IN THE SUPREME COURT OF FLORIDA
CASE NO: SC2026-0574

JAMES HITCHCOCK,
Appellant,
v.
STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE _ JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA
Lower Tribunal No. 481976CF001942000AOX

APPENDIX TO INITIAL BRIEF OF THE APPELLANT

CAPITAL CASE - DEATH WARRANT SIGNED

Appendix A

"Shevin Report", dated Feb. 26, 1996, 10 Fla. L. Weekly D166-169. (attachment to opinion found in Hill v. Butterworth, 941 F. Supp. 1129 (N.D. Fla. 1996)

is not being assigned to these individuals in accordance with the new substitution procedures. *See generally* Fla. Stat. § 27.703 (providing for appointment of "one or members of The Florida Bar" to represent collateral defendants when CCR is conflicted out, with such counsel to be paid from funds appropriated to the Justice Administrative Commission).

[35]To hold otherwise, as the Defendants apparently suggest, could have the effect of shrinking the six-month statute of limitations under Chapter 154 to such a short amount of time that it would deprive capital defendants of procedural due process.

[36]In reaching this preliminary conclusion, the Court is unconcerned with the reasons for the backlog. Regardless of whether it is caused by inadequate funding or a misallocation of resources by CCR, the effect is the same.

[37]In *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as precedent the decisions of the Fifth Circuit rendered prior to October 1, 1981.

[38]In 1995, fifty-six murderers were put to death in the United States—the largest number in nearly four decades. However, in Florida, where convicted murderers spend an average of 9.7 years on death row, there were only three executions. Diane Hirth, *State Looks to Shrink Death Row Appeal Time—Executions Expected to Increase in 1996,* FT. LAUDERDALE SUN-SENTINEL, Dec. 30, 1995, at A1. In fact, in the twenty-two years since Florida reinstated the death penalty, more than seven hundred convicted murderers have been sentenced to death, but fewer than forty have actually been executed. Bentley Orrick, *Murderers Detour from Death Row: Legal Appeals Help Keep Most Condemned Killers in Florida from Being Executed in the Electric Chair,* TAMPA TRIB., Nov. 6, 1995, Florida/Metro Sec., at 1.

[39]The Court concurs with the Supreme Court of Florida's discussion of this point:

> The importance of finality in any justice system, including the criminal justice system, cannot be understated. It has long been recognized that, for several reasons, litigation must, at some point, come to an end. In terms of the availability of judicial resources, cases must eventually become final to allow effective appellate review of other cases . . . . [A]n absence of finality casts a cloud of tentativeness over the criminal justice system, benefiting neither the person convicted nor society as a whole.

Witt v. State, 387 So. 2d 922, 925 (Fla.), *cert. denied*, 449 U.S. 1067, 101 S. Ct. 796, 66 L. Ed. 2d 612 (1980).

[40]*See City of Atlanta v. Metropolitan Atlanta Rapid Transit*, 636 F.2d 1084 (5th Cir. 1981).

ATTACHMENT A
SHEVIN REPORT

VIA FEDERAL EXPRESS

February 26, 1996

The Honorable Stephen H. Grimes
Chief Justice
Supreme Court of Florida
500 South Duval Street
Tallahassee, Florida 32399-1925

RE: Study Of The Capital Collateral Representative

Dear Mr. Chief Justice:

I am pleased to submit the following report based on my study of the Office of the Collateral Capital Representative ("CCR") and the current status of postconviction counsel for Florida's death row inmates.

BRIEF PROCEDURAL HISTORY

In June of 1995, Michael J. Minerva, the head of CCR, filed a motion for relief from the new one-year deadline for filing 3.850 postconviction motions in capital cases. See Fla. R. Crim. P. 3.851. At the same time, Mr. Minerva stopped designating individual staff counsel to represent death row inmates whose one-year deadline had started running. At present, there are 40 inmates for whom CCR is the statutorily authorized representative, but for whom CCR has refused to designate individual counsel.

Mr. Minerva's actions were precipitated by the Supreme Court's affirmance in 1994 of 46 new death penalty cases, twice the historical average. Mr. Minerva's motion claimed that CCR could not incorporate all of these cases into its current caseload of 138 clients, and that to accept all of these cases with a one-year filing deadline would require his staff attorneys to violate their ethical duty of providing effective assistance of counsel.

Mr. Minerva supplemented his motion for relief in August of 1995 after the Volunteer Lawyers' Post-Conviction Defender Organization, formerly known as the Volunteer Lawyers' Resource

D. The Office of the Governor
   1. W. Dexter Douglass, Counsel to the Governor
   2. Phyllis Hampton, Assistant Counsel
E. Representative Elvin L. Martinez, Chair of the House Criminal Justice Committee.
F. Chandler R. Muller, President of the Board of VLRC.
G. Judge Rodolfo Sorondo, Jr., Criminal Division, 11th Judicial Circuit in and for Dade County, Florida.
H. Judge Thomas M. Carney, Criminal Division, 11th Judicial Circuit in and for Dade County, Florida,
I. Bennett H. Brummer, Public Defender, 11th Judicial Circuit in and for Dade County, Florida.
J. James Rinaman, Former President of The Florida Bar.
K. Michael Millman, Executive Director of the California Appellate Project.

I also reviewed numerous written materials, including the 1987 Caseload/Workload Formula developed for CCR by The Spangenberg Group (the "Spangenberg Report"), the report of the federal Subcommittee on Death Penalty Representation chaired by Judge Emmett Ripley Cox of the Eleventh Circuit Court of Appeals (the "Cox Report"), the American Bar Association Standards for representation in death penalty cases (the "ABA Standards"), the Report of the Supreme Court Committee on Postconviction Relief in Capital Cases chaired by Justice Ben F. Overton (the "Overton Committee Report"), the Florida Supreme Court's case tracking summary of active death penalty cases, CCR's current caseload docket, CCR's 1996-97 legislative budget requests, and the Governor's 1996-97 budget recommendations.

TWO QUESTIONS PRESENTED

I have been asked to address two principal questions:

First, is CCR capable of accepting the 40 new cases in which they have so far refused to designate counsel?

Second, how should the State of Florida provide support to private counsel in the 41 cases that were previously assisted by VLRC?

Federal habeas corpus is a statutory remedy provided for by 28 U.S.C. § 2254(a) that permits a state inmate to ask the federal district court to review any violation of federal law that may have tainted the inmate's conviction or sentence. Subject to limited exceptions, the federal court may only consider claims previously asserted in the direct appeal or the 3.850 review; thus, federal habeas petitions are the last stage of death penalty proceedings. Review of the federal district court's habeas decision is to the Eleventh Circuit Court of Appeals, and then to the United States Supreme Court.

Under the current practice in Florida, the Governor will not sign a death warrant until a death-sentenced defendant has exhausted his or her 3.850 remedy and federal habeas corpus review. Once the Governor signs a death warrant, however, an inmate typically files a *second* 3.850 motion, a *second* federal habeas petition, and various motions to stay the execution pending resolution of this second round of proceedings.

B. WHAT IS CCR?

CCR was created by the Florida Legislature in 1985 for the following purpose:

> [T]o provide for the representation of any person convicted and sentenced to death in this state who is unable to secure counsel due to indigency, so that collateral legal proceedings to challenge such conviction and sentence may be commenced in a timely manner and so as to assure the people of this state that the judgments of its courts may he regarded with the finality to which they are entitled in the interests of justice.

§ 27.7001., Fla. Stat.

CCR is obligated to represent *all* indigent death-sentenced defendants in collateral proceedings in both state and federal courts, including the United States Court of Appeals for the 11th Circuit and the United States Supreme Court. § 27.702(1), Fla. Stat. The only defendants that CCR cannot represent are defendants in cases where CCR may have a conflict of interest, such as where two defendants have been convicted as co-defendants, or where CCR staff counsel participated in the direct appeal. § 27.703, Fla. Stat.

The head of CCR is appointed by the Governor, subject to Senate confirmation, for a 4-year term. § 27.701, Fla. Stat.

VLRC currently provides representation, with the assistance of volunteer lawyers, to 41 death row inmates, 19 of which are "conflict cases" that cannot be represented by CCR. The reason that VLRC represents 22 defendants who, by statute, should be represented by CCR, is that CCR became overloaded with cases during Governor Martinez's administration (due to the record number of death warrants). In addition, the Overton Committee Report recommended that VLRC provide temporary relief to CCR pending CCR's receipt of adequate funding.

There is presently no logical reason to maintain the distinction between CCR and VLRC with respect to these 22 non-conflict cases. The problem, of course, is that the 40 cases that created the current impasse could become a 62-case problem, which would represent an approximate 45% increase in CCR's client base if

all the allowable cases were assigned to CCR.

D. THE 1991 OVERTON COMMITTEE REPORT

In early 1991, the Florida Supreme Court convened the Committee on Postconviction Relief in Capital Cases to address CCR's inability to process its current caseload and because of substantial delays in the resolution of capital collateral proceedings.

The Committee made a number of significant findings in its 1991 report. First, that CCR was underfunded and understaffed despite its 1990-91 budget of $1.9 million. Second, that one of the major problems with the collateral process was that the triggering mechanism to start the postconviction relief process moving was the signing of a death warrant, resulting in a disorderly and unmanageable system of representation. Third, that all the parties involved in the death penalty process—CCR, the Attorney General, the Governor, and the Courts—needed to coordinate their efforts to monitor death penalty cases and to assure that there are no unjustified delays.

Consistent with these findings, the Committee made three recommendations. The first recommendation, which resulted in the enactment of Rule 3.851, was that CCR should designate specific named counsel no later than 30 days after certiorari was denied in a capital inmate's direct appeal. Second, the Committee recommended that the initial round of collateral proceedings should be completed within a period of 2 years and eight months. To accomplish this time table, the Committee recommended that Rule 3.850 be shortened to 1 year in capital cases, and that trial court should resolve 3.850 motions on an expedited basis. Third, the Committee recommended that, to avoid delays at the

Commentary to the rule, which is based on the Overton Committee Report, the reduction in the time period was conditioned on CCR being "fully funded."

By July 1993, CCR's caseload increased 20%, to 100 clients, and by July 1994 to 118 clients. As of June 1995, CCR's assigned case load had grown to 141 clients, representing a 59% increase in clients since 1991, with no increase in budget to directly correspond to the increase in clients.

The current impasse arose after the Court affirmed 46 death penalty cases in 1994.[5] As a result of these affirmances, CCR would have been required to file 3.850 motions in most of the 46 cases in 1996. This would represent approximately twice the number of 3.850 motions that CCR regularly files in any given year. Pursuant to a previous order of extension, CCR was supposed to begin designating lawyers for 40 of these cases in May of 1995. The current impasse was created when CCR began refusing to designate lawyers in any of the 40 cases.[6]

B. CURRENT POSTCONVICTION CAPITAL COUNSEL STATISTICS

Florida currently has 367 death row inmates. 139 of the inmates are now involved in the direct appeal of their cases. All of these defendants are represented either by private counsel or local public defender organizations.

There are 228 postconviction cases in various stages of collateral proceedings. These defendants are represented as follows:

[5]The extremely high number of affirmances in 1994 was caused by the departure of two Supreme Court Justices, Rosemary Barkett and Parker Lee McDonald. Justice Barkett was appointed to the United States Court of Appeals for the Eleventh Circuit, and Parker Lee McDonald retired. The Court issued final decisions in all cases in which Justices Barkett and McDonald were sitting in order to avoid giving a back log of cases to the two new Justices, Harry Lee Anstead and Charles Wells.

[6]The deadlines to designate counsel have already passed for 25 of the 40 cases; the deadlines in the other 15 cases are approaching.

CCR's 138 cases are assigned as follows:

Anderson, Gail	16
Anderson, Mary	4
Backhus, Terri	20
Brewer, Heidi	2
Gardner, Lissa	4
Kissinger, Stephen	29
McClain, Martin	21
Scher, Todd	14
Shavazz, Harum	8
Shippy, Daren	12
Strand, Bret	8
TOTAL	138

The 138 cases are in the following procedural postures: 3.850 motions have been filed in all but 7 cases; 90 cases are pending at the circuit court level, having had no evidentiary hearing; 19 are on appeal to the Florida Supreme Court; 18 cases are pending habeas corpus review in the federal court; 5 cases have completed the first round of collateral appeals.

Based on its historical record of filing sixteen or seventeen 3.850 motions annually, but also recognizing that CCR filed 28 3.850 motions in 1995, CCR should be able to absorb a good portion of the 40 impasse cases into its caseload.

CCR contends that it has "just about" reached its limit, and that, even if extensions of time are granted, it cannot accept many more cases. The basis for CCR's contention is its claim that the volume of 138 cases has a cumulative weight that cannot be measured with complete objectivity. Although there is some basis for this claim—especially because 90 cases have not yet been decided by the trial courts, some of which have been pending for up to 4 years—the claim must be countered by the fact that CCR has filed 3.850 motions in virtually all of its cases. Because the bulk of CCR's investigation should be performed before 3.850 motions are filed, it would appear that CCR can accept new cases.

The problem would be more easily resolved if there was an accepted methodology to determine the maximum annual caseload for capital lawyers. The existing studies, including the Cox Report and the Spangenberg Report, indicate that each lawyer should be assigned no more than 4-6 cases per year. There is cause, however, to doubt the accuracy of this figure. First, both studies are based on anecdotal, not empirical data, without the benefit of contemporaneous time records. Second, the studies do

My proposal assumes that, in every case, CCR should be given the full 11 months anticipated by Rule 3.851 to investigate and file the 3.850 motion. In addition, as mentioned above, my proposal assumes that the reforms outlined below will be implemented, thereby easing some of the burden on CCR. Finally, this schedule recognizes that CCR has already gained an approximate 10-month respite by virtue of the present impasse.

As to the second set of 20 cases, I believe that they should be incorporated as part of the 6 new lawyers that CCR will hopefully be authorized to hire by the Legislature, consistent with the Governor's recommended budget. Each of these lawyers should be qualified to handle 4 new cases, and also should be able to assist as second-chairs on existing cases.[11] I would recommend that CCR be required to designate counsel in these cases over a several month period beginning in September or October 1996.

D. RECOMMENDED REFORMS TO THE 3.850 PROCESS

In making my recommendation, I respectfully, but strongly suggest that reforms be implemented in the following four areas.

1. Approval of The Governor's 1996-97 Recommended Budget For CCR

The most important financial reform for resolving the present impasse is for the Legislature to adopt the Governor's recommended budget for CCR as part of the 1996-97 Budget. Although CCR has requested that the Legislature double its budget and staff size, I believe that the Governor's budget recommendation is more realistic and will be initially sufficient to accomplish most of the recommendations set forth in this Report.

The Governor has recommended an annualized increase in CCR's budget of approximately $730,000, with 14 new positions as follows:

[11]I am assuming that, with the creation of branch offices, and the provision of additional funding, CCR will be able to hire experienced mid-level attorneys to fill these six positions and will *not* continue to hire only entry level lawyers.

civil litigation.[13] CCR estimates that it has over 100 pending Chapter 119 civil suits.[14]

The Supreme Court should promptly solve this problem by enacting a Rule of Discovery in 3.850 proceedings, *with expedited time schedules* for both the requesting and providing of public records, for the filing of objections, and for the resolution of disputes by the trial judge who eventually will rule on the 3.850 motion. The goal of the new rule should be to expedite CCR's access to Chapter 119 information so that it can be reviewed by CCR in time to be incorporated in the original 3.850 motion. The new rule should eliminate a significant portion of the delay in ruling on 3.850 motions that has occurred because of tangential civil litigation and the inability of CCR to file a *complete* 3.850 motion within the 1 year time period.

3. The Need For Branch Offices

CCR is a statewide public defender organization. It is required to represent all indigent death-sentenced defendants regardless of the county in which they were convicted. Thus, although all of CCR's clients are housed on death row at Union Correctional Institution in Raiford, CCR is required to file 3.850 motions in the trial courts of the counties where the defendants were originally convicted. Because CCR's only office is in Tallahassee, CCR investigators and lawyers have

been required to travel throughout the State of Florida to handle hearings and to investigate cases.

CCR currently spends over $100,000 per year in travel expenses for its attorneys and investigators. In addition, CCR loses countless hours of attorney and investigator time in transit, and in setting up temporary field offices when arguing evidentiary hearings in other parts of Florida.

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[13]As it stands, CCR has been required to file incomplete 3.850 motions to meet the one-year deadline, reserving the right to supplement the motion upon the receipt and review of belated Chapter 119 materials. This procedure obviously defeats the purpose of Rule 3.851.

[14]Part of the problem in obtaining Chapter 119 material has been the result of lack of cooperation in providing prompt and full disclosure by some state and local agencies. Although the Attorney General has indicated that such files should be disclosed as a matter of public policy, he does not have the authority to mandate disclosure.

order to preserve them for future review. This can be done, however, without the presentation of extensive legal argument resulting in 170-page motions that create unnecessary delays at the trial level. Issues that have been adversely decided can simply be listed at the end of the 3.850 motion, with the express notation that they are being raised only to preserve the issue for appellate review.[15]

E. OTHER SIGNIFICANT ISSUES

In addition to the issues discussed above, I believe it is necessary to note a number of other significant issues that recurred throughout my study and that have influenced my report.

1. "Death In Different"

When I argued *Proffitt v. Florida*, 428 U.S. 242 (1976), for the state, I agreed with the United States Supreme Court Justices that the death penalty was, in fact, "different" from other criminal sanctions because of the immutable consequence of the punishment. That is why, in upholding the constitutionality of Florida's death penalty, the Court recognized the necessity for heightened procedural and substantive protections for capital defendants. These necessary protections have resulted in extra time and expense associated with death penalty representations.

2. Expertise And Continuity of Counsel

Florida and federal death penalty jurisprudence is complex and rapidly evolving. This fact was recognized by all of the sources I consulted. The complexity of death penalty

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[15]Rule 4-3.3(a)(3) of the Florida Rules of Professional Conduct, provides that a lawyer shall *not* knowingly "fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." CCR raises issues for their clients, with knowledge of legal authority directly adverse to their clients' positions, and without disclosing this either to the trial judge in the 3.850 motion or to the Florida Supreme Court in the appellate briefs. This procedure evades the spirit of the rule and should *not* be tolerated. It also has the effect of lengthening the entire 3.850 procedure, both at the trial and appellate levels, and is probably one of the reasons that 90 cases remain pending at the trial court level.

qualified private lawyers were available), the cost would be approximately $9 million per year to fund just the existing 138 cases and the 40 impasse cases. In addition, as Mr. Rinaman suggested, significant resources would be expended in the recruiting process itself.

The institutionalization of capital collateral representation serves three purposes: specialization, centralization, and continuity. It helps in training future death penalty qualified attorneys, in maintaining an "institutional memory" of the historical development of the law, in developing a central registry of postconviction capital cases, and in assuring whenever possible that the same lawyer is assigned to a case throughout the postconviction process. CCR thus appears to me to be a more efficient means of representing capital defendants than a private Bar model.

Although I briefly explored the long-term scenario of using CCR as a clearinghouse to support the privatization of capital collateral representation, for the reasons cited above, combined with the recommendation of the Cox Report that federal VLRC-type programs be reconfigured to provide CCR type direct representation, I have concluded that neither privatization nor a VLRC-type program are workable long-term solutions.

4. Clemency

CCR specifically brought to my attention two death penalty cases (Carlis Lindsey and Samuel Pettit) that raise the issue of the expanded use of the clemency process. CCR contends that Mr. Lindsey, who is 72 years old, likely will die of natural causes before the expiration of his collateral appeals. CCR contends that Mr. Pettit, who is suffering from a degenerative brain disease, also will likely die of natural causes before the expiration of his collateral appeals. CCR cites these two cases as examples of situations where the selective use of clemency might *slightly* ease the volume of death penalty cases while still serving the interests of justice.

Generally, the early initiation of clemency review may create the possibility that *some cases* can be removed from the system by imposing life imprisonment without the possibility of parole where there is an indication that the defendant is mentally ill, has received a life recommendation from the jury, or otherwise may deserve clemency. There is certainly merit in discussing this approach with the Governor, although I do *not* believe it will result in any significant reduction of CCR's cases.

determine whether a death-sentenced defendant has received a fair trial and a constitutionally proportionate sentence.

Although I cannot provide a detailed formula for CCR to follow in deciding how to allocate its resources, I do believe that the United States Supreme Court's jurisprudence provides sufficient guidance by requiring that errors raised on collateral review must be substantial enough to have changed the outcome of the trial. *e.g., United States v. Bagley*, 473 U.S. 667, 682 (1985) ("The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."); *Strickland v. Washington*, 466 U.S. 668, 687 (1984) ("[T]he defendant must show that the deficient performance prejudiced the defense."). CCR's attorneys do not have the luxury to pursue every lead *ad infinitum*. They must choose to pursue only those leads that have a reasonable probability of showing material prejudice to the defendant and to the outcome of the trial.

In light of this requirement that CCR must ration its funds within the bounds of finite resources, but also realizing that CCR has performed, in good faith, a vital service in assuring that the death penalty is effectuated consistent with the dictates of basic fairness and constitutional due process, I make the following 6 recommendations.

RECOMMENDATION #1

CCR should be required by Court order to designate counsel in all 40 undesignated cases on an incremental 3.850 schedule that allows the full 11 months for CCR to file 3.850 motions in each individual case. Assuming the Court agrees with this primary recommendation, CCR's pending motion for rehearing and clarification would presumably be denied.

It is recommended that CCR should designate counsel from its existing staff of lawyers to incorporate the oldest 20 of the 40 impasse cases. CCR should designate attorneys in these 20 cases over a several month period, to be set by the Court, with at least 4 cases designated each month. The remaining 20 cases should be incorporated as part of the 6 new lawyers that CCR will be authorized to hire pursuant to the Governor's recommended budget. Each of these lawyers should be qualified to initially handle at least 4 new cases. I recommend that CCR be required to designate counsel in these cases over a several month period beginning in September or October 1996.

This incremental schedule recognizes that CCR has already gained an approximate 10-month respite from accepting new cases

and state and local law enforcement agencies. The new rule should contain expedited time schedules for requests, responses, objections, and for the resolution of disputes by the trial judges that eventually will rule on the 3.850 motions. The goal of the new rule should be to expedite CCR's access to Chapter 119 information so that it can be reviewed by CCR in time to be incorporated in the original 3.850 motion. This should eliminate a significant portion of the delay in ruling on 3.850 motions that has occurred because of tangential civil litigation and the apparent inability of CCR to file a *complete* 3.850 motion within the 1 year time period.

RECOMMENDATION #4

CCR should list, *without argument*, those issues that are clearly not dispositive but that CCR believes must be preserved as a matter of procedural formality. This perhaps could be facilitated by the Court's adoption of another new Rule.

The Supreme Court should place CCR staff attorneys on notice that it will no longer tolerate anything but complete candor before state trial courts and the Florida Supreme Court and total compliance with the Florida Rules of Professional Responsibility. In particular, the failure to advise all courts of known adverse precedents on particular issues should result in disciplinary investigation

and action by the Florida Bar.

RECOMMENDATION #5

Because part of the delay in prosecuting 3.850 motions occurs at the trial court level, the Florida Supreme Court should adopt a rule of judicial administration requiring expedited processing of 3.850 motions and hearings. The rule should also provide that the same judge who tried the case—if still available—should decide 3.850 motions in capital cases, even if the judge no longer sits in the circuit court's criminal division. In addition, the Court should follow through with the Overton Committee Report's recommendation of requesting circuit court clerks to assign one person the responsibility of administering 3.850 cases. Finally, the Judicial College should prepare a concise handbook for trial judges in capital collateral proceedings to assist them in sorting through the major jurisprudential issues.

RECOMMENDATION #6

The Legislature should require CCR staff attorneys and investigators to keep contemporaneous time records that can be converted into computer-generated time reports. This will

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Environmental law—Resource Conservation and Recovery Act—Hazardous waste—Owner of shopping center granted preliminary injunction requiring lessee/drycleaning company to cease discharging perchloroethylene and other hazardous wastes—Defendant ordered to assess groundwater contamination caused by its past disposal of dry cleaning chemicals at its facility and to propose remediation plan—Magistrate judge properly analyzed and applied RCRA to owner's action for injunctive relief compelling abatement of contamination created by improper handling, storage, transportation, or disposal of hazardous wastes

FAIRWAY SHOPPES JOINT VENTURE, a Texas Joint Venture, Plaintiff, v. DRYCLEAN U.S.A. OF FLORIDA, INC., a Florida corporation, Defendant. U.S. District Court, Southern District of Florida. Case No. 95-8521-CIV-HURLEY. July 31, 1996. Daniel T.K. Hurley, Judge. (Frank J. Lynch, Jr., U.S. Magistrate Judge.) Counsel: Douglas M. Halsey and Kirk L. Burns, Douglas M. Halsey, P.A., Miami, FL, for Plaintiff. John Barkett, Coll, Davidson, Carter, Smith, Salter & Barkett, P.A., Miami, FL; and Teresa Woody, Spencer, Fane, Britt & Brown, Kansas City, MO, for Defendant.

ORDER ADOPTING MARCH 7, 1996 REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE, GRANTING PRELIMINARY INJUNCTION, REFERRING REPORTING AND MONITORING TO U.S. MAGISTRATE JUDGE, AND RESOLVING VARIOUS MOTIONS

This matter comes before the court upon the Report and Recommendation of United States Magistrate Judge Frank J. Lynch Jr., entered March 7, 1996. The defendant filed timely objections, requiring this court to make a *de novo* review of the record pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule 72(b) of the Federal Rules of Civil Procedure.

Having made a *de novo* review of the record, the court adopts the magistrate judge's findings. Defendant makes numerous attacks on the magistrate judge's analysis of the application of the Resource Conservation and Recovery Act (RCRA). However, the court concludes that the magistrate judge clearly understood and properly applied RCRA Section 7002 to the present case. Therefore, the Report and Recommendation of the magistrate judge is adopted. Accordingly, it is hereby

ORDERED and ADJUDGED as follows:

III. DECRETAL PROVISIONS

1. The Report and Recommendation of United States Magistrate Judge Frank J. Lynch Jr. is adopted.

2. Plaintiff Fairway Shoppes' [18-1] Motion for Preliminary Injunction is GRANTED as detailed below.

3. Defendant shall immediately cease discharging perchloroethylene and other hazardous wastes.

4. Pursuant to Federal Rule 65(c), Plaintiff shall post a bond in such sum as Magistrate Judge, shall deem proper. The court respectfully asks the Magistrate Judge to set the sum of the bond (if any) within 15 days from the entry of this order.

5. No later than 30 days from the entry of this order, Defendant shall submit a report detailing the feasibility of the following preventive measures (if such measures are not already in place):

a) a secondary containment system; and
b) an impermeable epoxy seal on the bare concrete floor.

6. Furthermore, as required by the Magistrate Judge, Defendant shall conduct a comprehensive and complete assessment of the contamination at the Shopping Center. This assessment shall be performed in accordance with the procedures detailed in the Florida Department of Environmental Protection guidance document, *Corrective Action for Contamination Site Cases*. The Defendant shall submit a copy of *Corrective Action for Contamination Site Cases* to the court for the record. The assessment shall be conducted as follows:

a) no later than 30 days from the entry of this order, Defendant shall file a report detailing the steps taken by it to complete the environmental assessment,

b) no later than 60 days from the entry of this order, Defendant shall file a final report which includes the lateral and vertical extent of the perc and its related degradation constituents. The report shall also include a proposed remediation plan designed to prevent further lateral and vertical migration of the contaminant plume.

7. The court respectfully requests that the Magistrate Judge monitor compliance with this order and consider all motions related thereto, including motions to adjust and amend these reporting requirements.

8. This order does not limit Plaintiff's right to move for additional relief should the assessment reveal a need for such. In accordance with the Magistrate Act, 28 U.S.C. § 63(b)(1)(A), and Federal Rules of Civil Procedure 72, all such motions, if any, are hereby REFERRED to Magistrate Judge Lynch for final disposition or report, as appropriate.

9. Plaintiff Fairway Shoppes' [13-1] Unopposed Motion for Enlargement of Time to Respond to Defendant Dryclean U.S.A. of Florida, Inc.'s Answer and Counterclaim is GRANTED.

10. Defendant Dryclean U.S.A.'s [46-1] Motion for Oral Argument with Respect to Objections to the March 7, 1996 Report and Recommendation of U.S. Magistrate Judge Regarding Motion for Preliminary Injunction is DENIED.

11. Defendant Dryclean U.S.A.'s [46-2] Motion to Extend Page Limit of Objections to the March 7, 1996 Report and Recommendation of U.S. Magistrate Judge is GRANTED.

12. Defendant Dryclean U.S.A.'s [7-1] Application for Limited Appearance is GRANTED. Teresa A. Woody, Esq. is recognized *pro hoc vice* for the Defendant.

13. Plaintiff's July 22, 1996 Motion to Expedite Resolution of Motion for Preliminary Injunction is mooted by this order.

REPORT AND RECOMMENDATION ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

THIS CAUSE came before the Court upon the motion of Plaintiff, Fairway Shoppes Joint Venture, for entry of a preliminary injunction requiring Defendant, Dryclean U.S.A. of Florida, Inc. ("Dryclean U.S.A."), to cease discharging hazardous wastes and to assess and remediate the groundwater contamination it caused by its past disposal of dry cleaning chemicals at its facility at 7100 Fairway Drive, Palm Beach Gardens, Florida. A day long evidentiary hearing was held on January 29, 1996. Having considered the evidence offered at hearing, reviewed the pleadings and affidavits filed by the parties, and being otherwise advised in the premises, the Court finds and rules as follows:

Findings of Fact

1. Fairway Shoppes Joint Venture ("Fairway Shoppes") is the owner of the Shoppes on the Green Shopping Center located at 7100 Fairway Drive, Palm Beach Gardens, Florida ("Shopping Center"). Since 1986, Dryclean U.S.A. has owned and operated a dry cleaning business at the Shopping Center. Dryclean U.S.A. has been the only operator of a dry cleaning facility at the Shopping Center since it was built in 1986. As part of its dry cleaning operation, Dryclean U.S.A. regularly uses the

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of April, 2026, the foregoing document has been electronically filed with the Clerk of the Circuit Court using the Florida Courts e-portal filing system, which will send a notice of electronic filing to the following: The Honorable Lisa T. Munyon, Chief Judge, Orange County Courthouse, 425 North Orange Avenue, Orlando, FL 32801, **99orange@ninthcircuit.org**; the Honorable Reginald K. Whitehead, Circuit Judge, Orange County Courthouse, 425 North Orange Avenue, Orlando, FL 32801, **nedwards@ninthcircuit.org**; Timothy A Freeland, Special Counsel, Assistant Attorney General, and Jennifer A. Davis, Senior Assistant Attorney General, **timothy.freeland@myfloridalegal.com**, **jennifer.davis@myfloridalegal.com**, **paula.montlary@myfloridalegal.com**, **elizabeth.bueter@myfloridalegal.com**, **lourdes.parodi@myfloridalegal.com**, **capapp@myfloridalegal.com**, **marilyn.muir@myfloridalegal.com**, **scott.browne@myfloridalegal.com**, **stephen.ake@myfloridalegal.com**; Monique H. Worrell, State

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/s/ Joshua P. Chaykin
Joshua P. Chaykin
Counsel for Appellant