IN THE SUPREME COURT OF FLORIDA

FLORIDA GOVERNOR CHARLIE CRIST;
KEN PRUITT, AS PRESIDENT OF THE
FLORIDA SENATE; KURT BROWNING, AS
SECRETARY OF STATE; AND JEFFREY
LEWIS, JACKSON FLYTE, JOSEPH GEORGE,
JR., PHILIP MASSA, AND JEFFREY DEEN,
AS CRIMINAL CONFLICT AND CIVIL
REGIONAL COUNSEL,

Appellants,

vs. CASE NO. SC08-02

FLORIDA ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS, INC.,

Appellee.
_______________________________________/

REPLY BRIEF OF APPELLANTS

On Appeal From The Circuit Court of the
Second Judicial Circuit, In
And For Leon County, Florida

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REPLY ARGUMENT

I. THE OCCCRCs ARE NOT PUBLIC DEFENDERS UNDER ARTICLE V, SECTION 18 OF THE FLORIDA CONSTITUTION.

FACDL's argument boils down to its claim that the Offices of Criminal Conflict and Civil Regional Counsel ("OCCCRCs") are "public defenders" and thereby subject to the election and residency requirements of article V, section 18. Yet, it is undisputed that the OCCCRCs (a) provide representation only in criminal cases where the public defenders offices cannot do so due to conflicts; (b) have no powers exercised by the public defenders who are subject to the election and residency requirements of article V, section 18; and (c) are not subject to the direction of these elected public defenders and do not in any way compete with them. Indeed, the functions of the elected officials who reside in and perform the functions of the public defenders in the twenty circuits statewide are unchanged and unaffected by the OCCCRCs. Simply stated, no "second tier" "public defenders" are created that conflict with or are subject to article V, section 18.

FACDL nevertheless contends that the OCCCRs are "public defenders" both because the Legislature purportedly defined and intended them to be so, and because the Legislature has authority under the Florida Constitution to create as many

public defender offices as it wishes. FACDL misreads both chapter 2007-62, Laws of Florida, and the Florida Constitution.

FACDL's argument is based entirely on sections 29.001(1) and 29.008(1), Florida Statutes, as amended by chapter 2007-62. FACDL repeatedly asserts that these statutes define the OCCCRCs as "Public Defender Offices,"[1] thereby setting up the facile conclusion that the Regional Counsel are public defenders under article V, section 18 who must be elected and reside within their respective circuits. Only in a footnote does FACDL acknowledge that these statutes include OCCCRCs solely for specified funding purposes under article V, section 14(c) of the Florida Constitution. Ans. Br. at 11-12, n. 5.

The Legislature's explanatory language at the beginning of section 29.001(1), however, could not be clearer: "For the purpose of implementing s. 14, Art. V of the State Constitution, the state courts system is defined to include" certain elements of the state court system including "the 20 state attorneys' offices" and "the 20 public defenders and the five offices of criminal conflict and civil regional counsel." § 29.001(1), Fla. Stat. (emphasis added). Likewise, section 29.008 is clear: "For purposes of this section [referencing county funding of court-related functions], the term 'circuit and county courts' includes the offices and staffing of the guardian ad litem

[1] See Ans. Br. at 5, 9, 11.

programs, and the term 'public defenders offices' includes the offices of criminal conflict and civil regional counsel." § 29.008(1), Fla. Stat. (emphasis added). Thus, FACDL mischaracterizes sections 29.001(1) and 29.008(1), in asserting that they define the OCCCRCs as public defenders. Those statutes merely define the term "public defenders' offices" to include the OCCCRCS for a single limited purpose related to funding.

FACDL's argument is essentially that the legal character of the OCCCRCs depends not on what they do, but on a definition that concerns only funding. In footnote 5 of its brief, FACDL explains that it does not question the funding requirement because to do so would be "self-defeating." Obviously so. If the county funding requirement were found invalid, FACDL would have no basis for arguing that the Legislature created a second and unconstitutional tier of public defender offices; at best, only the funding mechanism would be drawn into question and the existence of the OCCCRCs could not be questioned.[2]

As explained in the initial brief, the OCCCRCs no more compete with or supplant public defenders than do court-

[2] FACDL presented precisely this issue, however, in paragraph 13 of its petition, asserting that "were the OCCCRCs not public defender offices, section 29.001(1) would violate Article V, sections 14(a) and (c) of the Constitution." In footnote 5 of its brief, FACDL denies having presented such a claim, asserting now that it would be "self-defeating." Ans. Br. at 12, n. 5.

appointed private counsel. That is not disputed. Defining the term "public defenders' offices" to include OCCCRCs for limited funding purposes simply does not by its literal terms make the Regional Counsel public defenders subject to article V, section 18's requirements; nor does it establish the legal character of the OCCCRCs as "second tier" public defender offices.

This Court long ago announced the axiomatic principle that "it is not what [an object] is called but what it is that fixes its legal status. It is the substance and not the form which is controlling." Underwood v. Underwood, 64 So. 2d 281, 288 (Fla. 1953)(emphasis in original)(holding that to call a property settlement agreement "alimony" did not make it alimony). By the same token, this Court has also held that calling judges of compensation claims "judges" and allowing them to perform quasi-judicial functions does not change their status as members of the executive branch. Jones v. Chiles, 638 So. 2d 48, 51 (Fla. 1994). See also Boyd v. Boyd, 478 So. 2d 356, 357 (Fla. 3d DCA 1985)(citing Underwood and holding that the legal effect of the term "lump sum alimony" is determined "not by what it is called, but by what it does").

To put the point more graphically, numerous courts have alluded to Abraham Lincoln's classic query -- "If you call a dog's tail a leg, how many legs does a dog have?" The answer, said Lincoln, is four, because calling a tail a leg does not

make it a leg. <u>See</u> <u>Arteaga v. Mukasey</u>, 511 F. 3d 940, 942 (9th Cir. 2007); <u>see</u> <u>also</u> <u>Seaboard Coastline R.R. Co. v Nieuwendaal</u>, 253 So. 2d 451, 453 (Fla. 2d DCA 1971)(Mann, J., dissenting)("Abraham Lincoln is said to have remarked that calling a dog's tail a leg doesn't make it a leg. Judges seeking legislative intent should heed this bit of executive wisdom"). As the Ninth Circuit explained in <u>Arteaga</u>, a court should not be misled by expansive definitions "to the extent that the application of such definition fails to comport with the manifest legislative purpose of the law and its language." 511 F. 3d at 942.

The manifest purpose of chapter 2007-62 is to create an office that provides representation in criminal cases when the public defender has a conflict, and to handle certain civil cases, which the Legislature has complete discretion to assign to the OCCCRCs. These are not functions of the public defenders' offices under article V, section 18. Putting aside FACDL's mischaracterization of sections 29.001(1) and 29.008(1), nothing in Chapter 2007-62 supports the conclusion that the Legislature intended OCCCRCs to be public defenders.

FACDL further rejects the argument that the legal character of the OCCCRCs is determined by what they do, not on how they are funded, by asserting that under the language of article V, section 18 of the Florida Constitution "public defenders are

essentially whatever the Legislature says they are," the only limitations being "how the public defenders are to be selected and where they are to be located." Ans. Br. at 13. FACDL apparently believes there can be two elected public defender offices in each circuit, one "with primary responsibility for criminal cases and another, given a different name, with primary responsibility for civil appointments and criminal conflict cases." Ans. Br. at 13. This argument, of course, directly conflicts with article V, section 18, which provides that "[i]n each judicial circuit a public defender shall be elected ...." (emphasis added). "A public defender" does not mean as many as the Legislature wants to authorize in each circuit.

Because article V, section 18 clearly does not permit more than one public defender per circuit, it makes no sense to argue that the Legislature either intended to create a second tier system or that it could have authorized two (or more) public defenders in each of the twenty circuits. What the Legislature intended was that OCCCRCs be funded in part by the counties because the OCCCRCs will provide representation to indigents in thousands of criminal cases that public defenders' offices would handle but for conflicts of interest. That does not make the OCCCRCs public defenders for purposes of article V, section 18. The only question raised by the definitional amendment to sections 29.001(1) and 29.008(1), Florida Statutes, is whether

such funding can be required because the duty of the OCCCRC is to provide counsel when the public defender offices cannot. That question, which FACDL raised in its petition, is not at issue because the trial court declined to rule on it, and FACDL has abandoned it as "self-defeating." Ans. Br. at 12, n. 5.

II. NEITHER POLICY CONSIDERATIONS NOR THE SIXTH AMENDMENT REQUIRE THAT OCCCRCs BE ELECTIVE OFFICES.

In its petition, FACDL contended that public defenders are elected in Florida "to insure that such officers maintain independence from the political process and thereby protect the Sixth Amendment guarantee to the effective assistance of counsel in criminal cases at trial and on direct appeal." Petition at 11. In their brief to this Court, FACDL seemingly abandons its previous reliance on the Sixth Amendment. Without citation to any authority except State v. Brummer, 426 So. 2d 532 (Fla. 1982), it argues that article V, section 18 embodies a free-floating policy of independence mandating not only election of public defenders but also of the OCCCRCs because they provide representation in criminal cases when the public defender has a conflict of interest. Brummer certainly does not support this proposition because it held only that public defenders had no authority to file class action cases seeking damages.

There are several problems with FACDL's argument, all of them fatal. First, article V, section 18 by its plain terms

applies only to the office of the public defender, not to the OCCCRCs. Hence, whatever the policy underlying article V, section 18 might be, it cannot apply to a different, statutorily created office. Moreover, to infer an underlying -- and unspoken -- policy that the election requirement of article V, section 18 carries over to OCCCRCs who handle criminal conflict cases would mean, as FACDL concedes, that there would be two elected public defenders in every circuit. As pointed out, article V, section 18 permits only one.[3]

Finally, FACDL does not even mention the Sixth Amendment and hence does not appear to any longer contend that amendment requires that OCCCRCs must be elected in order to provide competent counsel. To the extent it still relies on the Sixth Amendment, there is simply no support for such an argument. FACDL cites not a single case holding or even suggesting that public defenders -- much less conflict counsel such as the

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[3] On page 22 of its brief, FACDL suggests that the Legislature could have "draft[ed] Chapter 2007-62 in such a way as to create one entity run by an **appointed** official to represent clients against the state in criminal conflict cases, for whom there exists a constitutional right to counsel, and one that would represent clients in many of the civil proceedings currently assigned to the OCCCRC. That is not, however, the statute that the Legislature drafted."

But that is exactly what chapter 2007-62 provides. Apparently, FACDL's use of the word "appointed" (bolded above) is in error because the OCCCRCs are appointed. Assuming FACDL meant "elected," it is clear FACDL believes article V, section 18, contrary to its plain language, permits two public defenders per circuit. See also Ans. Br. at 13 (arguing that public defenders are not limited in number). FACDL is wrong.

OCCCRCs -- must be elected. Indeed, appellants' research indicates that only Florida and Tennessee provide exclusively for elected public defenders. A few states allow for elected or appointed public defenders depending on specified circumstances, while nearly all others provide that public defenders may be appointed by executive officers, courts, county commissions, or other boards, councils, and commissions of varying composition. See App. A. FACDL has not provided even the slightest anecdotal evidence that the independence of public defenders is fatally compromised when they are appointed rather than elected.

III. THE RESPONSIBILITY OF THE OCCCRCs FOR CRIMINAL CONFLICT CASES UNDER CHAPTER 2007-62, LAWS OF FLORIDA, IS SEVERABLE IF UNCONSTITUTIONAL.

A. The Trial Court Erred In Enjoining The OCCCRCs From Performing Any Of Their Duties Pursuant To Chapter 2007-62.

FACDL first asserts that no severability analysis is possible because the trial court properly enjoined the respondent Regional Counsel from performing any of the duties of their offices on the ground that they were "unconstitutionally appointed" and the Governor lacked authority to appoint the Regional Counsel. Ans. Br. at 23-26. While conceding in one part of its brief that there is no impediment to appointive OCCCRCs providing representation in civil cases, Ans. Br. at 13, 21-22, in footnote 10 of its brief FACDL asserts that its

petition "sought to have Chapter 2007-62 declared unconstitutional" and suggests that it challenged the entirety of the act. Ans. Br. at 23, n. 10.

FACDL is playing with words. Its petition scarcely mentioned the OCCCRCs' duties in civil cases and certainly did not raise the first objection to them or point to any lack of authority in the Governor. The only defect alleged in the petition and ruled upon by the trial court was that the Regional Counsel were public defenders who do not comply with article V, section 18. The Regional Counsel do not have to be elected as public defenders to provide representation in civil cases, as FACDL admits; nor did the trial court so find. In fact, the trial court did not attempt to explain why an appointed Regional Counsel could not provide representation in civil cases or why the Governor "lacked authority" to make appointments. Nor does FACDL's brief address this question. Accordingly, the trial court should not have enjoined the Regional Counsel from representing indigent persons in civil cases.

B. The Invalid Parts of Chapter 2007-62 May Be Severed Under the Mortham/Smith Test.

FACDL's brief also fails to respond to appellants' severability argument, which contended that the responsibilities of the OCCCRCs for criminal conflict cases could be severed from chapter 2007-62. FACDL's argument is premised instead on the

erroneous assumption that the OCCCRCs are "unconstitutionally defined" and that the Governor "exceeded his authority" in appointing the Regional Counsel. Ans. Br. at 29, 38. But FACDL again misapprehends chapter 2007-62. The OCCCRCs are created under section 8 of that act, specifically in section 27.511(1), Florida Statutes. The statutes on which FACDL relies, however, define the term "public defenders' offices," not the OCCCRCs, and are only for the purpose of securing limited county funding. The OCCCRCs are therefore not "unconstitutionally defined."

If, however, the Regional Counsel must be elected in order to provide representation in criminal cases involving a conflict, this Court may sever those parts of chapter 2007-62 providing for criminal representation. Specifically, in section 1 of the act the amendment to section 27.40(1), Florida Statutes, could be severed. In section 4 of chapter 2007-62, the Court could sever section 27.511(5)(a)-(f) and (9), Florida Statutes. For the reasons set forth in the initial brief, the remainder of chapter 2007-62 meets all components of the severability test set forth in Ray v. Mortham, 742 So. 2d 1276, 1281 (Fla. 1999), and Smith v. Dep't of Insurance, 507 So. 2d 1080, 1089 (Fla. 1987).

FACDL further argues that Chapter 2007-62 fails the severability test because twenty Regional Counsel would have to be elected, which would necessitate a rewriting of most of

Chapter 2007-62. But relieved of any responsibility for criminal conflict cases, the OCCCRCs are not even arguably public defenders. The OCCCRCs are created under section 28.511(1), Florida Statutes. There is nothing problematic about that subsection as long as the Regional Counsel are limited to civil cases. The definitions in sections 29.001(1) and 29.008(1) relate only to funding and do not create the OCCCRCs or define them.

FACDL attempts to make much of the fact that there is no mechanism providing for OCCCRCs to withdraw from cases except in instances of conflict. This is irrelevant. Regardless of the existence of a "mechanism," the OCCCRCs would have to withdraw from existing criminal cases if they had no authority to provide representation without being elected. There is no reason for compelling withdrawal from civil cases. FACDL also complains there is no mechanism in Chapter 2007-62 for funding twenty elected OCCCRCs. But if appointed Regional Counsel are limited to civil cases, there is no reason to require twenty elected Regional Counsel.

Finally, FACDL asserts that if sections 27.511(1) and (3) are voided, the legislative intent of Chapter 2002-62 cannot be fulfilled because the Legislature never intended to have twenty elected OCCCRCs. It is certainly true that the Legislature never intended to have twenty elected OCCCRCs, but FACDL does

not explain why twenty such offices are necessary if the five appointed Regional Counsel provide representation only in civil cases. FACDL merely reiterates without any elaboration that the Governor "exceeded his authority" in appointing the five regional counsel. Ans. Br. at 29, 38. But the only defect FACDL claims in all of Chapter 2007-62 is not in any authority vouchsafed the Governor, but in allowing the OCCCRCs to provide representation in criminal cases without being elected. Absent some defect in the Governor's authority, which FACDL nowhere identifies, the Governor could, if necessary, reappoint the Regional Counsel once their criminal conflict responsibilities are severed. Because FACDL has not demonstrated why five unelected OCCCRCs cannot constitutionally provide representation in civil cases, its severability analysis fails.

CONCLUSION

The order of the trial court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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Pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), I certify that this computer-generated brief is prepared in Dark Courier 12-point font and complies with the Rule’s font requirement.

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