

REPORT OF FLORIDA PROSECUTING ATTORNEYS ASSOCIATION

Re: The Office of Statewide Prosecution

DECEMBER 2001

I. BACKGROUND

The Office of Statewide Prosecution (OSWP) was created by Constitutional Amendment in November 1986. The Florida Legislature, based on the recommendation of "The Governor's Commission on the Statewide Prosecution Function" adopted a joint resolution and bill to create the Office of Statewide Prosecution. The purpose of OSWP was to investigate and prosecute multi-jurisdictional organized crime. The bill and OSWP became effective January 1987. Legislation provided that the OSWP be in the Department of Legal Affairs and the Statewide Prosecutor be appointed by the Attorney General.

It should be noted that the State Attorneys were represented on the "Governor's Commission" and made recommendations to the Legislature regarding the OSWP. From the beginning, State Attorneys recognized that the establishment of a state office charged with the responsibility of prosecuting multi-jurisdictional criminal activity creates a potential for conflict between the OSWP and the State Attorneys.

The State Attorneys relied on a report submitted to the Governor's Commission authored by Professor G. Robert Blakey of Notre Dame Law School. Professor Blakey's report, "*Recommendations on the Office of Statewide Prosecutor for Florida: The Challenge of Organized Crime*", offered recommendations so that the future statewide prosecutor would be able to effectively meet the challenges presented by multi-jurisdictional organized crime activity. About the relationship between the Statewide Prosecutor and State Attorneys, Professor Blakey warned:

Under no circumstances should the Statewide Prosecutor permit his (OSWP) Office to act as a rival of the State Attorneys. When jurisdictional issues arise-as they will-it should be his (OSWP) firm policy to defer. More than enough crime exists to stay busy doing vital work without arguing over individual investigations or prosecutions. Instead of fighting, he (OSWP) should let the prosecution go-or enter into a joint investigation with the State Attorney, in which the Statewide Office plays the subsidiary role.

With this concern, the Florida Prosecuting Attorneys Association (FPAA) attempted to convince the Legislature that it should require the Statewide Prosecutor to give written notice to local State Attorneys before initiating investigations in a judicial circuit, and grant the State Attorneys the ability to file written objections with the Attorney General, who would rule on conflicts. Although such a provision was included in the Senate Bill, it was eventually viewed as a technicality and deleted. Therefore, no procedure to settle conflicts or guidelines for prosecution exists.

II. ISSUES AND EXAMPLES

As predicted by Professor Blakey, conflicts have occurred and the relationship between the State Attorneys and the Office of Statewide Prosecution has deteriorated. The OSWP now solicits criminal cases directly from law enforcement agencies to increase its caseload. Law enforcement agencies, in turn, are able to “forum shop” for prosecutors. There are no procedures or requirements for the OSWP to communicate with or contact the State Attorney’s Offices with concurrent jurisdiction. Consequently, there is little communication between agencies, a complete lack of coordination regarding criminal cases, and a duplication of efforts by both agencies. Although created specifically to investigate and prosecute multi-circuit organized crime, the OSWP is often involved in cases with no organized crime activity.

These issues are best illustrated with specific examples including cases where there was no organized crime activity. It should be noted that most circuit and county data information systems and State Attorneys’ case management systems cannot identify cases involving the OSWP. The examples cited are based on the review of active pending cases listed by the OSWP and the memory of individual State Attorneys.

It is clear from the examples that the majority of Statewide Prosecution cases are solicited directly from the law enforcement, primarily FDLE. This creates a situation where law enforcement agencies can “pick and choose” their prosecutor and the OSWP competes with local State Attorneys’ Offices.

A clear example of this occurred in the 2nd Judicial Circuit when the OSWP filed a criminal Information charging Solicitation to Commit First Degree Murder.¹ This case involved a law student who had been caught cheating at the FSU Law School. The defendant solicited the murder of a law school employee who would be a witness against her in the law school disciplinary action. A telephone call was made to Key West, Florida to arrange a supposed hit man. The Defendant did in fact meet the FDLE informant / hit man in a Tallahassee, Leon County motel. The FDLE referred the case directly to the OSWP, even though there was no organized crime activity.

When the State Attorney in the 2nd Judicial Circuit became aware of this situation, he contacted the State Attorney in Key West. Neither State Attorney had been made aware of this case. Because the only multi-circuit issue in this case was the telephone call that was made from Tallahassee to Key West, the State Attorneys felt that the OSWP

jurisdiction was a serious issue. The 2nd Judicial State Attorney filed a criminal Information charging Conspiracy to Commit First Degree Murder. The OSWP Nolle Prossed their criminal Information.

Clearly, this is a serious case with questionable statewide jurisdiction – a telephone call to Key West. Because FDLE forwarded this case directly to the OSWP, neither State Attorney was aware that OSWP had filed an Information. The OSWP never contacted or communicated with either State Attorney.

This multi-jurisdictional issue and “overreaching” by the OSWP is a serious and repeated problem. The DCA recently ruled the Statewide Prosecutor was without jurisdiction and reversed a conviction in the 2nd Judicial Circuit.² The defendant was an employee for UNISYS, a private firm that processed claims for State employee insurance. The defendant and another co-worker obtained a fictitious address and processed payments fraudulently to themselves. The defendant was charged with Grand Theft and all of the activities occurred in Leon County. Once again, FDLE took the investigation to the OSWP office who filed the charges of Grand Theft, based on the fact that employees around the state contributed to the fund. A jury convicted the defendant. On appeal the 1st District Court of Appeal ruled that the Statewide Prosecutor was without jurisdiction and reversed the conviction. This case is on appeal to the Florida Supreme Court. The real concern is that the OSWP is currently prosecuting cases where jurisdiction is an obvious issue and the State Attorneys are unaware of these cases.

Law enforcement’s ability to pick “their prosecutor” and the lack of cooperation and coordination with OSWP are also evident in a case that occurred in the 12th Judicial Circuit.³ This was a Grand Theft / Organized Fraud case that originated in the 13th Judicial Circuit. It was transferred to the 12th Judicial Circuit by Governor’s Executive Assignment. When the State Attorney’s Office (SAO) conducted pre-filing interviews in Hillsborough County, it was learned that the FDLE and the OSWP were currently investigating this defendant in several counties for many other alleged violations. The OSWP was contacted but advised the SAO that they did not want jurisdiction over this case.

Consequently, the SAO continued their pre-filing interviews and investigation. When it became clear that the original charges could not be proven, based on the available evidence, FDLE was contacted and advised that additional information was required. FDLE did attempt to contact other witnesses and obtain evidence to strengthen the case, but were not able to do so. The SAO declined to file criminal charges on February 16, 2000, after a four-month investigation.

Within five days, the OSWP filed a criminal Information on the same charges that the SAO had declined. The SAO became aware of this fact when information and documents in the SAO case file were requested by OSWP. The OSWP had filed these charges at the request of the FDLE investigating agent who had worked with the SAO.

During the next 17 months, the OSWP added 27 new, unrelated charges to this Information. The defendant entered a plea to the Information and was sentenced to five years probation and ordered to pay \$180,530.35 at \$100.00 per month. The sentencing guidelines recommended a minimum sentence of 27 years in prison.

This case is particularly troublesome. Despite the fact that the SAO and the OSWP were aware of each other's involvement and communicated, two separate prosecutorial agencies made different filing decisions on the same case. No new information or evidence was presented. A substantial number of new, unrelated charges were added and a defendant received probation when significant prison time was recommended. Most alarmingly, this was orchestrated by FDLE that worked with both agencies.

The OSWP solicits cases directly from law enforcement by advertising directly to police agencies. As an example, this occurred when the 2001 Legislature amended Florida Statute 817.568 to give the OSWP jurisdiction in Identity Theft cases. The OSWP advertised this information in *The Tallahassee Police Legal Bulletin*.⁴ Consequently, the Tallahassee Police decide which prosecutor's office to forward their cases.

The OSWP also receives cases directly from Law Enforcement by joining Task Forces in certain circuits. This usually occurs in jurisdictions where the OSWP has an office and prosecutes many local cases. Assistant Statewide Prosecutors are able to join these task forces and work with law enforcement because their active caseload is significantly lower than Assistant State Attorneys. Currently, the average active caseload for an Assistant State Attorney is 199 cases.⁵ Currently, an Assistant Statewide Prosecutor's active caseload is 13 cases. The OSWP receives cases directly from these task forces, which bypasses the procedures of local State Attorneys who are unaware of the OSWP prosecutions.

This occurs regularly in the 20th Judicial Circuit. The State Attorney often becomes aware that a case, which appears to be a simple drug arrest with no organized crime activity, is being handled by the OSWP. This information most frequently comes from the media, the public, or a victim in a case. Upon investigation, it is discovered that the law enforcement agency referred the case directly to the OSWP who has filed charges. Again, a conflict occurs and the State Attorney and the OSWP are in direct competition for a case.

A specific case that highlights this direct conflict between agencies occurred in the 20th Circuit when a defendant was caught smuggling heroin inside his body when he arrived on an international flight from Germany to Lee County.⁶ Lee County was the only place in Florida where this defendant possessed this heroin. The defendant was arrested by the Airport Police for Trafficking in Heroin and they forwarded the case to the State Attorney's Office. Customs and/or the DEA, however, who were working with the Airport Police, made direct contact with the OSWP and provided reports to them. As a result, both the SAO and the OSWP filed an Information against this defendant.

Neither agency knew of the other's action. When requested, the OSWP would not explain nor relinquish jurisdiction, and only dismissed their Information in open court prior to an arraignment and court hearing.

While individual examples have clearly identified specific problems, it is helpful to review all pending OSWP cases in one jurisdiction. For example, there are currently twenty-four (24) pending cases in the 11th Judicial Circuit.⁷ This is one of the circuits with the highest number of active OSWP cases. Fourteen (14) of the twenty-four (24) cases are drug trafficking or drug conspiracy cases. Seven cases are Medicaid Fraud cases. The remaining three cases include an Organized Scheme to Defraud, Organized Fraud, and Money Laundering.

The review of the OSWP cases clearly shows that the 11th Circuit SAO could have easily prosecuted all twenty-four (24) cases. Eight of these cases are SAO drug cases being prosecuted by an Assistant Statewide Prosecutor who has been designated as an Assistant State Attorney. In 1999, the Legislature was prompted by Drug Czar Jim McDonough to fund drug prosecution positions. The Statewide Prosecutor received several of these positions, but did not have enough drug cases to justify new prosecutors. The SAO designated Assistant Statewide Prosecutors, who had previously worked for the SAO, to handle these cases. In the remaining six (6) drug cases all of the criminal acts occurred in Dade County and or one other county, usually Broward. The seven Medicaid Fraud cases are cases in which all of the pertinent acts occurred in Dade County. The OSWP jurisdiction was alleged because the Medicaid Offices are located in Leon County. Of the three remaining cases, one involves a defendant obtaining grossly inflated mortgages from their offices in Dade and Broward Counties; a second case involves practicing medicine without a license, in which the defendant worked out of offices in Miami and Palm Beach; and the third case alleges money laundering in which the pertinent acts occurred in Dade and Broward Counties.

The fact that the 11th Circuit SAO could have prosecuted all of these cases becomes even more critical when the OSWP cost of prosecution is compared with State Attorneys. As reported in the State Attorney's Base Budget Exercise for FY 99/00, the average unit cost statewide per felony case was \$406.51. This was based on the intake of new cases. According to the 99/00 Annual Report of the Statewide Prosecutor, the OSWP intake was 432 cases. With an annual budget of \$4.3 million dollars, this equates to \$9,953,70 per case. A cost that is twenty times greater than local prosecutions. The types of cases handled by the OSWP in Miami, certainly, do not justify this expense.

Another concern identified in the 11th Circuit, which created a morale problem, was the cross-designation of Assistant Statewide Prosecutors. These Assistants had been hired from the Miami State Attorney's Office, paid a considerably higher salary by the OSWP, and were returning to work for and at the 11th Circuit State Attorney's Office.

The ability of the OSWP to hire Assistant State Attorneys from around the State at a higher salary has created a hardship on State Attorneys' Offices to recruit, hire and retain qualified Assistant State Attorneys and created an inequity statewide. The annual

starting salary for an Assistant Statewide Prosecutor with one-year experience is \$46,305. The starting salary for an Assistant State Attorney is \$35,931.00, effective January 1, 2002. Even with four to five years experience the average statewide salary for Assistant State Attorneys is \$49,356, which compares to an Assistant Statewide Prosecutor with one-year experience. Assistant Statewide Prosecutors come from the ranks of the State Attorneys' Offices. The State Attorneys' Offices simply cannot compete and retain Assistant State Attorneys with this discrepancy in salaries.

Although case tracking systems in many circuits make it difficult to retrieve data, the 2nd Judicial Circuit reviewed all of the cases prosecuted by the OSWP since 1995.⁸ This included 200 pending and closed cases. Of these 200 cases, nine cases are currently pending and 191 cases have been closed. Thirty-eight or 19% of the closed cases were entirely dropped. Over half of all counts filed (57%) in these closed cases were dropped, (2,415 counts dropped out of a total of 4,238 total counts), and only 26 of the 191 defendants received a prison sentence in the Department of Corrections.

When cost is considered and compared with local prosecution, effectiveness of the Statewide Prosecutor is even more of an issue. The purpose of Statewide Prosecution should be to more effectively prosecute and impact multi-circuit crime than local prosecutions. Obviously, this has not been the case in the 2nd Circuit where only 26 of 191 defendants went to prison, over 50% of the counts and almost 20% of the cases were dropped. Obviously, Statewide prosecution has not resulted in more severe sanctions or more effective prosecution than local jurisdictional prosecution.

III. CONCLUSION AND RECOMMENDATIONS

This report identifies some obvious problems with the current situation, such as, "overreaching" by the OSWP, "forum shopping" by law enforcement agencies, a lack of coordination, jurisdictional issues, and direct conflicts between the State Attorneys and the OSWP.

There is no reason for two state prosecutorial agencies filing charges and competing in the same cases. Similarly, it is inexcusable for one agency to file criminal charges at the request of law enforcement knowing a second state agency had declined the same charges. The fact that a "solicitation to commit murder" case with questionable jurisdiction was forwarded directly to the OSWP by law enforcement, and filed on without any communication or coordination and by-passing the State Attorney with jurisdiction, exemplifies the seriousness of the problem.

The purpose, function, and cost of the Office of Statewide Prosecution need to be reviewed in light of these problems. The stated purpose of a Statewide Prosecutor was to more effectively investigate and prosecute multi-circuit organized crime. Obviously, this multi-circuit jurisdiction often becomes an issue. Although, the multi-jurisdictional limitation is the same today as when it was created, expansion has occurred by the addition of new types of crimes that the Statewide Prosecutor can handle. The Statewide Prosecutor aggressively accomplished this expansion during legislative sessions, often in

direct conflict with the FPAA. This has led to the OSWP prosecuting a large number of cases with questionable multi-circuit jurisdiction, and cases that could easily be prosecuted by local State Attorneys. Finally, at a cost twenty times greater than State Attorneys, statewide prosecutions are no more effective than local prosecutions.

As elected officials the State Attorneys are genuinely concerned that there is no communication or coordination with the OSWP, that mistakes are being made, and that the citizens of Florida are not being well served. Cost is certainly an issue and should be compared with local prosecutions. The theory that Statewide Prosecution cost are greater because they are multi-circuit and complex cases, is not the case based on our review and does not consider the complex capital cases and similar cases that the State Attorneys prosecute. This cost effectiveness must be considered in light of the fact the OSWP, with 37 Assistant State Wide Prosecutors, seven offices and a \$4.3 million dollar budget disposed of 220 cases in FY 99/00.

The OSWP cannot act as a separate entity without guidelines, rules and procedures to determine jurisdiction. It is the recommendation of the FPAA that every current pending case and investigation of the OSWP be reviewed and, unless multi-circuit organized crime is evident, returned to the jurisdictional State Attorney for prosecution. State Attorneys should be given primary jurisdiction over all criminal cases. The Statewide Prosecutor, who was created by Constitutional amendment, should receive future cases through the State Attorneys' Offices, The Governor, or the Statewide Grand Jury. If the OSWP retains the ability to solicit cases directly from law enforcement, jurisdiction will always be an issue and direct conflicts will result between the OSWP and State Attorneys' Offices.

APPENDIX

¹State vs. Plachy, Leon County Circuit Court, Case No. R95-0583

²Winter v. State of Florida, District Court of Appeal of Florida, First District
Case No. 1D99-3540

³State vs. Calvin Burley Hyde, Hillsborough County Circuit Court
Case No. 99-15375 CFAWS

⁴*The Tallahassee Police Legal Bulletin*; copy attached as Exhibit “A”

⁵State Attorney performance measures, cases referred

⁶State vs. John Ikeaka, Lee County Circuit Court, Case No. 01-15CF

⁷List of the 24 pending cases in the Eleventh Judicial Circuit
Dade County Circuit Court Case Nos:

Drug cases

99-41704

00-11313

00-17870

00-20033

0023885

00-5527

00-24147

00-2229

Multi-circuit drug cases

01-4472

01-8482

99-42801

01-11427

00-2178

00-14934

Medicaid Fraud cases

99-21907

99-38856

99-4821

00-38785

00-24311

00-27204

00-38781

Inflated mortgage case: 01-28691

Practicing medicine without a license case: 01-26701

Money laundering case: 01-6737

⁸List of 2nd Judicial Circuit OSWP case