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THE STATEWIDE PROSECUTOR: A NEW WEAPON AGAINST ORGANIZED CRIME

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I. INTRODUCTION

On the closing day of the 1985 Regular Session, the Florida Legislature adopted a joint resolution and bill to create an Office of Statewide Prosecution.¹ Committee Substitute for House Joint Resolution 386 and Committee Substitute for House Bill 387 are perhaps the most significant pieces of criminal justice legislation passed in the last decade. If approved by the voters, this legislation will transfer the responsibility of prosecuting multijurisdictional criminal activity from the various state attorneys to the attorney general and a new public official, a statewide prosecutor. The House joint resolution proposed a constitutional amendment that will be submitted to the voters in 1986 that would permit the establishment of the new office in January 1987.²

Whether Florida should have a statewide prosecutor has been an issue for over a dozen years.³ Although prior to the 1985 Regular Session this issue had come before the legislature on a number of occasions, it failed each time.⁴ The purpose of this Article is to

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1. FLA. H.R. JOUR. 1163 (Reg. Sess May 31, 1985) (CS for HJR 386 (1985)); *id.* at 1162 (Reg. Sess. May 31, 1985) (CS for HB 387 (1985)); FLA. S. JOUR. 1006 (Reg. Sess. May 31, 1985) (CS for HJR 386 (1985)); *id.* at 1008 (Reg. Sess. May 31, 1985) (CS for HB 387 (1985)). The enabling legislation contained in ch. 85-179, 1985 Fla. Laws 1295, will take effect on the effective date of the amendment to the Florida Constitution proposed by Fla. CS for HJR 386 (1985) or any similar joint resolution giving the attorney general concurrent jurisdiction with state attorneys for criminal prosecution. Fla. CS for HJR 386, 1985 Fla. Laws 2220.

2. Fla. CS for HJR 386, 1985 Fla. Laws 2220.

3. Gov.'s Comm'n on the Statewide Prosecution Function, transcript of proceedings at 15 (Sept. 21, 1984) (on file with Prosecution Coordination Office, the Capitol, Tallahassee, Fla.) (testimony of Robert E. Stone) [hereinafter cited as Gov. Comm'n transcript]. See also, THE FLA. BAR SPECIAL COMM. ON THE STATEWIDE PROSECUTION FUNCTION, REPORT TO THE BOARD OF GOVERNOR'S (1977), 81-88 [hereinafter cited as BAR REP.].

4. See, e.g., FLA. LEGIS., HISTORY OF LEGISLATION, 1976 REGULAR SESSION, HISTORY OF SENATE BILLS at 123, SB 387; *id.*, HISTORY OF HOUSE BILLS at 390, HB 2590; FLA. LEGIS., HISTORY OF LEGISLATION, 1977 REGULAR SESSION, HISTORY OF HOUSE BILLS at 56, HB 219; FLA. LEGIS., HISTORY OF LEGISLATION, 1978 REGULAR SESSION, HISTORY OF SENATE BILLS at

provide a history of the statewide prosecutor legislation from the popular inception of the concept in 1973 to its passage in 1985.

II. PAST ATTEMPTS TO CREATE A STATEWIDE PROSECUTOR

The present prosecutorial system in Florida, insofar as it relates to organized crime prosecution, has long been recognized as inadequate. The state is divided into twenty judicial circuits, each with an elected state attorney.⁵ Each state attorney is an independent and autonomous elected public official who is accountable only to the voters within the circuit. While organized crime transcends traditional political boundaries, each prosecutor's jurisdiction is limited to the judicial circuit.⁶

A Florida Bar committee aptly described the shortcomings of the present system in a 1977 report to the Board of Governors:

In 18th Century America the prosecutor was a local official who performed his tasks exclusively in a county courthouse, a common site in every county and usually located no farther than one day's horse ride from the farthest county line. From its American origin in 1704 when Connecticut established the first public prosecutor to protect the crown against "vice and immoralities," the prosecutor in America generally has been concerned with matters of local concern. This tradition has its base not in a philosophy of government but in the practicalities of communication and transportation. So it is with Florida's prosecutors whose jurisdiction and focus of attention are divided in twenty parcels of the State, each semi-autonomous and neither responsible for nor aware of crime problems in other parts of the State.⁷

In response to provincialism of the state attorney system and the perceived threat of organized crime that transcends county borders, the 1973 Florida Legislature passed the Statewide Grand Jury Act.⁸ This Act provided for a statewide grand jury that could investigate matters which transpired or had significance in more than one county.⁹ While the evidence gathering process was im-

215, SB 752; *id.*, HISTORY OF HOUSE BILLS at 365, HB 1866; FLA. LEGIS. HISTORY OF LEGISLATION, 1982 REGULAR SESSION, HISTORY OF HOUSE BILLS at 209, HJR 702.

5. FLA. CONST. art. V, § 17; FLA. STAT. § 26.01 (1983).

6. FLA. STAT. § 27.02 (1983).

7. BAR REP., *supra* note 3, at 12.

8. Statwide Grand Jury Act, ch. 73-132, 1973 Fla. Laws 254 (codified at FLA. STAT. §§ 905.31-.40 (1973)). The bill was signed by Gov. Askew on June 7, 1973 and took effect the next day. *Id.* at 257.

9. *Id.* § 1, 1973 Fla. Laws 254, 254 (codified at FLA. STAT. 905.32 (1973)).

proved by this Act, the prosecutorial system remained unchanged. The statewide grand jury legal advisor (a state attorney appointed by the Governor) could not prosecute indictments returned by the grand jury; the indictments had to be transferred to a local state attorney's office for prosecution.¹⁰ Neither could the legal advisor file direct informations.¹¹

Despite these limitations, the Statewide Grand Jury Act became the State's answer for a statewide prosecutorial presence. The statewide grand jury system, however, was almost immediately recognized as being inadequate. Indeed, seven months after the statewide grand jury bill's enactment, aides to Governor Askew submitted a report to the Governor recommending a constitutional amendment that would establish a state prosecutor who would be appointed by the Governor to serve as legal advisor and prosecutor for all statewide grand jury cases.¹² The report compared Florida's prosecutorial systems with those of other states and concluded that Florida's system was incapable of effectively prosecuting major multicounty organized crime cases,¹³ a conclusion echoed by other study commissions years later.¹⁴ According to the report, the state attorneys' offices were too overburdened to prosecute such cases, and the statewide grand jury lacked a permanent prosecutor with enough authority to prosecute organized crime effectively.¹⁵ Nonetheless, Governor Askew rejected the recommendation of his staff.¹⁶

In 1975, another proposal was submitted to the Governor, this time not predicated on a constitutional amendment. It recommended the creation of a permanent legal advisor to the statewide grand jury who would be appointed by the Governor and confirmed by the Senate.¹⁷ To prosecute a case, the legal advisor

10. The power of a legal advisor to prosecute grand jury indictments was added by ch. 77-403, § 4, 1977 Fla. Laws 1701 (codified at FLA. STAT. 905.36 (1977)).

11. See ch. 73-132, 1973 Fla. Laws 254 (codified at FLA. STAT. §§ 905.31-40 (1973)).

12. C. INTRIAGO & J. McDONALD, OFFICE OF STATE PROSECUTOR: A PROPOSAL at Summary of Recommendation (Feb. 6, 1974) (on file with Prosecution Coordination Office, the Capitol, Tallahassee, Fla.).

13. *Id.* at Summary of Conclusions.

14. See, e.g., GOV.'S COUNCIL ON ORGANIZED CRIME, 1982 ANNUAL REPORT 3 (on file with the Prosecution Coordination Office, the Capitol, Tallahassee, Fla.) [hereinafter cited as 1982 ANN. REP.].

15. C. INTRIAGO & J. McDONALD, *supra* note 12, at 1-3.

16. Interview with James E. McDonald, former Special Counsel to Gov. Reubin O'D. Askew (June 18, 1985) [hereinafter cited as McDonald Interview].

17. J. McDONALD, PERMANENT LEGAL ADVISOR FOR THE STATEWIDE GRAND JURY: A PROPOSAL (Jan. 21, 1975).

would be sworn as an assistant state attorney in the circuit where the case was venued.¹⁸ Governor Askew also rejected this proposal. However, in his 1975 State of the State speech to the legislature, Governor Askew recommended the creation of a permanent, full-time legal staff for the legal advisor, who would continue to be a state attorney.¹⁹ Senator Scarborough²⁰ filed Senate Bill 649, which would have implemented Governor Askew's recommendation, but the bill died in committee.²¹

Governor Askew, in his 1976 State of the State address, recommended the passage of a constitutional amendment creating an independent office for a statewide prosecutor. His recommendation provided that the prosecutor be appointed by the Governor subject to Senate confirmation. Pending the outcome of a vote on the constitutional amendment, the Governor recommended creating a permanent staff for the statewide grand jury to be appointed by and located in the Office of the State Attorney for the Second Judicial Circuit.²² A joint resolution proposing a constitutional amendment, however, was never filed. Legislation was filed that would designate the attorney general as legal advisor to the statewide grand jury.²³ The legislation died in committee,²⁴ was reintroduced in 1977,²⁵ and again died in committee.²⁶

The next legislative attempt to address the need for a statewide prosecutor came in 1978 when Senator Graham²⁷ and Representative Sample²⁸ each introduced such legislation. The Graham bill proposed creating the Office of Special Prosecutor and Statewide Assistant State Attorney, whose personnel would assist the legal advisor but could independently refer any evidence of misconduct of a public officer to the official charged with such prosecution or removal.²⁹ Representative Sample's bill went further than the Gra-

18. *Id.* at 6.

19. FLA. H.R. JOUR. 7 (Reg. Sess. 1975).

20. Dem., Jacksonville.

21. FLA. LEGIS., HISTORY OF LEGISLATION, 1975 REGULAR SESSION, HISTORY OF SENATE BILLS at 171, SB 648.

22. FLA. S. JOUR. 13 (Reg. Sess. 1976).

23. Fla. SB 387 (1976); Fla. HB 2590 (1976).

24. FLA. LEGIS., HISTORY OF LEGISLATION, 1976 REGULAR SESSION, HISTORY OF SENATE BILLS at 123-24, SB 387; *id.*, HISTORY OF HOUSE BILLS at 390, HB 2590.

25. Fla. HB 219 (1977).

26. FLA. LEGIS., HISTORY OF LEGISLATION, 1977 REGULAR SESSION, HISTORY OF HOUSE BILLS at 56, HB 219.

27. Dem., Miami Lakes.

28. Repub., St. Petersburg.

29. Fla. SB 752 (1978).

ham bill by proposing the creation of an Office of State Prosecutor of Organized Crime, which would have broader powers and a more specific charge to combat organized crime.³⁰ Both bills failed.³¹

In addition to the legislature's activity, the Florida Bar assembled a committee to study the need for a statewide prosecutorial presence in Florida. A select committee was empaneled on November 26, 1975, consisting of state attorneys, a member of the attorney general's office, a judge, and members of the Bar.³² The Committee took testimony for a year from experts in the investigation and prosecution of organized crime, state attorneys, out-of-state prosecutors, and other interested parties. The hearings were public and resulted in a report issued on January 14, 1977, in which the Committee concluded that Florida's approach to the prosecution of organized crime was in shambles.³³ The Committee found that there were few career prosecutors who could provide a backlog of experience and continuity in states' attorneys offices. Furthermore, there was no central or unified direction given to the state attorneys in reference to existing or imminent criminal activity with statewide importance. The Committee noted that there were no statewide priorities concerning the prosecution of crime with statewide impact; prosecutorial decisions that impacted more than one area of the state were made without communication between prosecutors and law enforcement agencies in the various areas affected. The accomplishments of the two Florida statewide grand juries were recognized by the Committee. However, the Committee found that the system of designating one state attorney as legal advisor to the grand juries was ineffective, inefficient, and uneconomical.³⁴ The Committee addressed these problems by recommending the creation of a prosecutorial system on the federal model with the attorney general assuming the responsibilities of the statewide prosecutor and appointing state attorneys to serve in the circuits.³⁵

30. Fla. HB 1866 (1978).

31. FLA. LEGIS., HISTORY OF LEGISLATION, 1978 REGULAR SESSION, HISTORY OF SENATE BILLS at 215, SB 752; *id.*, HISTORY OF HOUSE BILLS at 365-66, HB 1866.

32. BAR REPORT, *supra* note 3. Members of the committee were James E. McDonald (chairman), Exec. Office of the Gov.; David H. Blutworth, State Att'y, 15th Jud. Cir.; Charles A. Intriago, Ass't U. S. Att'y; James R. Jorgenson, Dade County Public Safety; Robert Josefsberg, attorney; Raymond L. Marky, Dep't of Legal Affairs; Marvin U. Mounts, Cir. Judge; Janet Reno, Ass't State Att'y, 11th Jud. Cir.; E. J. Salcines, State Att'y, 13th Jud. Cir.; Charles Tindell, attorney. *Id.* at ii.

33. *Id.* at 34.

34. *Id.* at 1-4.

35. *Id.* at 9-11.

The Board of Governors of the Florida Bar, however, refused to accept the Committee's recommendations.³⁶ Several state attorneys, who opposed the recommendations of the Committee, appeared before the Board and apparently helped persuade the members of the Board to withhold their endorsement of the Committee's report.³⁷

In an effort to stall the growing momentum towards a state prosecutor, the Florida Prosecuting Attorneys Association proposed their own plan for the prosecution of organized crime in Florida.³⁸ The association recommended the creation of a prosecutors' council on organized crime. This council would consist of seven elected state attorneys appointed by the Governor with staffing to be provided by a Prosecution Coordination Office located in the Governor's Office. The council, thus staffed, would provide coordination between the state attorney's offices, the Department of Law Enforcement, and various regulatory agencies. The council would also coordinate the exchange of expertise and resources and the movement of those resources around the state to ensure an adequate investigative and prosecutorial response in areas where there was a present need.³⁹

A delegation of the state attorneys met with Governor Askew prior to the 1977 Regular Session to discuss the creation of the council.⁴⁰ On March 8, the Governor promulgated Executive Order 77-24 creating the Governor's Council for the Prosecution of Organized Crime. The purposes and powers of the Council were as originally recommended by the Prosecuting Attorneys Association except that the number of state attorneys was reduced to five.⁴¹

The legislature adopted these ideas and passed a bill sponsored by Senator Dunn⁴² that legislatively created the Office of Prosecution Coordination and the Council for the Prosecution of Organized Crime.⁴³ The Act provided that the Council would consist of

36. *Id.* at cover page.

37. McDonald Interview, *supra* note 16.

38. Letter from Robert E. Stone, Pres., Fla. Prosecuting Att'ys Ass'n, to Gov. Reubin O'D. Askew (Feb. 9, 1977) (available at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.).

39. *Id.*

40. GOV.'S COUNCIL ON THE PROSECUTION OF ORGANIZED CRIME, 1978 ANNUAL REPORT (on file with Jt. Legis. Mgt. Comm., Div. of Legis. Library Servs., the Capitol, Tallahassee, Fla.) [hereinafter cited as 1977 COUNCIL REP.].

41. Fla. Exec. Order No. 77-24.

42. Dem., Ormond Beach.

43. Ch. 77-403, 1977 Fla. Laws 1701.

five state attorneys appointed by the Governor, one of whom was designated to act as legal advisor and direct the operation of the statewide grand jury.⁴⁴ The remaining members of the Council were to assist the legal advisor, attend sessions of the grand jury, and provide adequate staff support to the legal advisor.⁴⁵ In addition, a sentence was added to the Statewide Grand Jury Act that allowed the legal advisor, when an indictment was returned, to prosecute the indictment rather than having to transfer the indictment to the local state attorney.⁴⁶

These changes ostensibly eliminated two major problems that had plagued the first two statewide grand juries. The addition of the Office of Prosecution Coordination and the Council for the Prosecution of Organized Crime spread the responsibility of the statewide grand jury and the cases it produced over five state attorneys' offices and a staff within the Governor's Office rather than further burdening the office of the legal advisor. Allowing the legal advisor to prosecute statewide grand jury indictments, regardless of the circuit in which the case was venued, eliminated the problem of the local state attorney's receiving an unfamiliar indictment.

The newly created Council met four times in May and June 1977 to determine the most effective organization for combatting organized crime.⁴⁷ The Council's plan divided the state into four geographic regions, each served by a coordinating council composed of all state attorneys in the region and headed by a Council member.⁴⁸ To complement the efforts of the regional councils, task forces with specific areas of subject responsibility were established.⁴⁹ Each member of the state Council was assigned responsibility for a task force, which covered the subject areas of narcotics, gambling, targets of opportunity, and individual targets.⁵⁰ In the spring of 1978, the state Council hired a chief prosecutor, who, in turn, began to make plans to hire a staff of prosecutors.⁵¹ However, a consensus never developed among the members of the Council, the other state attorneys, and the staff concerning the proper role

44. *Id.* § 2, 1977 Fla. Laws at 1702 (codified at FLA. STAT. § 27.37 (1977)).

45. *Id.*

46. *Id.* § 4 (codified at FLA. STAT. § 905.36 (1977)).

47. 1977 COUNCIL REP., *supra* note 40, at 4.

48. *Id.* at 6-8.

49. *Id.*

50. *Id.*

51. *Id.*

and authority of the Council.⁵² Because the infighting became so severe, Governor Graham reorganized the Council and the staff soon after taking office in 1979.⁵³

Governor Graham, in February of 1979, signed an executive order appointing a new chairman for the Council.⁵⁴ The Governor met with the chairman, who pledged to make the Council an effective organization for coordinating Florida's effort against organized crime.⁵⁵ The plan was to hire a small cadre of experienced prosecutors, one of whom would be assigned to each member of the Council heading a regional coordinating council.⁵⁶ Although the prosecutors would be directed by the Council, they would be employed by the Governor's Office. In addition, the Governor recommended appropriating approximately \$2 million to fund the hiring of a senior prosecutor in each circuit who would be dedicated to the prosecution of organized crime and who would coordinate with the regional council prosecutor.⁵⁷

Although the chief prosecutor had left, the Governor's staff continued recruiting prosecutors to staff the regional council positions.⁵⁸ However, at the meeting where the Council was expected to give final approval to the recruited prosecutors, the Council, after meeting in private session, announced that it would not hire any prosecutors.⁵⁹ In addition, the state attorneys rejected Governor Graham's proposal to fund an organized crime prosecutor in each office and persuaded the legislature to transfer the approximately \$2 million out of the budget for the Prosecution Coordination Office and into the budgets of the state attorneys.⁶⁰ The effect of these actions was to scuttle Governor Graham's plan.

In an effort to revitalize the Council on Organized Crime, the legislature in 1981 funded three positions in the Office of Prosecution Coordination to provide a limited, permanent staff for the Council and the statewide grand jury. In addition, the legislature passed a bill that added two legislators to the Council.⁶¹ With the

52. Telephone interviews with James White, former Ass't Gen. Counsel to Govs. Askew and Graham (July 1 and 13, 1985) [hereinafter cited as White Interviews].

53. *Id.*

54. Fla. Exec. Order No. 79-9 (Feb. 7, 1979).

55. White Interviews, *supra* note 52.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. Ch. 81-135, 1981 Fla. Laws 281 (codified at FLA. STAT. § 27.37 (1981)).

additional staff, the activity of the Council and the fifth and sixth statewide grand juries increased.⁶²

Even with the permanent staff for the statewide grand jury and the reconstituted Council, new problems quickly surfaced. The Governor's Council on Organized Crime utilized the staff to conduct private hearings into law enforcement problems within the State of Florida.⁶³ The Council controlled the statewide grand jury by reviewing all cases to be presented, despite the fact that two legislators had been added to the Council.

The Council's 1982 report was critical of the Florida Department of Law Enforcement's efforts against organized crime, including its intelligence gathering methods.⁶⁴ The Council attempted to become a user and coordinator of organized crime intelligence, and attempted to oversee organized crime prosecutions.⁶⁵ Differences between the Governor's Council on Organized Crime, the statewide grand jury permanent staff, the Department of Law Enforcement, and the statewide grand jury legal advisor were resolved by an executive order issued by Governor Graham in the fall of 1983.⁶⁶

The Governor, in his order, reorganized the functions and responsibilities of the entities involved in the investigation and prosecution of organized crime. The function of the Council on Organized Crime was limited to its primary statutory function of advising the Governor and legislature on the scope of organized crime in Florida. The Council's previous activities in investigating the Department of Law Enforcement and other enforcement agencies, and in screening cases prior to their presentation to the grand jury, were specifically omitted.⁶⁷ Governor Graham directed the

62. GOV.'S COUNCIL ON ORGANIZED CRIME, 1983 ANNUAL REPORT, 42-44 (on file with the Prosecution Coordination Office, the Capitol, Tallahassee, Fla.) [hereinafter cited as 1983 ANN. REP.]; see also THE PUBLIC REPORT OF THE FIFTH STATEWIDE GRAND JURY OF FLORIDA (Dec. 14, 1983) (on file with the Prosecution Coordination Office, the Capitol, Tallahassee, Fla.).

63. See Gov.'s Council on Organized Crime, transcript of proceedings (Jan. 4, 1982 to May 19, 1982) (testimony sealed and not subject to public inspection).

64. 1982 ANN. REP., *supra* note 14.

65. *Id.* at 7-8.

66. Fla. Exec. Order No. 83-87 (June 23, 1983); Fla. Exec. Order No. 83-193 (Nov. 30, 1983). Some of the members of the Council on Organized Crime objected to the wording of the first order. At a meeting attended by Gov. Graham; Barbara M. Lintthicum, Dep. Gen. Counsel, Exec. Office of the Gov.; and Scott Palmer, Chief Prosecutor, and the members of the Council, on Nov. 8, 1983, Gov. Graham discussed the terms of the Fla. Exec. Order 83-87 and subsequently agreed to issue a new order, changing the name and authority of the statewide Grand Jury Legal Unit.

67. Notes of Barbara Lintthicum, meeting with Gov. Bob Graham; Gene Whitworth, Chairman, Gov.'s Council on Organized Crime; R. Scott Palmer, Chief Prosecutor, Statewide

Council's chairman to begin holding public hearings on organized criminal activity within the state.⁶⁸

The legal advisor to the grand jury was given sole authority to select and prosecute cases. The permanent staff to the statewide grand jury, renamed Statewide Grand Jury Legal Unit by the executive order, was to assist him in those duties.⁶⁹ The Department of Law Enforcement was to investigate organized crime cases and collect intelligence on organized crime to be submitted to the Council and the statewide grand jury.⁷⁰

While this order lessened the conflicts between the entities, the fundamental flaws in the system remained and could not be addressed by executive order. The primary defect of the system was that power to investigate and issue indictments resided with the statewide grand jury and not with the legal staff. First, the legal advisor could only issue subpoenas returnable before the statewide grand jury, rather than issue "office subpoenas" which the state attorneys are empowered to issue.⁷¹ Therefore, were it necessary to interview a hostile witness, the grand jury had to be seated, subpoenas issued, and the witness brought before the grand jury. If the grand jury were not empaneled, then the legal staff was forced to go to a local state attorney, ask to be sworn in as his assistant state attorneys, subpoena the witnesses to the state attorney's office by desk subpoena, and interview them there. Second, the grand jury legal staff could only charge by indictment and was not empowered to charge by information, by far the more frequent method of charging used by state attorneys.⁷² A grand jury indictment required the empanelment and the meeting of the grand jury to issue the indictment. The number of cases that could be prosecuted was limited by the number of times the grand jury could meet. Consequently, the legal advisor to the grand jury had far fewer tools to fight organized crime than did the state attorney to

Grand Jury Legal Unit; Thorton Williams, Ass't Gen. Council, Exec. Office of Gov.; and Barbara M. Linthicum, Dep. Gen. Counsel, Exec. Office of the Gov. (June 22, 1983). At this meeting, Graham and Whitworth concurred that statewide grand jury cases could not be run by committee.

68. *Id.*

69. Fla. Exec. Order No. 83-193 (Nov. 30, 1983).

70. *Id.*

71. FLA. STAT. § 27.04 (1983) limits the issuance of subpoenas to criminal matters within each state attorney's circuit. *See also* Able Builders Sanitation Co. v. State, 368 So. 2d 340 (Fla. 3d DCA 1979).

72. The power to file an information is limited to crimes occurring within each state attorney's circuit. FLA. CONST. art. V, § 17; FLA. STAT. § 27.02 (1983).

investigate and prosecute a shoplifting case.

Another major limiting factor was that the legislature did not adequately fund either the state attorneys' offices or the legal unit to prosecute statewide grand jury cases after indictment. Under the present prosecutorial system, each state attorney is funded to prosecute crimes which occur only within his circuit.⁷³ A statewide grand jury case is multijurisdictional, having simultaneous, significant criminal activity in more than one circuit. As a result, the legal unit became responsible for prosecuting many of the statewide grand jury cases.⁷⁴ This added a time consuming responsibility that was not envisioned by the legislature in funding or staffing the legal unit.

In addition to these problems, the public hearings held by the Governor's Council on Organized Crime revealed that the extent of organized crime in Florida exceeded expectations. The Council recognized Florida's vulnerability to organized crime in its 1983 annual report:

While the problem is not unique to Florida, the magnitude and the pervasiveness of organized criminal activity present here is shared by few other states. Florida attracts organized crime for many of the same reasons it attracts legitimate business investment. Florida's agreeable climate and steady economic and population growth have attracted the crime business. The traditional racketeering activities of organized crime — extortion, prostitution, economic fraud schemes, bookmaking, fencing, loansharking — flourish in a rapidly expanding state like Florida. But its growth here has been greatly accelerated by the profits of drug smuggling, which provides [sic] the resources to add strength to every element of organized crime's structure. Additionally, these profits are used to penetrate the state's legitimate economy and to corrupt people in positions of public trust. Thus, as long as Florida's economy continues to grow, organized criminal activity will continue to flourish, unless state and local governments commit additional resources to combat organized crime and the components of the criminal justice system learn to more effectively utilize these resources.⁷⁵

73. Memorandum to Barbara Linthicum, Dep. Gen. Counsel, Exec. Office of the Gov., from David Columbo (Aug. 27, 1985) (on file with Prosecution Coordination Office, the Capitol, Tallahassee, Fla.).

74. See letter and accompanying report from R. Scott Palmer, Chief Prosecutor, Statewide Grand Jury Legal Unit, to Hon. T. K. Wetherell, Rep., 29th Dist. (Apr. 3, 1985) (on file with Prosecution Coordination Office, the Capitol, Tallahassee, Fla.).

75. 1983 ANN. REP., *supra* note 62, at 5.

III. A NEW ORGANIZATIONAL APPROACH

A. *The Governor's Commission*

History evidenced that the Council on Organized Crime could not provide the leadership and coordination of the state attorneys necessary to combat effectively organized crime and that the statewide grand jury legal staff did not have the resources or powers to represent effectively the state's interest in this effort. In the summer of 1984, Governor Graham signed an executive order establishing the Governor's Commission on the Statewide Prosecution Function.⁷⁶ The executive order directed the Commission⁷⁷ to draft, prior to the 1985 Regular Session, a constitutional amendment to permit the establishment of an agency with statewide responsibility for prosecuting organized criminal activity and to draft legislation to establish and define the jurisdiction of such an agency.⁷⁸ Intentionally absent from the executive order was any language that could intentionally be interpreted to permit the Commission to debate the issue whether a statewide prosecutor was necessary.⁷⁹ The Governor had made the decision that Florida should have a statewide prosecutor; the structure and responsibilities of such a prosecutor were left to the Commission.

The Commission met five times between September 1984 and January 1985.⁸⁰ During the first meeting, witnesses testified regarding the extent of organized crime in Florida and the state's response to the problem.⁸¹ Additionally, the Commission held a two-day public hearing in Tampa where more than 300 interested citizens and law enforcement officials were invited to express their

76. See Fla. Exec. Order No. 84-150 (Aug. 8, 1984).

77. Members of the Commission were Alan C. Sundberg (Chairman), attorney; Jim Smith, Att'y Gen.; Robert R. Dempsey, Comm'r, Fla. Dep't of Law Enforcement; James C. Adkins, Assoc. Justice, Fla. S. Ct.; Ed Austin, State Att'y, 4th Jud. Cir.; Syd McKenzie, Gen. Counsel, Office of the Gov.; Robert Josefsberg, attorney; Robert E. Stone, State Att'y, 19th Jud. Cir.; Judge C. Luckey, Public Defender, 13th Jud. Cir.; Lawson Lamar, Sheriff, Orange County; James Jorgenson, Judge, 3d DCA; Rosemary Barkett, Judge, 4th DCA; Raymond E. Beary, Police Chief, Winter Park; Raul Martinez, Mayor, Hialeah; Henry Latimer, attorney; Robert E. Crawford, Sen., Winter Haven; and Hamilton Upchurch, Rep., St. Augustine.

78. *Id.*

79. Memorandum from Barbara M. Linthicum, Dep. Gen. Counsel, Exec. Office of the Gov., to Gov. Graham (Apr. 30, 1984) (on file with Prosecution Coordination Office, the Capitol, Tallahassee, Fla.) [hereinafter cited as Memorandum of Apr. 30, 1984].

80. The five meetings took place on Sept. 21, 1984; Oct. 19, 1984; Nov. 19-20, 1984; Dec. 7, 1984; and Jan. 18, 1985.

81. See generally Gov. Comm'n transcript, *supra* note 3.

views on how best to establish a statewide prosecutor.⁸² Experts in the field of organized crime prosecution also testified.⁸³ The other meetings were work sessions in which the Commission discussed and voted upon issues that needed to be resolved to establish a statewide prosecutor.

The first issue resolved by the Commission was whether the Florida Constitution needed to be amended to allow a statewide prosecutor to function in Florida.⁸⁴ The language of article V, section 17, arguably indicates that the state attorney shall be the sole prosecuting officer of all trial courts in that circuit.⁸⁵ Even though the intent of the 1968 constitutional revision apparently was to eliminate county solicitors and not necessarily to vest sole prosecutorial authority in the state attorneys, the Commission decided that the intent was not clear enough to risk establishing a statewide prosecutorial system without a constitutional amendment.⁸⁶

A second issue before the Commission was the location of the statewide prosecutor's office. The options given the most serious consideration were the Executive Office of the Governor and the Department of Legal Affairs. The Commission members finally agreed that the statewide prosecutor function should be located in the Department of Legal Affairs under the supervision of the attorney general, because the attorney general has historically been charged with the responsibility of prosecuting criminal activity and the public continues to believe that the office is ultimately responsible for this activity.⁸⁷ However, the commissioners believed that

82. *Id.*

83. *Id.*

84. Memorandum from Barbara M. Linthicum, Dep. Gen. Counsel, Exec. Office of the Gov., to Gov. Graham (Feb. 16, 1984) (on file with Prosecution Coordination Office, the Capitol, Tallahassee, Fla.).

85. FLA. CONST. art V, § 17 provides:

In each judicial circuit a state attorney shall be elected for a term of four years. He shall be the prosecuting officer of all trial courts in that circuit and shall perform other duties prescribed by general law; provided, however, when authorized by general law, the violations of all municipal ordinances may be prosecuted by municipal prosecutors. A state attorney shall be an elector of the state and reside in the territorial jurisdiction of the circuit. He shall be and have been a member of the bar of Florida for the preceding five years. He shall devote full time to his duties, and he shall not engage in the private practice of law. State attorneys shall appoint such assistant state attorneys as may be authorized by law.

86. See Gov. Comm'n transcript, *supra* note 3.

87. Memorandum from Barbara M. Linthicum, Dep. Gen. Counsel, Exec. Office of the Gov., to file (Dec. 7, 1984) (on file with Prosecution Coordination Office, the Capitol, Tallahassee, Fla.) [hereinafter cited as Memorandum of Dec. 7, 1984]; Letter from Alan C. Sund-

the office should operate independently of the rest of the department. To help ensure this independence, the Commission decided to make the office a separate budget entity, to exempt the staff from career service, and to have both the attorney general and the Governor appoint the statewide prosecutor.⁸⁸

The Commission members expressed two concerns about the position of statewide prosecutor. On the one hand, the members wanted to insulate the prosecutor from any undue political influence; and on the other hand, they wanted to ensure that the prosecutor did not use the position as a stepping stone to another state political office.⁸⁹ To accomplish the first objective, the Commission recommended that the statewide prosecutor be appointed for a term of four years unless removed by the joint action of the Governor and the attorney general.⁹⁰ To accomplish the other objective, the members agreed that the statewide prosecutor would be prohibited from running for or being appointed to a state office during the first two years after leaving the position.⁹¹

The third issue resolved by the Commission concerned the qualifications for the statewide prosecutor. Without much debate, the Commission decided that the statewide prosecutor should meet the same qualifications as a state attorney: an elector of the state, a member of the Florida Bar for the preceding five years, and a full-time prosecutor who would not engage in the private practice of law.⁹²

The fourth issue faced by the Commission was the jurisdiction of the statewide prosecutor's office.⁹³ The Commission recognized that the establishment of a state office charged with the responsibility for prosecuting multijurisdictional criminal activity created a potential for conflict between the office and the state attorneys. The Commission found it impossible to establish a jurisdictional test that would eliminate all overlap between the responsibilities of

berg, Chairman, Gov.'s Comm. on the Statewide Prosecution Function, to Gov. Bob Graham (Feb. 8, 1985) (report of the Commission and proposed constitutional amendment and enabling bill) [hereinafter cited as Sundberg Letter].

88. Sundberg Letter, *supra* note 87, at 4; Memorandum of Dec. 7, 1984, *supra* note 87.

89. Gov. Comm'n transcript, *supra* note 3, at 37.

90. Sundberg Letter, *supra* note 87, at 3.

91. *Id.*

92. Memorandum of Dec. 7, 1984, *supra* note 87.

93. Memorandum from Barbara M. Linthicum, Dep. Gen. Counsel, Exec. Office of the Gov., to Alan C. Sundberg, Chairman, Governor's Comm. on the Statewide Prosecution Function (Oct. 12, 1984) (on file with Prosecution Coordination Office, the Capitol, Tallahassee, Fla.).

the statewide prosecutor and the state attorneys.⁹⁴ The Commission, therefore, decided to limit the statewide prosecutor's jurisdiction to the same jurisdictional limitations as the statewide grand jury because those limitations had proven workable and had met with few objections since first adopted in 1973.⁹⁵

In addition, to further reduce the potential that the functions of the statewide prosecutor and the state attorneys would overlap, the Commission recommended changing the jurisdiction of the statewide grand jury from multicounty to multicircuit criminal activity and adopted the same standard for the Office of Statewide Prosecution.⁹⁶ Thus, the Commission recommended that the statewide prosecutor could initiate criminal prosecutions only if a two-part jurisdictional test were met: "[F]irst, the subject matter of the offense prosecuted must be one of the offenses enumerated in the enabling legislation, and second, such offense must be occurring, or must have occurred, in two or more circuits as part of a related transaction."⁹⁷

Another jurisdictional issue discussed by the Commission was whether the statewide prosecutor should be empowered to prosecute single circuit public corruption cases without a request from local authorities. Except when it involves state officials, a political corruption case does not generally cross circuit lines. Certain members of the Commission thought that perhaps an exception to the multicircuit requirement was in order so that these cases might be handled by the statewide prosecutor rather than by a federal prosecutor or by appointment of an outside state attorney.⁹⁸ This idea

94. See generally Gov. Comm'n transcript, *supra* note 3.

95. Dec. 7, 1984 Memorandum, *supra* note 87; Sundberg Letter, *supra* note 87, at 5. FLA. STAT. § 905.34 (1983) limits the jurisdiction of the statewide grand jury as follows:

The jurisdiction of a statewide grand jury impaneled under this chapter shall extend throughout the state. The subject matter jurisdiction of the statewide grand jury shall be limited to the offenses of bribery, burglary, criminal fraud, criminal usury, extortion, gambling, kidnapping, larceny, murder, prostitution, perjury, and robbery; crimes involving narcotic or other dangerous drugs; any violation of the provisions of the Florida RICO (Racketeer-Influenced and Corrupt Organization) Act; any violation of the provisions of the Florida Anti-Fencing Act; or any attempt, solicitation, or conspiracy to commit any violation of the crimes specifically enumerated above, when any such offense is occurring, or has occurred, in two or more counties as part of a related transaction, or when any such offense is connected with an organized criminal conspiracy affecting two or more counties.

96. The discussion occurred at the meetings of Oct. 19, 1984, Nov. 19-20, 1984, and Dec. 7, 1984.

97. Sundberg Letter, *supra* note 87, at 5.

98. Memorandum from Barbara Linthicum, Dep. Gen. Council, Exec. Office of the Gov., to file (Sept. 21, 1984) (on file with Prosecution Coordination office, the Capitol, Tallahas-

was eventually rejected by the Commission because the members thought that it was politically unpopular and would detract from the statewide prosecutor's ability to prosecute large criminal organizations.⁹⁹ The statewide prosecutor, however, could prosecute a multicircuit political corruption case on his own authority or a single circuit corruption case at the request of state attorneys. The Commission agreed to settle for this compromise recognizing that the issue could be addressed by future legislatures.¹⁰⁰

The fifth major issue decided by the Commission involved the powers and duties of the statewide prosecutor. The testimony presented to the Commission demonstrated that two major weaknesses of the statewide grand jury system were the inability of the grand jury prosecutors to file informations and the inability to subpoena witnesses to their offices.¹⁰¹ Thus, it seemed apparent that the statewide prosecutor needed to have the same procedural powers as a state attorney, but on a statewide level.¹⁰² The Commission, therefore, decided that the statewide prosecutor should be empowered to sign informations, subpoena witnesses to the prosecutor's office, confer immunity, and exercise other powers as by law are granted to a state attorney, with one exception: The prosecutor would not be allowed to approve wiretap applications.¹⁰³ However, because the attorney general in Florida is empowered to authorize wiretap applications,¹⁰⁴ and because the statewide prosecutor would be housed in the Department of Legal Affairs, the Commission decided that the effectiveness of the prosecutor would not be impeded by having to rely on the attorney general to authorize wiretap applications.¹⁰⁵

On February 6, 1985, Chairman Sundberg met with the Governor to review the recommendations of the Commission and to discuss legislative strategy.¹⁰⁶ The Commission formally presented the

see, Fla.) [hereinafter cited as Memorandum of Sept. 21, 1984].

99. *Id.*

100. *Id.*

101. Gov. Comm'n transcript, *supra* note 3, at 125.

102. Memorandum of Dec. 7, 1984, *supra* note 87.

103. Sundberg Letter, *supra* note 87 at 4. A statewide prosecutor apparently would be unable to authorize wiretaps under federal preemption of state law. It is settled that the Governor, the attorney general, and the state attorneys may authorize wiretap applications, but assistant state attorneys may not. *State v. Daniels*, 389 So.2d 631, 636 (Fla. 1980). Congress has made it clear that wiretap authorization must be given only to officials responsible to the political process. *See id.* at 636.

104. FLA. STAT. § 934.07 (1983).

105. Sundberg Letter, *supra* note 87, at 4.

106. Meeting with Gov. Graham; Ash Williams, Dep. Chief of Staff, Exec. Office of the

recommended constitutional amendment and enabling legislation to Governor Graham on February 8, 1985.¹⁰⁷ On March 6, the Governor held a press conference with Representative Upchurch¹⁰⁸ and Senator Crawford,¹⁰⁹ the two legislative sponsors of the Commission's recommendations, and Attorney General Smith to announce this legislative initiative. At the press conference, the Governor spoke of the critical need in Florida to organize on a statewide basis to defeat statewide criminals. Specifically, Governor Graham noted that the office of a statewide prosecutor would accomplish the following:

[It] will add continuity to the investigation and prosecution of long-term, complex organized crime cases. It will provide a needed close working relationship between prosecutors and investigators from the outset of a case. It will establish an expert prosecutorial staff with the specific skills required to direct long-term investigations to assure the recovery of ill-gotten gains and convict major criminals.

This office will accumulate expertise in organized crime investigations which will serve as a statewide resource available to local law enforcement and prosecutors. Under this proposal, the state will assume responsibility for cases with a statewide impact. Until now, local prosecutors were forced to choose between state interests and local priorities.

The dimension the statewide prosecutor will add is the critical linkage between the statewide grand jury, local law enforcement and the Department of Law Enforcement. Investigative resources are largely in place—the Department of Law Enforcement, for example, has grown from 117 special agents in 1979 to 183 today. These front line troops in the war on drugs and organized crime will be even more effective with the resources of a statewide prosecutor.¹¹⁰

B. *The 1985 Regular Session*

While prior legislatures had opposed the statewide prosecutor legislation, the legislature adopted the bill and constitutional

Gov.; and Barbara M. Lunthicum, Dep. Gen. Counsel, Exec. Office of the Gov. (Feb. 6, 1985).

107. Sundberg Letter, *supra* note 86.

108. Dem., St. Augustine.

109. Dem., Winter Haven.

110. Gov. Graham's Remarks Concerning the Statewide Prosecutor Amendment (Mar. 6, 1985) (on file with Prosecution Coordination Office, the Capitol, Tallahassee, Fla.).

amendment with only five dissenting votes in 1985.¹¹¹ The bill and amendment were intensely debated because legislators disagreed about certain key elements of the bill, but throughout the legislative process there was a general consensus among the members that a statewide prosecutor was necessary. The key elements subjected to the most intense debate were the location of the Office of Statewide Prosecution, the selection of the statewide prosecutor, and the constitutional jurisdiction of the statewide prosecutor.

Under the sponsorship of Representative Upchurch, House Joint Resolution 386 and House Bill 387 moved quickly through the committees of the House of Representatives. The Judiciary Committee, chaired by Representative Upchurch, passed both pieces of legislation with only technical amendments.¹¹² The Appropriations Committee added three amendments to the bill before reporting it favorably with only one dissenting vote.¹¹³ The most important of the three amendments addressed the issue of the selection of the statewide prosecutor.¹¹⁴ The Committee eliminated the Governor from the selection process, leaving the power to appoint and remove the statewide prosecutor solely in the hands of the attorney general. In addition, the Committee added language to the joint resolution that would permit the attorney general to delegate his authority to prosecute criminal violations to a statewide prosecutor. The amended House bill and joint resolution were made into committee substitutes by the Appropriations Committee, and placed on the House calendar.¹¹⁵

Meanwhile, Senate Joint Resolution 242 and Senate Bill 241, the companion legislation sponsored by Senator Crawford, were being considered by the Senate Judiciary-Criminal Committee. Like the

111. FLA. S. JOUR. 1005, 1006 (Reg. Sess. May 31, 1985) (Conference Committee Report on CS for HJR 386); *id.* at 1006, 1008 (Conference Committee Report on CS for HB 387); FLA. H.R. JOUR. 1160, 1162 (Reg. Sess. May 31, 1985) (Conference Committee Report on CS/HB 387); *id.* at 1162, 1163 (Conference Committee Report on CS/HJR 386).

112. FLA. H.R. JOUR. 111 (Reg. Sess. Apr. 8, 1985) (Reports of Standing Committees).

113. *Id.* at 203 (Reports of Standing Committees); Fla. H., Comm. on Approp., tape recording of proceedings (Apr. 24, 1985) (on file with committee).

114. The other two amendments were as follows: First, a section was inserted in the bill that provided for the transfer of the Statewide Grand Jury Legal Unit, presently housed in the Office of Prosecution Coordination within the Office of the Gov., to the newly created Office of Statewide Prosecution; second, a section was inserted in the bill to indicate that it was the intent of the legislature that the statewide prosecutor, whenever feasible, use agents employed by the Fla. Dep't of Law Enforcement. The latter amendment was adopted at the request of representatives of the Fla. Sheriff's Ass'n who were fearful that the statewide prosecutor would hire investigators, as the state attorneys have done. *Id.*

115. See Fla. CS for HJR 386 (1985); Fla. CS for HB 387 (1985); FLA. H.R. JOUR. 203 (Reg. Sess. Apr. 24, 1985) (Reports of Standing Committees).

House Appropriations Committee, the Senate Judiciary-Criminal Committee adopted an amendment eliminating the Governor from the process of selecting and removing the statewide prosecutor. However, in addition to this amendment, the Senate Committee further added the requirement that the statewide prosecutor be confirmed by the Senate.¹¹⁶

Representatives of the Florida Prosecuting Attorneys Association appeared before the Senate Committee and persuaded the members to adopt two other amendments, one requiring a notice provision and the other establishing a constitutional limitation of jurisdiction.¹¹⁷ The state attorneys representative argued that requiring the statewide prosecutor to give written notice to a local prosecutor of the statewide prosecutor's intention to initiate an investigation in the state attorney's circuit would foster cooperation between the statewide prosecutor and the state attorney.¹¹⁸ A state attorney also argued that Senate Joint Resolution 242 should be amended to limit the jurisdiction of the attorney general to violations of the criminal law occurring in more than one circuit. Although the attorney general's jurisdiction was limited to multicircuit cases in the enabling legislation, according to the state attorneys, the limitation in the constitution would make it more difficult for future legislatures to expand the attorney general's authority. While the Committee adopted the amendments suggested by the state attorneys, the chairman, Senator Weinstein,¹¹⁹ and Senator Crawford clearly indicated that the quid pro quo for adoption was the state attorneys' support of the legislation.¹²⁰ The amended Senate joint resolution and bill were made into committee substitutes. The joint resolution was referred to the Rules and Calendar Committee and the enabling bill to the Appropriations

116. Fla. CS for SB 241, sec. 2 (1985); see also Fla. S., Comm. on Jud'y-Crim., tape recording of proceedings (Apr. 11, 1985) (on file with committee) [hereinafter cited as Jud'y-Crim. tape].

117. Jud'y-Crim. tape, *supra* note 116. Specifically, the notice provision was as follows:

The statewide prosecutor shall give the state attorney 5 days written notice of his intention to conduct an investigation in that judicial circuit. Upon receiving such notice, the state attorney may within 5 days notify the Attorney General in writing of any objections to the investigation. Unless the Attorney General overrules the objection of the state attorney within 5 days, the investigation shall not proceed. The Attorney General may, by written notice to the statewide prosecutor, waive the provisions of this subsection with respect to any investigation.

Fla. CS for SB 241, sec. 2 (1985).

118. *Id.*

119. Dem., Cocoa Beach.

120. Jud'y-Crim. tape, *supra* note 116.

Committee.¹²¹

In the Senate Appropriations Committee, the two amendments adopted by the House Appropriations Committee were incorporated into the Senate bill.¹²² The bill was favorably reported, made into a committee substitute for a committee substitute, and placed on the Senate calendar.¹²³ Subsequently, the Senate Rules Committee favorably reported the Senate joint resolution and placed it on the Senate calendar.¹²⁴

By the midpoint of the 1985 Regular Session, the prospect for final passage of the statewide prosecutor legislation seemed positive. Both the House and Senate packages were moving quickly through the committees of their respective houses and the amendments adopted in each house were very similar. However, on April 28, Attorney General Smith announced that he would run for Lieutenant Governor of Florida on a ticket with Senator Johnston,¹²⁵ President of the Florida Senate, and consequently, would not run for reelection as attorney general. Representative Upchurch responded to the announcement by apparently requesting Representative Silver¹²⁶ to propose amendments to the joint resolution and bill that would establish the Office of Statewide Prosecution in the Executive Office of the Governor, rather than in the Department of Legal Affairs, and provide that the statewide prosecutor be appointed by the Governor, rather than the attorney general.¹²⁷ The House adopted the Silver amendments, passed the House bills without a dissenting vote, and sent the package to the Senate.¹²⁸

The Senate, however, refused to go along with the House's proposed transfer of the Office of Statewide Prosecution to the Governor's Office. On the floor, the Senate took up the House package in

121. See Fla. CS for CS for SB 241 (1985); Fla. CS for SJR 242 and 42 (1985); FLA. S. JOUR. 101 (Reg. Sess. Apr. 16, 1985) (Reports of Standing Committees).

122. Fla. S., Comm. on Approp., tape recording of proceedings (Apr. 23, 1985) (on file with committee).

123. See Fla. CS for CS for SB 241 (1985); FLA. S. JOUR. 183 (Reg. Sess. Apr. 25, 1985) (Reports of Standing Committees).

124. FLA. S. JOUR. 322, 323 (Reg. Sess. May 22, 1985).

125. Dem., West Palm Beach.

126. Dem., North Miami Beach.

127. Jud'y-Crim. tape, *supra* note 116. On April 20, 1985, the Governor met with representatives of the Fla. Prosecuting Attorneys Ass'n; Ash Williams, Dep. Chief of Staff, Exec. Office of the Gov.; and Barbara M. Linthicum, Dep. Gen. Counsel, Exec. Office of the Gov., to discuss his position on the location of the Office of Statewide Prosecutor. Basically, the Governor supported the recommendations of the Commission. However, if the legislature decided that the office should be located in the Office of the Governor, he would not oppose it.

128. *Id.* at 470, 471 (Reg. Sess. May 21, 1985) (CS for HJR 386); *id.* at 471 (CS for HB 387).

lieu of the two Senate bills¹²⁹ and substituted the Senate joint resolution and bill for the House package.¹³⁰ In addition, the Senate adopted what Senator Crawford termed a "hostile amendment"¹³¹ proposed by Senator Gordon¹³² to permit a target of an investigation by the statewide grand jury to have legal counsel while before the grand jury and to make it a third-degree felony to disclose any of the proceedings of the statewide grand jury.¹³³ The other amendment adopted by the Senate struck the state attorney's notice provision¹³⁴ because it was argued that this was one more technicality that would hinder the effectiveness of the office.¹³⁵ The Senate passed both the joint resolution and bill, with only one senator voting against the enabling bill, and returned the package to the House.¹³⁶

The House refused to concur in the Senate amendments¹³⁷ and the Senate refused to recede.¹³⁸ Because the houses had reached an impasse, a conference committee was appointed. The Speaker of the House appointed Representatives Upchurch, Meffert¹³⁹ and Messersmith,¹⁴⁰ and the President of the Senate appointed Senators Crawford, Kiser,¹⁴¹ and Gersten.¹⁴² The five basic differences between the houses, identified by the Conference Committee, were the constitutional jurisdiction of the statewide prosecutor, whether a lawyer would be permitted in the grand jury room, whether a criminal penalty for disclosure of grand jury information would be imposed, the location of the office, and the method of selection of

129. FLA. S. JOUR. 373 (Reg. Sess. May 22, 1985) (CS for HJR 386); *id.* at 375-76 (CS for HB 387).

130. *Id.* at 374 (CS for HJR 386); *id.* at 376 (CS for HB 387).

131. Fla. S., tape recording of proceedings (May 22, 1985) (on file with Secretary).

132. Dem., Miami Beach.

133. FLA. S. JOUR. 375, 381, (Reg. Sess. May 22, 1985) (CS for HB 387) (Amendment 1C).

134. *Id.* at 377 (Amendment 1A).

135. Fla. S., tape recording of proceedings (May 22, 1985) (statement of Sen. Kiser) (on file with Secretary).

136. FLA. S. JOUR. 374, 375 (Reg. Sess. May 22, 1985) (CS for HJR 386); *id.* at 375, 381 (CS for HB 387).

137. FLA. H.R. JOUR. 587, 589 (Reg. Sess. May 27, 1985) (CS for HB 387); *id.* at 589, 590 (CS for HJR 386).

138. FLA. S. JOUR. 540 (Reg. Sess. May 28, 1985) (CS for HJR 386); *id.* (CS for HB 387).

139. Dem., Ocala.

140. Repub., Lake Worth. *See* FLA. H.R. JOUR. 732 (Reg. Sess. May 28, 1985) (CS for HJR 386); *id.* (CS for HB 387).

141. Repub., Palm Harbor.

142. Dem., Coral Gables. *See* FLA. S. JOUR. 540 (Reg. Sess. May 28, 1985) (CS for HJR 386); *id.* (CS for HB 387).

the statewide prosecutor.¹⁴³ After a brief discussion of the issues at the initial meeting, it was apparent that a ready compromise was not going to be reached. The conferees met informally during the next three days, but not until the last day of the session did they report to their respective houses with a compromise.¹⁴⁴

The Conference Committee recommended the adoption of the Senate's position on the constitutional language defining the jurisdiction of the statewide prosecutor.¹⁴⁵ However, the difference between the positions of the two houses was relatively minor. The Senate's position would authorize the statewide prosecutor not only to prosecute crimes that occurred in two or more judicial circuits as part of a related transaction, but also crimes that are connected with a criminal conspiracy affecting two or more circuits even though the criminal conspiracy had not committed an element of the crime in the second circuit.¹⁴⁶ The conference struck the provision that would have permitted a target of the statewide grand jury to be accompanied by his attorney.¹⁴⁷ However, the second part of Senator Gordon's amendment, which would make disclosure of any proceedings or the identity of any persons referred to or being investigated by the statewide grand jury a third-degree felony,¹⁴⁸ was recommended for adoption by the conferees.¹⁴⁹

The issues on which the conferees found it most difficult to reach a compromise were the location of the office and the method of selecting the statewide prosecutor. The conferees recommended to their respective houses that the office be located in the Department of Legal Affairs and that the attorney general appoint the statewide prosecutor from not less than three persons nominated

143. Fla. H.R., Comm. on Jud'y, Comparison of House and Senate Versions of Statewide Prosecutor Bills (May 29, 1985) (on file with committee).

144. FLA. S. JOUR. 1005 (Reg. Sess. May 31, 1985) (Conference Committee Report on CS for HJR 386); *id.* at 1006 (Conference Committee Report on CS for HB 387); FLA. H.R. JOUR. 1160 (Reg. Sess. May 31, 1985) (Conference Committee Report on CS/HB 387); *id.* at 1162 (Conference Committee Report on CS/HJR 386).

145. FLA. S. JOUR. 1005 (Reg. Sess. May 31, 1985) (Conference Committee Report on CS for HJR 386); FLA. H.R. JOUR. 1162 (Reg. Sess. May 31, 1985) (Conference Committee Report on CS/HJR 386).

146. FLA. S. JOUR. 375, 376 (Reg. Sess. May 22, 1985) (CS for HB 387).

147. *Id.* at 1006 (Reg. Sess. May 31, 1985) (Conference Committee Report on CS for HB 387); FLA. H.R. JOUR. 1160 (Reg. Sess. May 31, 1985) (Conference Committee Report for CS/HB 387).

148. FLA. S. JOUR. 381 (Reg. Sess. May 22, 1985) (CS for HB 387).

149. *Id.* at 1006 (Reg. Sess. May 31, 1985) (Conference Committee Report for CS for HB 387); FLA. H.R. JOUR. 1160 (Reg. Sess. May 31, 1985) (Conference Committee Report on CS/HB 387).

by the judicial nominating commission for the supreme court.¹⁵⁰ The House was forced to retreat from its position that the statewide prosecutor should be located in the Governor's Office and appointed by the Governor.¹⁵¹ The Senate, on the other hand, receded from its position that the statewide prosecutor be subject to Senate confirmation.¹⁵² The constitutional language provides that the nominating process can be changed by general law.¹⁵³ Both houses adopted the Conference Committee's report on the last day of the Regular Session.¹⁵⁴

C. Analysis

Prior to 1985, all attempts to pass legislation that would have provided for a state prosecutor, a permanent statewide grand jury staff, or a special prosecutor, died in committee. Further, the Florida Prosecuting Attorneys Association stood ready to oppose any statewide prosecutor legislation.¹⁵⁵ Recognizing these facts, the Governor decided to appoint a special commission to prepare legislation for the 1985 Regular Session. Under the Governor's strategy, if the legislature failed to pass the necessary measures in 1985, the bills could be refiled during the 1986 Regular Session and still be placed on the ballot in 1986, as planned. During the interim, additional support could be organized on behalf of the proposals.¹⁵⁶ However, the anticipated opposition never materialized.

With hindsight, it is clear that during the fall and winter of 1984 and 1985, when the Commission was meeting, a consensus was building that the time was right to establish a statewide prosecutor. During this period, nearly every major newspaper in Florida

150. FLA. S. JOUR. 1005 (Reg. Sess. May 31, 1985) (Conference Committee Report on CS for HJR 386); *id.* at 1006 (Conference Committee Report for CS/HB 387); FLA. H.R. JOUR. 1160 (Reg. Sess. May 31, 1985) (Conference Committee Report on CS/HB 387); *id.* at 1162 (Conference Committee Report on CS/HJR 386).

151. *Id.*

152. *Id.*

153. FLA. S. JOUR. 1005 (Reg. Sess. May 31, 1985) (Conference Committee Report on CS for HJR 386); FLA. H.R. JOUR. 1162 (Reg. Sess. May 31, 1985) (Conference Committee Report on CS for HJR 386).

154. FLA. S. JOUR. 1005, 1006 (Reg. Sess. May 31, 1985) (Conference Committee Report on CS for HJR 386); *id.* at 1008 (Conference Committee Report on CS for HB 387); FLA. H.R. JOUR. 1160, 1162 (Reg. Sess. May 31, 1985) (Conference Committee Report on CS/HB 387); *id.* at 1163 (Conference Committee Report on CS/HJR 386). *See generally* ch. 85-179, 1985 Fla. Laws 1295; Fla. CS for HJR 386, 1985 Fla. Laws 2220.

155. Fla. Prosecuting Attorney's Ass'n, meeting minutes (Nov. 15, 1984) (on file with the Office of the State Att'y, 11th Jud. Cir., Miami, Fla.).

156. Memorandum of Apr. 30, 1984, *supra* note 79.

editorially supported establishing a statewide prosecutor.¹⁵⁷ Generally, the editorials expressed the opinion that a statewide prosecutor was necessary because Florida is a haven for organized crime elements that operate without regard to jurisdictional boundaries and because local state attorneys do not have the authority to pursue these elements across jurisdictional lines.

Responding to the emerging consensus, the Florida Prosecuting Attorneys Association modified its traditional stance on the statewide prosecutor.¹⁵⁸ While the members voted, in principle, to continue their opposition to a statewide prosecutor, they nevertheless agreed to direct their lobbying efforts toward amending the Commission's recommendation in three ways: first, to establish the Office of Statewide Prosecution in the Governor's Office and to provide that the head of the office be appointed by the Governor, rather than being established in the Department of Legal Affairs with the appointment being made by the attorney general and Governor, as recommended by the Commission; second, to require the statewide prosecutor to notify the local prosecutor of any investigation in the local prosecutor's circuit before beginning the investigation; and third, to constitutionally limit the jurisdiction of the attorney general to multicircuit cases, rather than granting him jurisdiction concurrent with state attorneys.¹⁵⁹ The state attorneys succeeded in persuading the legislature to incorporate the multicircuit limitation into the constitution.

The legislation that was finally adopted largely tracks the recommendations of the Governor's Commission on the Statewide Prosecution Function. However, there are several seemingly minor but important differences. First, the process of selecting the statewide prosecutor was changed. Second, the multicircuit jurisdictional limitation was removed from the enabling statute and incorporated into the proposed constitutional amendment. Third, the power to prosecute criminal violations was shifted from the attorney general to the statewide prosecutor.¹⁶⁰

The Commission originally recommended that the attorney gen-

157. See, e.g., Florida Times Union, Jan. 9, 1985, at A-6, col. 1; Florida Times Union, Mar. 8, 1985, at A-18, col. 1; Orlando Sentinel, Jan. 9, 1985, at A-14, col. 1; Miami Herald, Mar. 26, 1985, at 16A, col. 1.

158. Fla. Prosecuting Attorney's Ass'n, meeting minutes (Feb. 20, 1985) (on file with Office of the State Att'y, 11th Jud. Cir., Miami, Fla.).

159. *Id.*

160. Compare ch. 85-179, 1985 Fla. Laws 1295 and Fla. CS for HJR 386, 1985 Fla. Laws 2220 with Sundberg Letter, *supra* note 86, proposed constitutional amendment and enabling bill.

eral and the Governor jointly select the statewide prosecutor.¹⁶¹ Both houses rejected this method early in the legislative process and preferred that the statewide prosecutor be appointed by and responsible to one official, although the houses differed on which official should select the prosecutor.¹⁶² In addition, the Senate supported requiring Senate confirmation of the statewide prosecutor appointee, because it wanted to provide a check on the attorney general's appointment power.¹⁶³

The Conference Committee settled on appointment by the attorney general but added that the supreme court nominating commission would nominate the candidates for appointment.¹⁶⁴ This procedure would have the advantage of providing the desired check on the attorney general's appointment power and would do so in a way that would protect the selection process from any undue political influence, an objective strongly supported by the Commission. The changes made by the legislature, except for removing the Governor from the selection process, did not violate any of the objectives advanced by the Commission. Even with regard to the Governor's role in the selection process, many members of the Commission saw the Governor's role as a check on the attorney general in the appointment process,¹⁶⁵ a role now to be performed by the nominating commission.

The second difference concerned the location of the jurisdictional limitation on the statewide prosecutor's power to prosecute. Both the Commission and the legislature agreed that the jurisdiction of the statewide prosecutor should be limited to multicircuit crimes. However, the Commission provided for the limitation in the enabling statute¹⁶⁶ and the legislature incorporated the multicircuit limitation into the constitution.¹⁶⁷ The obvious effect is that the legislature's version would make it more difficult to

161. Sundberg Letter, *supra* note 87, proposed enabling bill at 3.

162. Compare Fla. CS for SB 241, sec. 2 (1985) and Fla. CS for CS for SB 241, sec. 2 (1985) with Fla. CS for HB 387, sec. 2 (1985). Both bills, as introduced, provided that the Governor and attorney general would jointly appoint the prosecutor. Fla. SB 241, sec. 2 (1985); Fla. HB 387, sec. 2 (1985).

163. Fla. CS for SB 241, sec. 2 (1985); Fla. CS for CS for SB 241, sec. 2 (1985).

164. FLA. S. JOUR. 1005 (Reg. Sess. May 31, 1985) (Conference Committee Report on CS for HJR 386); *id.* at 1006 (Conference Committee Report on CS for HB 387); FLA. H.R. JOUR. 1160 (Reg. Sess. May 31, 1985) (Conference Committee Report on CS/HB 387); *id.* at 1162 (Conference Committee Report on CS/HJR 386).

165. Memorandum of Sept. 21, 1984, *supra* note 96.

166. Sundberg Letter, *supra* note 87, proposed enabling bill, sec. 6, at 7, 8.

167. Fla. CS for HJR 386, 1985 Fla. Laws 2220 (proposed amendment to FLA. CONST. art. IV, § 4(c)).

change this jurisdictional limitation, since any change would require a constitutional amendment.

One reason the Commission favored placing the jurisdictional limitation in the enabling legislation rather than the constitution was to make it easier to add to the responsibilities of the state prosecutor the prosecution of single circuit public corruption cases.¹⁶⁸ Certain members of the Commission initially favored excepting the prosecution of political corruption cases from the multicircuit requirement, but eventually rejected the idea because they believed that its inclusion would risk the adoption of the legislation.¹⁶⁹ Certain members of the legislature also favored including single circuit political corruption cases, but, like the Commission members, they were willing to address the issue at a later date.¹⁷⁰ However, incorporating the multicircuit jurisdiction into the constitution would preclude the statewide prosecutor from prosecuting single circuit political corruption cases without a constitutional amendment, unless the case is connected with a criminal conspiracy that affects two or more judicial circuits.

The third difference concerned whether the attorney general or the statewide prosecutor is constitutionally granted the authority to prosecute violations of the criminal laws of Florida. The Commission recommended that the authority to appoint the prosecutor be statutorily shared by the attorney general and the Governor but that the attorney general be constitutionally granted the power to prosecute.¹⁷¹ Since the attorney general was the source of the power, there was no question that he had authority over and responsibility for the activities of the statewide prosecutor. At the time the Conference Committee was appointed, the Senate's package contained the commission's recommendation to constitutionally grant to the attorney general jurisdiction to prosecute criminal violations.¹⁷² The House, on the other hand, had eliminated any role for the attorney general and instead had vested the Governor with the sole authority to appoint the person empowered to prosecute multijurisdictional crimes and also sole control over the of-

168. Memorandum of Sept. 21, 1984, *supra* note 96.

169. *Id.*

170. Fla. S., tape recording of proceedings (May 22, 1985) (on file with Secretary) (statements of Sen. Carlucci, Dem., Jacksonville, and Sen. Kiser).

171. Sundberg Letter, *supra* note 87, at 3.

172. Compare Sundberg Letter, *supra* note 87, proposed enabling bill at 3 with FLA. S. JOUR. 375, 376 (Reg. Sess. May 22, 1985) (Fla. CS for HB 387).

fice.¹⁷³ The Conference Committee report established a compromise that arguably was substantially different from either the Senate or House version of the amendment or the Commission's recommendation. The proposed amendment constitutionally creates the position of statewide prosecutor. The position is located in the office of the attorney general and the statewide prosecutor is appointed by the attorney general. The statewide prosecutor is then granted the power to prosecute multicircuit criminal violations.¹⁷⁴

On the Senate floor, during the debate on the Conference Committee's report, Senator Gordon raised the issue whether the report was germane since it recommended provisions not contained in either the House or Senate joint resolution. He argued that the amendment would constitutionally create an Office of State Prosecution. According to Senator Gordon, the office is not under the attorney general or the Governor; it is a separate constitutional office which is for administrative purposes placed under the attorney general.¹⁷⁵ President Johnston overruled Senator Gordon's point of order, finding the report germane. Senator Gordon continued to argue against the conference report, commenting that the statewide prosecutor was not controlled by any elected official, and, therefore, such a system was potentially subject to greater abuse.¹⁷⁶

Senator Dunn, in an effort to clarify legislative intent concerning the provision, asked the Senate sponsor whether the intent of the proposed constitutional provision was to create a position in the office of the attorney general, who is to have complete supervisory responsibility for and authority over the statewide prosecutor. He further asked whether the intent of the amendment was that the

173. FLA. H.R. JOUR. 453, 454 (Reg. Sess. May 20, 1985) (CS for HB 387).

174. The constitutional provision is worded as follows:

(c) The attorney general shall be the chief state legal officer. There is created in the office of the attorney general the position of statewide prosecutor. The statewide prosecutor shall have concurrent jurisdiction with the state attorneys to prosecute violations of criminal laws occurring or having occurred, in two or more judicial circuits as part of a related transaction, or when any such offense is affecting or has affected two or more judicial circuits as provided by general law. The statewide prosecutor shall be appointed by the attorney general from not less than three persons nominated by the judicial nominating commission for the supreme court, or as otherwise provided by general law.

Fla. CS for HJR 386, 1985 Fla. Laws 2220 (proposed amendment to FLA. CONST. art. IV, § 4(c)) (words underlined are additions).

175. Fla. S., tape recording of proceedings (May 31, 1985) (on file with Secretary) (statement of Sen. Gordon).

176. *Id.*

attorney general could discharge the statewide prosecutor for cause or for no cause at any time.¹⁷⁷ To these questions Senator Crawford replied affirmatively.¹⁷⁸ However, the fact remains that the language of the proposed constitutional amendment finally approved by the legislature differs from the original language recommended by the Commission. The attorney general is no longer constitutionally granted the power to prosecute criminal violations; the statewide prosecutor has been given the power. The effect of the difference, in large part, will be determined by the next attorney general and the first statewide prosecutor.

IV. CONCLUSION

Several years ago, Professor Blakey of the Notre Dame Law School, commenting on the way that Florida government is organized to combat crime, remarked that Florida has "all the tools but not a cabinetmaker."¹⁷⁹ Committee Substitute for House Joint Resolution 386 and Committee Substitute for House Bill 387 give Florida the cabinetmaker. In eliminating the problem Florida has had in the prosecution of criminal organizations, this legislation also gives the statewide prosecutor the same tools as the state attorney. After a dozen years, the legislature finally has enacted thorough and comprehensive legislation, which if passed by the voters in 1986, might well make criminal organizations find another place in the sun.

177. *Id.* (statement of Sen. Dunn).

178. *Id.* (statement of Sen. Crawford).

179. The Fla. Bar Special Comm. on the Statewide Prosecution Function, transcript of proceedings, Sept. 10, (1976) 117.