Although it appears that law enforcement officials are receiving mandatory training on how to recognize mental illness and interact with individuals with mental illness, not all actors within the criminal justice system are required to receive this training. Therefore, the State of Florida is only in partial compliance with Recommendation #1.

#### B. Recommendation #2

**During police investigations and interrogations, special steps should be taken to ensure that the *Miranda* rights of a mentally ill person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.**

As discussed under Recommendation #6 in the Mental Retardation Analysis, the State of Florida requires, as part of the law enforcement basic training course on mental retardation, that law enforcement candidates be instructed on proper methods of explaining *Miranda* warnings in terms that a mentally retarded individual can best understand.<sup>179</sup> The State of Florida, however, does not appear to require instruction on the proper methods of explaining *Miranda* warnings to individuals with mental illness. Therefore, the State of Florida is not in compliance with Recommendation #2.

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<sup>175</sup> See *supra* notes 124-134 and accompanying text.

<sup>176</sup> Telephone Interview with Dwight Floyd, Training Manager, Florida Department of Law Enforcement (Oct. 21, 2005).

<sup>177</sup> BASIC RECRUIT CURRICULUM, *supra* note 114, at module 1, unit 8.

<sup>178</sup> *Id.*

<sup>179</sup> See *supra* notes 160-165.

*C. Recommendation #3*

**The jurisdiction should have in place policies that ensure that persons who may have mental illness are represented by attorneys who fully appreciate the significance of their client's mental disabilities. These attorneys should have training sufficient to assist them in recognizing mental disabilities in their clients and understanding its possible impact on their clients' ability to assist with their defense, on the validity of their "confessions" (where applicable) and on their initial or subsequent eligibility for capital punishment. These attorneys should also have sufficient funds and resources (including access to appropriate experts, social workers, and investigators) to determine accurately and prove the disabilities of a defendant who counsel believes may have mental disabilities.**

This Recommendation is identical to Recommendation #3 in the Mental Retardation section, except that it pertains to mental illness instead of mental retardation. Like Recommendation #3 in the Mental Retardation section, we do not have enough information to accurately assess whether the State of Florida is in compliance with this Recommendation.

*D. Recommendation #4*

**Prosecutors should employ, and trial judges should appoint, mental health experts on the basis of their qualifications and relevant professional experience, not on the basis of the expert's prior status as a witness for the State. Similarly, trial judges should appoint qualified mental health experts to assist the defense confidentially according to the needs of the defense, not on the basis of the expert's current or past status with the State.**

We were unable to obtain information pertaining to state attorney's offices' hiring procedures for mental health experts to determine whether such offices are hiring these experts based on their qualifications and relevant professional experience. Similarly, we were unable to obtain information on trial judges' reasoning for appointing certain mental health professionals and not others, but we were able to obtain information on state training requirements and on the qualifications and experience of mental health experts appointed by the court.

The State of Florida requires the Department of Children and Family Services (Department) to develop and provide: (1) "[a] plan for training mental health professionals to perform forensic evaluations and to standardize the criteria and procedures to be used in these evaluations;" (2) "[c]linical protocols and procedures based upon the criteria of Rules 3.210 and 3.216 of the Florida Rules of Criminal Procedure;" and (3) "[t]raining for mental health professionals in the application of these protocols and procedures in performing forensic evaluations and providing reports to the courts."<sup>180</sup> In criminal cases where the court is required to appoint experts to assess the

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<sup>180</sup> FLA. STAT. § 916.111(1)(a)-(c) (2006).

defendant's mental state and method of treatment,<sup>181</sup> these court-appointed experts must to the extent possible be a psychiatrist, licensed psychologist, or physician and have completed such forensic evaluator training.<sup>182</sup> The Department is required to maintain and annually provide to the courts a list of mental health professionals who have completed the approved training as experts, which ensures that the court is appointing experts with these qualifications and experience.<sup>183</sup>

Additionally, in cases in which an indigent defendant's counsel informs the court of his/her reasonable belief that the defendant may be incompetent to proceed or may have been insane at the time of the offense, the State of Florida requires the appointment of one expert to examine the defendant to assist counsel in the preparation of the defense.<sup>184</sup> Such expert may report only to the defense attorney, and matters related to the expert fall under the lawyer-client privilege.<sup>185</sup> On the other hand, experts appointed by the court in cases in which a defendant wishes to raise statutory or non-statutory mitigating circumstances during the capital penalty phase report to the court, rather than to defense counsel, and attorneys for the state and defendant may be present at the examination.<sup>186</sup> The examination, however, must be "limited to those mitigating circumstances the defendant expects to establish through expert testimony."<sup>187</sup>

Although it appears that trial judges are required to appoint qualified mental health professionals, we do not have sufficient information about prosecutors' or trial judges' expert selection/appointment process to assess whether the State of Florida is in compliance with Recommendation #4.

#### *E. Recommendation #5*

**Jurisdictions should provide adequate funding to permit the employment of qualified mental health experts in capital cases. Experts should be paid in an amount sufficient to attract the services of those who are well trained and who remain current in their fields. Compensation should not place a premium on quick and inexpensive evaluations, but rather should be sufficient to ensure a thorough evaluation that will uncover pathology that a superficial or cost-saving evaluation might miss.**

The State of Florida provides funding for experts to attorneys representing indigent defendants charged with or convicted of a capital offense through all legal proceedings, except possibly during clemency proceedings,<sup>188</sup> but we were unable to obtain the specific amount of funding allocated by the State of Florida for the employment of qualified mental health experts in capital cases. Similarly, the rates paid to mental health

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<sup>181</sup> FLA. STAT. § 916.115(1) (2006).

<sup>182</sup> FLA. STAT. § 916.115(1)(a) (2006).

<sup>183</sup> FLA. STAT. § 916.115(1)(b) (2006).

<sup>184</sup> FLA. R. CRIM. P. 3.216(a); *see also* Price v. State, 816 So. 2d 738, 740 (Fla. 3d DCA 2002).

<sup>185</sup> *Id.*

<sup>186</sup> FLA. R. CRIM. P. 3.202(b), (d).

<sup>187</sup> FLA. R. CRIM. P. 3.202(d).

<sup>188</sup> *See* Chapter Six: Defense Services, *supra*, at 135-206.

experts appointed by the court<sup>189</sup> or retained by public defenders, capital post-conviction attorneys, or the state are unknown. However, the rates paid to mental health experts retained by conflict trial counsel are determined by each circuit's Article V Indigent Services Committee and range from \$125 to \$200 per hour.<sup>190</sup> This information alone, however, is insufficient to assess the adequacy of the rate. Therefore, we are unable to determine whether the State of Florida is in compliance with Recommendation #5.

*F. Recommendation #6*

**The jurisdiction should forbid death sentences and executions with regard to everyone who, at the time of the offense, had significant limitations in both intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury.**

*Recommendation #7*

**The jurisdiction should forbid death sentences and executions with regard to everyone who, at the time of the offense, had a severe mental disorder or disability that significantly impaired the capacity (a) to appreciate the nature, consequences or wrongfulness of one's conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform one's conduct to the requirements of the law. [A disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this recommendation.]**

The State of Florida—by statute and by court rule—excludes from the death penalty only defendants who have mental retardation, as defined as “significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior” that “manifested during the period from conception to age 18.”<sup>191</sup> This exclusion does not include defendants who have mental retardation or other disabilities, such as dementia or a traumatic brain injury, which result in significant impairments in both intellectual and adaptive functioning but which manifest after the age of 18. Similarly, this exclusion does not apply to individuals who at the time of the offense had a severe mental disorder or disability that significantly impaired their capacity to appreciate the nature, consequences or wrongfulness of their conduct, to exercise rational judgment in relation to conduct; or to conform their conduct to the requirements of the law. As a result, the State of Florida is not in compliance with either Recommendation #6 or Recommendation #7.

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<sup>189</sup> FLA. STAT. § 916.115(2) (2006) (stating generally that the court is responsible for the fees of any mental health expert that it appoints by court order, regardless of whether it is upon motion of defense counsel or the state or upon its own motion).

<sup>190</sup> See Chapter Six: Defense Services, *supra*, at 156-161.

<sup>191</sup> FLA. STAT. § 921.137(1) (2006); FLA. R. CRIM. P. 3.203.

We note, however, that the Florida Supreme Court has reversed a number of death sentences upon a finding that death is disproportionate due to a defendant's mental disorder or disability, combined with other mitigating circumstances. Recently, in *Crook v. State*, the Florida Supreme Court found Crook's death sentence to be disproportionate in light of the "overwhelming mitigation," especially the mental mitigation.<sup>192</sup> With respect to the mental mitigation, the Court stated: "We are particularly influenced by the unrefuted testimony of mental health experts that relate the rage and brutal conduct in this crime to the defendant's brain damage and mental deficiencies."<sup>193</sup> The Court has reversed defendants' death sentences for similar reasons in the following cases, among others:

- (1) *Cooper v. State*<sup>194</sup>—finding Cooper's crime of murder to be one of the most mitigated, including evidence of Cooper's brain damage, mental retardation, and mental illness (paranoia and schizophrenia);<sup>195</sup>
- (2) *Hawk v. State*<sup>196</sup>—finding the death sentence to be disproportionate, despite aggravating circumstances, because of significant mental mitigation, including evidence of brain damage and mental illness;<sup>197</sup> and
- (3) *Knowles v. State*<sup>198</sup>—finding the death sentence to be disproportionate in light of the substantial mitigation, including Knowles' neurological deficiencies.<sup>199</sup>

Despite these decisions, the State of Florida does not explicitly exclude the individuals mentioned in Recommendations #6 and #7 from being sentenced to death.

Accordingly, the Florida Death Penalty Assessment Team recommends that the State of Florida adopt a law or rule: (a) forbidding death sentences and executions with regard to everyone who, at the time of the offense, had significantly subaverage limitations in both their general intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury; and (b) forbidding death sentences and executions with regard to everyone who, at the time of the offense, had a severe mental disorder or disability that significantly impaired their capacity (i) to appreciate the nature, consequences or wrongfulness of their conduct, (ii) to exercise rational judgment in relation to their conduct, or (iii) to conform their conduct to the requirements of the law.

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<sup>192</sup> *Crook v. State*, 908 So. 2d 350, 358 (Fla. 2005).

<sup>193</sup> *Id.*

<sup>194</sup> 739 So. 2d 82 (Fla. 1999).

<sup>195</sup> *Cooper v. State*, 739 So. 2d 82, 85-86 (Fla. 1999).

<sup>196</sup> 718 So. 2d 159 (Fla. 1998).

<sup>197</sup> *Hawk v. State*, 718 So. 2d 159, 163-64 (Fla. 1998).

<sup>198</sup> 632 So. 2d 62 (Fla. 1993).

<sup>199</sup> *Knowles v. State*, 632 So. 2d 62, 67 (Fla. 1993).

### G. Recommendation #8

**To the extent that a mental disorder or disability does not preclude imposition of the death sentence pursuant to a particular provision of law (see Recommendations #6-#7 as to when it should do so), jury instructions should communicate clearly that a mental disorder or disability is a mitigating factor, not an aggravating factor, in a capital case; that jurors should not rely upon the factor of a mental disorder or disability to conclude that the defendant represents a future danger to society; and that jurors should distinguish between the defense of insanity and the defendant's subsequent reliance on mental disorder or disability as a mitigating factor.**

The Florida Statutes and the *Florida Standard Jury Instructions in Criminal Cases* allow the jury to consider the defendant's mental disorder or disability as a mitigating circumstance. In fact, the Florida Statutes and the standard jury instructions contain two relevant mitigating circumstances: (1) "[t]he capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;" and (2) "[t]he capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired."<sup>200</sup> The Florida Statutes also allow the jury to consider "any other factors in the defendant's background that would mitigate against imposition of the death penalty;" similarly,<sup>201</sup> the standard jury instructions also allow the jury to consider "any [other] aspect of the defendant's character, record, or background,"<sup>202</sup> including the defendant's mental condition. However, neither the Florida Statutes nor the standard jury instructions require or recommend that judges instruct capital juries that: (1) mental illness is a mitigating factor, not an aggravating factor; and (2) jurors should distinguish between the defense of insanity and the defendant's subsequent reliance on mental illness as a mitigating factor.

Similarly, the Florida Statutes and the standard jury instructions do not require or recommend that judges instruct capital jurors that they should not rely upon the mental disorder or disability to conclude that the defendant represents a future danger to society. The State of Florida does indirectly attempt to prevent jurors from considering future dangerousness as an aggravating factor. It does not include future dangerousness as a statutory aggravating circumstance and non-statutory aggravators may not be considered by the jury.<sup>203</sup> In fact, the standard jury instructions make clear that the only aggravating circumstances that the jury may consider are those in the standard jury instructions.<sup>204</sup> Additionally, the Florida Supreme Court prohibits future dangerousness from being argued in aggravation, unless it is to rebut an argument by the defense that the defendant has a low probability of future dangerousness or is "directly related to proving a statutory

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<sup>200</sup> FLA. STAT. 921.141(3), (6)(b), (e) (2006); *see also* Fla. Stand. Crim. Jury Inst. 7.11 (2006).

<sup>201</sup> FLA. STAT. 921.141(3), (6)(h) (2006).

<sup>202</sup> FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 7.11 (5th ed. 2005).

<sup>203</sup> Fla. Stat. 921.141(3), (5) (2006); *Moore v. State*, 701 So. 2d 545, 552 (Fla. 1997).

<sup>204</sup> FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 7.11 (5th ed. 2005).

aggravating circumstance.”<sup>205</sup> Despite these rules, however, 25.2 percent of interviewed Florida capital jurors still believe that if they found the defendant to be a future danger to society, they were required by law to recommend a sentence of death.<sup>206</sup> Given that Florida capital jurors still consider a defendant’s future dangerousness, it is imperative that judges make clear that such consideration should not include the defendant’s mental disorder or disability.

Because neither the Florida Statutes nor the *Florida Standard Jury Instructions in Criminal Cases* require or recommend that judges instruct the juries on the three issues contained in Recommendation #8, the State of Florida is not in compliance with this Recommendation.

#### *H. Recommendation #9*

**Jury instructions should adequately communicate to jurors, where applicable, that the defendant is receiving medication for a mental disorder or disability, that this affects the defendant's perceived demeanor, and that this should not be considered in aggravation.**

*The Florida Standard Jury Instructions in Criminal Cases* contains an instruction addressing the administration of medication for a mental disorder or disability. The instruction specifically states: “(Defendant) currently is being administered psychotropic medication under medical supervision for a mental or emotional condition. Psychotropic medication is any drug or compound affecting the mind or behavior, intellectual functions, perception, moods, or emotion and includes anti-psychotic, anti-depressant, anti-manic, and anti-anxiety drugs.”<sup>207</sup> Pursuant to Rule 3.215(c)(2) of the Florida Rules of Criminal Procedure, the judge must, at the request of the defendant, give this instruction, or a similar explanatory instruction, “[i]f the defendant proceeds to trial with the aid of medication for a mental or emotional condition.”<sup>208</sup>

The instruction, however, does not allude to the medication’s possibly tranquilizing effects. Specifically, the medication can make the defendant look less mentally ill than the jury might expect and less responsive to his/her attorney and to the events in the court room, leading the jury to assume that the defendant lacks remorse or sympathy toward the victims. Additionally, the instruction does not mention that the possible effects of the medication on the defendant’s demeanor should not be considered in aggravation. Because the standard jury instruction does not adequately explain the effects of psychotropic medication, but does mention that the defendant is receiving medication for a mental disorder or disability, the State of Florida is only in partial compliance with Recommendation #9.

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<sup>205</sup> See *Kormondy v. State*, 703 So. 2d 454, 463 (Fla. 1997); O.H. EATON, JR., FLORIDA COLLEGE OF ADVANCED JUDICIAL STUDIES, CONDUCTING THE PENALTY PHASE OF A CAPITAL CASE 56 (2006), available at <http://www.flcourts18.org/PDF/Pen%20Phase%20Materials%202006.pdf> (last visited on Aug. 5, 2006).

<sup>206</sup> J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law’s Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51, 72 (2003).

<sup>207</sup> FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 3.6(c) (5th ed. 2005).

<sup>208</sup> FLA. R. CRIM. P. 3.215(c)(2).

### I. Recommendation #10

**The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of persons with mental disorders or disabilities are protected against "waivers" that are the product of a mental disorder or disability. In particular, the jurisdiction should allow a "next friend" acting on a death-row inmate's behalf to initiate or pursue available remedies to set aside the conviction or death sentence, where the inmate wishes to forego or terminate post-conviction proceedings but has a mental disorder or disability that significantly impairs his or her capacity to make a rational decision.**

Recommendation #10 is divided into two parts: the first, which is identical to Recommendation #7 in the Mental Retardation section, pertains to the existence of state mechanisms that protect against waivers resulting from an inmate's mental disability; and the second pertains to the specific mechanism of "next friend" petitions.

As discussed under Recommendation #7 in the Mental Retardation section, the State of Florida does have in place certain mechanisms to protect against waivers that are a product of a person's mental disability. Therefore, the State of Florida meets the requirements of the first part of Recommendation #10.

Apart from the mechanisms discussed in Recommendation #7 in the Mental Retardation section, the State of Florida also allows a "next friend" to act on behalf of a death-row inmate. Specifically, the State of Florida allows a "next friend" to file a petition on behalf of a death-row inmate who wishes to waive his/her right to pursue post-conviction proceedings if the "next friend" can establish that (1) s/he is truly "dedicated to the interests" of the inmate,<sup>209</sup> and (2) there is an adequate explanation—i.e., mental incompetence—as to why the inmate cannot appear on his/her own behalf.<sup>210</sup> The Florida Supreme Court has found that "mere volunteers who do not appear on behalf of the prisoner or show some right to represent him[her]" may not file a petition on behalf of a death-row inmate.<sup>211</sup> In *Durocher v. Singletary*, for example, the Florida Supreme Court found that an attorney from the Capital Collateral Regional Counsel Office constituted a "mere volunteer."<sup>212</sup>

An individual is "incompetent" for the purposes of next friend standing if s/he lacks the "capacity to appreciate his[her] position and make a rational choice with respect to continuing or abandoning further litigation," or suffers "from a mental disease, disorder, or defect which may substantially affect his[her] capacity."<sup>213</sup> This involves a determination of three issues: (1) "whether that [individual] suffers from a mental disease, disorder, or defect; (2) whether a mental disease, disorder, or defect prevents that

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<sup>209</sup> *Lonchar v. Zant*, 978 F.2d 637, 641 (11th Cir. 1993) (citing *Whitmore v. Arkansas*, 495 U.S. 149, 163-64 (1990)).

<sup>210</sup> *Durocher v. Singletary*, 623 So. 2d 482, 485 (Fla. 1993) (citing *Whitmore*, 495 U.S. at 163).

<sup>211</sup> *State ex rel. Deeb v. Fabisinski*, 152 So. 207, 209 (Fla. 1933).

<sup>212</sup> *Durocher v. Singletary*, 623 So. 2d 482, 485 (Fla. 1993).

<sup>213</sup> *See Rees v. Peyton*, 384 U.S. 312, 314 (1966).

[individual] from understanding his[/her] legal position and the options available to him[/her]; and (3) whether a mental disease, disorder, or defect prevents that [individual] from making a rational choice among his[/her] options.”<sup>214</sup> Courts have found rational a number of reasons for choosing not to pursue post-conviction proceedings, including, but not limited to: “[the inmate] was tired of languishing in prison; [the inmate] was pessimistic [s/he] would ever get out of prison; and [the inmate] truly believed [s/he] would be happier in the afterlife.”<sup>215</sup>

Given that the State of Florida meets the requirements of prong 1 and meets the requirements of prong 2, the State of Florida is in compliance with Recommendation #10.

#### *J. Recommendation #11*

**The jurisdiction should stay post-conviction proceedings where a prisoner under sentence of death has a mental disorder or disability that significantly impairs his or her capacity to understand or communicate pertinent information, or otherwise to assist counsel, in connection with such proceedings and the prisoner's participation is necessary for a fair resolution of specific claims bearing on the validity of the conviction or death sentence. The jurisdiction should require that the prisoner's sentence be reduced to the sentence imposed in capital cases when execution is not an option if there is no significant likelihood of restoring the prisoner's capacity to participate in post-conviction proceedings in the foreseeable future.**

Recommendation #11 consists of two parts: the first involves the suspension of post-conviction proceedings due to the prisoner’s mental disorder or disability; and the second involves the reduction of the prisoner’s sentence due to the likelihood of restoring the prisoner’s capacity to participate in post-conviction proceedings.

#### Suspension of Post-Conviction Proceedings

The State of Florida requires the suspension of some—but not all—portions of a death-sentenced prisoner’s post-conviction proceedings upon a finding of mental incompetency to proceed. To obtain a determination of mental competency during post-conviction proceedings, a death-sentenced prisoner’s counsel may file a motion alleging “the factual matters at issue and the reason that competent consultation with the prisoner is necessary with respect to each factual matter specified.”<sup>216</sup> The motion must be accompanied by a certificate of counsel that “the motion is made in good faith and on reasonable grounds to believe that the death-sentenced prisoner is incompetent to proceed.”<sup>217</sup>

Following the filing of the motion, a competency hearing is required only if the court determines that “there are reasonable grounds to believe that the death-sentenced prisoner

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<sup>214</sup> Hauser ex rel Crawford v. Moore, 223 F.3d 1316, 1322 (11th Cir. 2000) (citing *Lonchar*, 978 F.2d at 641-42).

<sup>215</sup> *Hauser*, 223 F.3d at 1323.

<sup>216</sup> FLA. R. CRIM. P. 3.851(g)(2), (4).

<sup>217</sup> FLA. R. CRIM. P. 3.851(g)(2).

is incompetent to proceed and that factual matters are at issue, the development or resolution of which require the prisoner's input.”<sup>218</sup> If the court finds the existence of such “reasonable grounds,” the court must have the prisoner examined by two or three experts before scheduling a hearing.<sup>219</sup> Within thirty days after the experts have completed their examinations, the court must schedule a hearing to determine the prisoner's competency to proceed.<sup>220</sup>

If the court finds the prisoner competent to proceed, the court must proceed with the post-conviction motion.<sup>221</sup> Alternatively, if the court finds the prisoner to be incompetent to proceed, the court must suspend all post-conviction proceedings involving factual matters that require the prisoner's input.<sup>222</sup> Consistent with this Recommendation, however, all post-conviction issues that involve “only matters of record and claims that do not require the prisoner's input” must proceed “notwithstanding the prisoner's incompetency.”<sup>223</sup>

### Reduction of Prisoner's Sentence

In cases in which a death-sentenced inmate is found incompetent to proceed during post-conviction proceedings, the court is to order treatment to restore the prisoner's competence either at the custodial facility or at another facility.<sup>224</sup> If practicable, such treatment must “take place at a custodial facility under the direct supervision of the Department of Corrections.”<sup>225</sup> Following treatment, if the court finds that the death-sentenced inmate's competency has been restored, s/he must proceed with the post-conviction motion.<sup>226</sup> If the prisoner is not restorable, Florida law is silent as to the disposition.

### Conclusion

The State of Florida is in partial compliance with Recommendation #11. A finding of mental incompetency to proceed suspends all post-conviction proceedings involving factual matters that require the prisoner's input, but upon such finding, the court is not required to reduce the prisoner's sentence to life without the possibility of parole when the prisoner's competence is not restorable.

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<sup>218</sup> FLA. R. CRIM. P. 3.851(g)(3); *see also* *Carter v. State*, 706 So. 2d 873, 875 (Fla. 1997); *see also* *Ferguson v. State*, 789 So. 2d 306, 312 (Fla. 2001) (finding that *Carter* applies retroactively).

<sup>219</sup> FLA. R. CRIM. P. 3.851(g)(5).

<sup>220</sup> FLA. R. CRIM. P. 3.851(g)(10).

<sup>221</sup> FLA. R. CRIM. P. 3.851(g)(11).

<sup>222</sup> FLA. R. CRIM. P. 3.851(g)(1).

<sup>223</sup> *Id.*

<sup>224</sup> FLA. R. CRIM. P. 3.212(c)(1)-(3).

<sup>225</sup> FLA. R. CRIM. P. 3.851(g)(13).

<sup>226</sup> FLA. R. CRIM. P. 3.851(g)(11).

K. Recommendation #12

**The jurisdiction should provide that a death-row inmate is not “competent” for execution where the inmate, due to a mental disorder or disability, has significantly impaired capacity to understand the nature and purpose of the punishment or to appreciate the reason for its imposition in the inmate's own case. It should further provide that when such a finding of incompetence is made after challenges to the conviction's and death sentence's validity have been exhausted and execution has been scheduled, the death sentence shall be reduced to the sentence imposed in capital cases when execution is not an option.**

Recommendation #12 is divided into two parts: the first pertains to a state's standard for determining whether a death-row inmate is competent to be executed; and the second pertains to a state's sentencing procedures after a death-row inmate has been found incompetent to be executed.

Standard for Competency to Be Executed

In order for a death-row inmate to be “competent” for execution under Recommendation #12, the death-row inmate must not only “understand” the nature and purpose of the punishment but s/he also must “appreciate” its personal application in the death-row inmate's own case—that is, why it is being imposed on the death-row inmate.

The State of Florida prohibits the execution of any death-row inmate who is found to be “insane to be executed.”<sup>227</sup> The standard used by the Governor of Florida<sup>228</sup> and the circuit courts<sup>229</sup> to determine whether an inmate is insane to be executed is whether s/he “lacks the mental capacity to understand the fact of the impending execution and the reason for it.”<sup>230</sup> The Florida Supreme Court has interpreted this standard to include a “rationality element, albeit a limited one,” which allows for inquiry into an inmate's “rational appreciation of the connection between his[her] crime and the punishment [s/]he is to receive.”<sup>231</sup>

Although the State of Florida allows for inquiry into an inmate's rational appreciation of the reason why s/he is to be executed, it does not require that such rational appreciation exist in order for a death-row inmate to be found sane for execution, as required by Recommendation #12. For instance, in December 1999, Thomas Provenzano was found competent to be executed<sup>232</sup> even though the circuit court found by clear and convincing

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<sup>227</sup> FLA. R. CRIM. P. 3.811(a).

<sup>228</sup> For a description of the process used by the Governor to assess insanity to be executed, *see supra* notes 85-96.

<sup>229</sup> For a description of the process followed by the circuit courts to assess insanity to be executed, *see supra* notes 97-107.

<sup>230</sup> FLA. R. CRIM. P. 3.811(b); *see also* FLA. R. CRIM. P. 3.812(b) (using the term “pending” in place of “impending”).

<sup>231</sup> *Provenzano v. State*, 750 So. 2d 597, 602-03 (Fla. 1999); *see also* *Martin v. State*, 515 So. 2d 189, 190 (Fla. 1987); *Martin v. Dugger*, 686 F. Supp. 1523, 1572 (S.D. Fla. 1988).

<sup>232</sup> *See Provenzano*, 760 So. 2d at 137 (affirming the circuit court's decision).

evidence that “Provenzano has a delusional belief that the real reason he is being executed is because he is Jesus Christ.”<sup>233</sup> Despite Provenzano’s delusions, the circuit court found that he has a “factual and rational understanding of ‘the details of his trial, his conviction, and the jury’s recommendation by a vote of seven to five that he be sentenced to death’ and of ‘the fact that in accordance with the jury’s recommendation, he was sentenced to death for the murder of Baliff Arnie Wilkerson, and that he will die once he is executed.’”<sup>234</sup> The Florida Supreme Court upheld the circuit court’s decision, finding that the “record contains competent, substantial evidence to support th[e] [circuit court’s] determination,”<sup>235</sup> and Provenzano was executed in June 2000.

### Sentencing Procedures After Finding of Incompetence

In cases in which an inmate is found to be insane to be executed, the State of Florida does not require that the inmate’s sentence be reduced to life imprisonment without the possibility of parole—the only alternative sentence to death. Rather, the inmate must be committed to a Department of Corrections (DOC) mental health treatment facility<sup>236</sup> and must remain in such facility until the facility administrator determines that the inmate has been restored to sanity.<sup>237</sup> If the facility administrator determines that the inmate’s sanity has been restored, s/he must inform the Governor of the inmate’s status, at which time the Governor must appoint a commission of three psychiatrists to evaluate the mental capacity of the inmate.<sup>238</sup>

### Conclusion

Although the State of Florida allows for inquiry into an inmate’s rational appreciation of the reason why s/he is to be executed, it does not require that such rational appreciation exist in order for a death-row inmate to be found sane for execution. Additionally, in cases in which the inmate is found to be insane to be executed, the state does not reduce the inmate’s death sentence to life imprisonment without the possibility of parole. Based on this information, the State of Florida is not in compliance with Recommendation #12.

The Florida Death Penalty Assessment Team, therefore, makes the following recommendation: The State of Florida should adopt a law or rule providing that a death-row inmate is not “competent” for execution where the inmate, due to a mental disorder or disability, has significantly impaired capacity to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the inmate’s own case. It should further provide that when a finding of incompetence is made after challenges to the validity of the conviction and death sentence have been exhausted and execution has been scheduled, the death sentence will be reduced to life without the possibility of

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<sup>233</sup> *Id.* at 140. (Anstead, J., dissenting).

<sup>234</sup> *Id.* (majority opinion).

<sup>235</sup> *Id.*

<sup>236</sup> FLA. STAT. 922.07(3) (2006).

<sup>237</sup> FLA. STAT. 922.07(4) (2006).

<sup>238</sup> *Id.*

parole (or to a life sentence for those sentenced prior to the adoption of life without the possibility of parole as the sole alternative punishment to the death penalty).

*L. Recommendation #13*

**Jurisdictions should develop and disseminate—to police officers, attorneys, judges, and other court and prison officials—models of best practices on ways to protect mentally ill individuals within the criminal justice system. In developing these models, jurisdictions should enlist the assistance of organizations devoted to protecting the rights of mentally ill citizens.**

To the best of our knowledge, the State of Florida is not currently working with organizations devoted to protecting the rights of mentally ill citizens, or any other organization, to develop or disseminate—to police, attorneys, judges, and other court and prison officials—models of best practice on ways to protect mentally ill individuals within the criminal justice system. The State of Florida, therefore, is not in compliance with Recommendation #13.



# **APPENDIX 1**



JEB BUSH  
GOVERNOR

STATE OF FLORIDA

## Office of the Governor

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September 1, 2006

Mr. Mark Schlakman, Program Director  
The Center for the Advancement of Human Rights  
Florida State University  
426 West Jefferson Street  
Tallahassee, Florida 32301

RE: ABA Review of Florida's Death Penalty Clemency System

Dear Mr. Schlakman:

In your letter of July 20, 2006, you invited the Governor's legal office to offer comments on the analysis performed by your staff, in coordination with the American Bar Association (ABA), of Florida's death penalty clemency system. You provided to us for our review a twenty (20) page document entitled "Draft - Chapter Nine, Clemency", which contained an introduction, background and eleven (11) recommendations of changes to Florida's current clemency system. It is our opinion that these recommendations advocate turning Florida's death penalty clemency review into yet another layer of additional appellate review, in violation of separation of powers and Florida's clemency jurisprudence. Furthermore, they would seem unnecessarily to constrict the broad discretion of the executive in considering any factors deemed relevant to them and disregarding factors they consider irrelevant to their decision. In our opinion, the lack of specific requirements on the Board of Executive Clemency in Florida ultimately does more to protect the rights of death row inmates, because it allows members to exercise mercy, unfettered by rules or bureaucracy. It is our position that as elected officials, members of the Board of Executive Clemency should be left to address in their own consciences what they believe mercy requires.

An elaborate post-conviction system exists in Florida which permits a death sentenced inmate to challenge his conviction in state and federal court. When the innocent are wrongfully convicted, indeed when anyone is convicted and sentenced to death, this system provides the opportunity to, among other things, present newly



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discovered evidence at any time, present DNA evidence when applicable, challenge the effectiveness of representation, and present many other challenges. It is a lengthy process that often requires the families of the murdered to endure many years of uncertainty and prolongs the finality of the conviction. The revisions proposed by the ABA recommendations would create a duplicative review of death cases unnecessarily impeding the finality of the sentence.

Florida's clemency system is not designed to bestow innocence. The idea behind clemency is to grant mercy and forgive. Forgiveness presupposes a wrong occurred. Clemency involves "forgiveness and not forgetness," *Page v. Watson*, 192 So. 205 (1938) at p. 208. A pardon "does not obliterate the fact of the commission of the crime and the conviction thereof." *Randall v. FDLE*, 791 So.2d 1238 (Fla.1<sup>st</sup> DCA 2001); *see also Sandlin v. Criminal Justice Standards and Training Commission*, 531 So. 2d 1344 (Fla. 1988); *Page v. Watson*, 140 Fla. 536 (Fla. 1938); *State v. Snyder*, 136 Fla. 875 (Fla. 1939). Because clemency is not designed to remove guilt, the clemency process should not be designed to re-litigate the question of guilt after guilt has been lawfully established in the court system, as many of the Report's recommendations suggest.

Recommendations like those proposed, which would require the clemency board to consider certain facts and circumstances of the cases which come before it, including matters which were deemed harmless errors, matters which are procedurally barred in court, and issues of lingering doubt, improperly impinge on the broad discretion of the executive. If a clemency board has serious reservations about the guilt of the inmate, it should be free to exercise its discretion in granting clemency for any reason it sees fit.

Issues of the age of the defendant at the time of the crime, or his mental status, similarly, are all matters currently required by law to be addressed at various stages of a murder prosecution, from the filing of charges, through the seeking the death penalty, and the penalty phase and sentencing. Requiring the Board of Executive Clemency to engage in an analysis of matters fully litigated in court also would impinge on the judicial process and cause undue repetition and delay in a system many believe is already too slow.

The Report's suggestion that the clemency board take up matters of racial or geographic disparity in the implementation of the death penalty is equally troublesome. Such policy matters are properly left for the legislature to address, not four members of the clemency board. Because we do not have the benefit of the underlying data upon which the report relies, we are unable to comment on the accuracy of the report's assumptions on these issues.

However, in 2000, Governor Bush convened a Special Session of the Florida Legislature to address Florida's death penalty. During this session, the Legislature asked

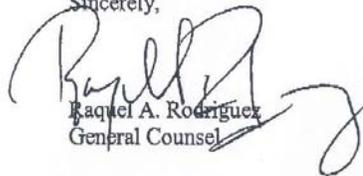
Mr. Mark Schlakman  
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for further study of issues involving capital cases. In response, Governor Bush, by Executive Order, assembled the Capital Cases Task Force to address, among other things, the issue of racial, gender and ethnic bias in application of the death penalty. The Task Force was comprised of a cross section of professionals who handle capital litigation and who are considered experts in the field. The Task Force received testimony from mental health professionals, prosecutors, defense attorneys, judges, members of the legislature, the Catholic Conference, the Department of Corrections, the NAACP, and the office of Capital Collateral Regional Counsel. The Task Force held six meetings over the course of six months in which testimony was taken about whether racial, gender and ethnic bias existed in the implementation of the death penalty. While recommending that the matter be studied further, the Task Force concluded: "currently there are insufficient reliable statistics available to support allegations that racial bias exists in Florida's death penalty sentencing procedure."

The suggestions that all aspects of clemency proceedings be conducted formally in public, that the members of the board be required personally to interview each applicant and that the board be required to provide written reasons when clemency is denied, are inconsistent with the discretion given to the clemency board in rendering its decisions. As you know, the Rules of Executive Clemency, which you helped write, codify the intention of the constitutional provision regarding clemency. Rule 4 specifically states that the board has "unfettered discretion" to grant clemency at any time, and that the Governor has "unfettered discretion" to alone deny clemency at any time, for *any* reason, and that this discretion is rooted in the judicial history behind our clemency system.

We appreciate the opportunity to be heard on this very important matter.

Sincerely,



Raquel A. Rodriguez  
General Counsel

# **APPENDIX 2**

## **Comment of The Florida Death Penalty Assessment Team**

After reviewing the comments relating to the clemency section of the report offered by Ms. Raquel Rodriguez, the Governor's General Counsel, in her letter, dated September 1st, 2006, Florida Death Penalty Assessment Team members believe that their state-specific recommendations can be implemented without creating another layer of appellate review that would implicate separation of powers concerns and, without unreasonably constraining executive branch discretion to consider factors that may be relevant to any particular case or requiring the Board of Executive Clemency to necessarily reconsider issues that were adequately raised and disposed of at trial.

Ms. Rodriguez asserts that, "[i]t is our position that as elected officials, members of the Board of Executive Clemency should be left to address in their own consciences what they believe mercy requires." In consideration of the problems associated with Florida's death penalty process that are documented throughout this report, the team's state-specific recommendations were carefully crafted in an effort to provide useful and necessary guidance while being respectful of the broad discretion that the executive branch traditionally exercises in this regard. These aspirational recommendations are intended to help ensure that the clemency process in Florida will play an appropriate and meaningful role in furtherance of the cause of justice.